

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Stewart,***
2005 YKCA 7

Date: 20050912
Docket: YU00451

Between:

Regina

Respondent

And

Kirk Alvin Stewart

Appellant

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

Oral Reasons for Judgment

G.R. Coffin

Counsel for the Appellant

D.A. McWhinnie

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia
12 September 2005

[1] **FINCH C.J.Y.T.:** Mr. Stewart appeals his conviction on one count of sexual assault following a trial by judge alone.

[2] The complainant described an event of non-consensual intercourse with the appellant in the residence of a third person, J. Malcolm. The intercourse, according to her testimony, ended when another man, A. George, arrived at the residence. The Crown called the complainant, Mr. George, Mr. Malcolm, and Dr. Secerbegovic who examined the complainant two days after the alleged assault. The appellant did not testify.

[3] The trial judge found the complainant to be extremely credible. He found Mr. George to be an unreliable witness. He also found Mr. Malcolm's evidence unreliable and placed no weight on it. Dr. Secerbegovic described findings on his physical examination of the complainant that were consistent with her allegations.

[4] The only other evidence adduced was a DNA analysis of materials found on a pair of the complainant's panties which she said she was wearing at the time of the assault and which she gave to the police two days later. The trial judge dealt with that evidence as follows:

[8] It remains to consider whether, despite these conclusions, there is nevertheless a reasonable doubt as to the truth of her evidence insofar as it identifies the accused as her assailant. The only possible source of doubt arises from this fact: On September the 6th the complainant turned over to the police the panties which she said she was wearing on the night in question. She testified that she had put on new panties on September 4th and had removed them after the incident. Scientific analysis of material deposited on these panties produced DNA samples which matched that of Ms. [W.]. There were also male DNA in the stain material, but it was not that of the accused. Having considered the matter, I have come to the conclusion that

these findings do not raise a doubt into my mind as to the identity of the assailant in this case. There was no evidence that Ms. [W.] did not have sexual relations with anyone else prior to September 4th, and no evidence that the material on the panties could not have been from some earlier occasion, even assuming that these were the panties worn by Ms. [W.] on the date in question, and further assuming that they had been laundered prior to being worn. Similarly, there was no evidence that one would inevitably expect to find DNA left by the true assailant in the circumstances of an assault as described by the complainant in this case.

[5] The appellant's case on appeal is that the learned trial judge erred in finding the offence proven beyond a reasonable doubt. Counsel attacked the trial judge's findings of credibility of all of the witnesses except the medical doctor. He examined in detail what he said were significant "internal inconsistencies" in the evidence of the complainant herself. In short, the appellant contends that the verdict is unreasonable.

[6] I have not been persuaded by these submissions. The appellant is in effect asking us to retry the case and substitute our views on credibility and on the facts for those of the trial judge. I can see no basis for interfering with any of the trial judge's conclusions.

[7] I would dismiss the appeal.

[8] **NEWBURY J.A.:** I agree.

[9] **KIRKPATRICK J.A.:** I agree.

[10] **FINCH C.J.Y.T.:** The appeal is dismissed.

"The Honourable Chief Justice Finch"