

Citation: *R. v. Sydney*, 2009 YKTC 124

Date: 20091106
Docket: 08-00264
Registry: Whitehorse
Heard: Teslin

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

DARREN ROLAND SYDNEY

Publication of information that could disclose the identity of the complainant, witness or justice system participant has been prohibited by court order pursuant to section 486.4 or 486.5 of the *Criminal Code*.

Appearances:

Ludovic Gouaillier
Fia Jampolsky

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] Darren Roland Sydney has entered a not guilty plea with respect to a single count of sexual assault arising out of events which occurred on July 20, 2008 in Teslin, Yukon.

[2] Evidence was heard from four Crown witnesses: the complainant, F. V., her brother, R. W., Mr. W.'s girlfriend, D. B., and the investigating officer, Constable Dunmall. Mr. Sydney testified in his own defence.

[3] The story which emerges has, not surprisingly, a number of inconsistencies as between the various witnesses, but there is sufficient consistency to form a clear picture of the majority of the events which occurred.

[4] Ms. V. was in Teslin for the wedding of one of her brother's, R. W. She, Mr. R. W., and Ms. B. attended the afternoon wedding ceremony and the evening reception. At approximately 2:00 a.m. the three adjourned to Mr. W.'s Teslin home along with a few other friends. It is here that Mr. Sydney enters the picture. He arrived at Mr. W.'s home to join the party. It is generally agreed that the group spent some time playing poker, until the remaining houseguests departed, leaving only the four witnesses who testified before me in the home.

[5] Ms. V. asked her brother if she could stay on the couch. Mr. Sydney, too, remained at Mr. W.'s home, falling asleep in a nearby chair. What then occurred is disputed by the parties and forms the crux of this case.

[6] Ms. V. says she fell asleep, fully clothed in her ankle length dress, short jacket and nylons, with the blanket pulled up and covering her shoulders. She was awoken by a brief, light touch on the inside of her knee and noted the blanket to be bunched around her feet, and Mr. Sydney seated at the end of the couch, turned toward her, but, as she describes is, "pulling away from her". Her clothing remained intact, though the skirt of her dress had risen to above her knees, which Ms. V. conceded could have occurred during sleep. Ms. V. was firmly convinced that Mr. Sydney had removed the blanket and had touched her on her leg for a sexual purpose.

[7] Mr. Sydney testified that he had fallen asleep in the chair before Ms. V. had gone to sleep on the couch. He awoke with a stiff neck and back, made his way to the washroom and when he returned, he decided he wanted to sleep at the other end of the couch. He indicated that he did not know who the person on the couch was, but felt that he should check on the person to ensure that they were well. He lifted the corner of the blanket off the shoulder, but could still not distinguish the identity as the person had their arm over their face. He leaned

over in an effort to see, and it was at that point Ms. V. awoke and asked him what he was doing.

[8] It is generally agreed that Mr. W. then came out from the bedroom, having heard his sister telling Mr. Sydney to return to the chair. He asked Mr. Sydney to leave. Mr. Sydney did not leave when asked, and even though Mr. W. essentially pushed him from the home, including striking him, Mr. Sydney kept returning to the residence, repeating that he was sorry on numerous occasions.

[9] Mr. Sydney ultimately left the residence on his quad; the police were contacted; and Mr. Sydney was arrested at his home.

[10] While this sets out the basic framework of the events, there were numerous points of dispute going to the central issue, necessitating findings of credibility. This is a case to which the test set out in the Supreme Court of Canada decision *R. v. W. (D.) [D.W.]*, [1991] S.C.J. No. 26, applies. To paraphrase, if I believe Mr. Sydney, I must acquit; even if I do not believe Mr. Sydney, I must ask myself whether his evidence nonetheless raises a reasonable doubt; if I do not believe Mr. Sydney and his evidence does not raise a reasonable doubt, I must ask myself whether, on the basis of the evidence I do accept, I am satisfied beyond a reasonable doubt that Mr. Sydney committed the offence.

[11] Having reviewed the evidence in its entirety, I have concluded that I do not believe the evidence of Mr. Sydney and would, therefore, reject it. I reach this conclusion for a number of reasons.

[12] Firstly, Mr. Sydney's evidence had a rehearsed quality. He presented details which one would not have expected him to remember, including a brief, inconsequential discussion with Ms. V. about the weather. Indeed, when confronted on cross-examination about the reliability of his memory, he conceded

that memory does fade over time, but insisted that his memory of the events was as clear at the date of trial as it had been on the night of the events. He even suggested that he could give a detailed description of the poker game, including the stakes and who had won what over the course of the game.

[13] This appeared to be an attempt to colour his evidence to make it more persuasive and to place himself in the best possible light at trial. This is seen again in his evidence as to alcohol consumption where he insisted that he was the soberest one there. And again in his evidence that he had only come to the residence after repeated and persistent calls from Mr. W., on both his cell and home phones, inviting him first to the wedding reception and then to his home. So persistent were Mr. W.'s efforts that Mr. Sydney turned off his cell phone, but, he notes, he finally "gave in" and went to Mr. W.'s residence.

[14] Secondly, there were a number of statements made by Mr. Sydney which were simply implausible and did not have a ring of truth. For example, when Mr. Sydney testified, in both direct and cross, about why he went to pull back the covers to check on the person on the couch, he repeated a number of times that it was simply common sense to check on someone who was sleeping on a couch, and when pressed as to why, he suggested it was necessary to make certain they had not vomited in their sleep. This makes no sense when one considers that he did not provide any evidence as to why this would be a potential concern with this person at this time.

[15] In addition, when Ms. V. awoke and asked him what he was doing, Mr. Sydney did not respond. He explained this failure by saying that he did not say anything as he was thinking about what to say; he felt stupid and embarrassed; and he did not know how to explain without them jumping to conclusions. If, in fact, his intention was to check to ensure that Ms. V. was okay, it makes absolutely no sense why he would not have simply indicated that to her when she asked what he was doing.

[16] Thirdly, concern with respect to Mr. Sydney's credibility can be found in his dealings with the police. In direct, Mr. Sydney acknowledged that several of the things he told the police upon arrest were not factually correct. These included that he had been home all night; he had been asleep until they arrived; and he had not driven his quad.

[17] He also advised the police that he had not bothered Mr. W.'s girlfriend, D., a statement which makes little sense on the information before me.

[18] When asked about his statements to the police, Mr. Sydney repeated on numerous occasions that he had been scared and nervous, having never dealt with the police before. While it is not unheard of for individuals to lie to the police when afraid, Mr. Sydney appeared to have an extreme amount of difficulty in admitting the obvious – that he had, in fact, lied to the police. When confronted on cross-examination, he said that he was telling them the truth; he simply did not correct himself when he should have. He suggested that he was babbling to the police as a result of fear and nerves, and wasn't thinking about what he was saying. When he finally conceded that he had indeed lied to the police, he was quick to add that he had not meant to lie to them.

[19] These exchanges cause me considerable concern about Mr. Sydney's appreciation of the difference between the truth and a lie.

[20] This concern was exacerbated in the fourth, and final, area of concern with Mr. Sydney's evidence, that of inconsistencies. Examples are seen in the many statements Mr. Sydney made in relation to his invitation to Mr. W.'s home and the poker game. He indicated that Mr. W. invited him over for a few drinks, and it was only after an hour or so that someone suggested they play poker. But when insisting that he had no alcohol in the home as he'd had no intention of

drinking that evening, he indicated that he had only given in and gone to Mr. W.'s as he had been invited to play poker.

[21] And even more notably, Mr. Sydney went to great lengths, when asked why he had not gone across the street to his girlfriend's to sleep and why he had not gone there when asked to leave Mr. W.'s, to explain that, as far as he knew, his girlfriend was not home, he did not have a key to her residence, and he did not stay there when she was not home. When confronted with the fact that other witnesses had indicated that Mr. Sydney's girlfriend was not only home, but outside standing in her driveway when Mr. Sydney was being asked to leave Mr. W.'s, he conceded that he had seen her in the driveway that evening.

[22] When I consider Mr. Sydney's evidence in light of these concerns, I have no hesitation in stating that I do not find his evidence to be credible, nor do I find anything in his evidence which raises a reasonable doubt for me, notwithstanding the fact that I do not believe his evidence.

[23] This leaves then a determination of which evidence I do accept, and whether that evidence is sufficient to establish guilt beyond a reasonable doubt.

[24] Dealing first with the evidence of Ms. B., in my view, her recollection of events differed significantly from the evidence of all of the other witnesses on numerous points. These include the presence of alcohol in the home, whether Mr. W. was drinking in the home, and when she, Ms. B., had gone to bed in relation to the others. On the whole, I found Ms. B.'s evidence to be unreliable, and it would be unsafe, in my view, to accept it. Though, in any event, she offers little evidence of value on the central issue of what occurred between Mr. Sydney and Ms. V.

[25] With respect to Mr. W.'s evidence, there was a great deal of similarity as between his evidence and that of Ms. V. Where the two differed was around the

key point of what Mr. W. heard and saw shortly after the incident, and it is here that I have concerns with respect to Mr. W.'s evidence.

[26] Ms. V. testified that she asked Mr. Sydney, "What are you doing" and told him to go back to the chair. She further testified that after Mr. W. confronted Mr. Sydney, Mr. Sydney was initially unresponsive, but then continually repeated, "I'm sorry". Mr. W. stated that he heard Ms. V. say, "Go back to your chair; it's not going to happen; and don't try your luck". He further stated that Mr. Sydney, when confronted, stated, "She wanted it".

[27] In cross-examination, it became apparent that Mr. W. had not included reference to hearing any of these statements, other than "go back to your chair" in his original statement to the police. It seems that Mr. W.'s memory has clearly been embellished over time.

[28] The other notable inconsistency between the evidence of Ms. V. and Mr. W. is that Ms. V. was clear that she never saw Mr. Sydney touch her while Mr. W. suggested that he saw Mr. Sydney's hand on Ms. V.'s knee when he came out of the bedroom.

[29] Of the two, I found the evidence of Ms. V. to be much more compelling and plausible. As the alleged victim, it makes absolutely no sense that she would not have noted Mr. Sydney's hand on her knee and testified to same. I would also note, that having stopped drinking upon leaving the wedding reception, Ms. V.'s evidence was, overall, more reliable than that of Mr. W. given his rate of consumption.

[30] Accordingly, where Mr. W.'s evidence conflicts with that of Ms. V. on these points, I accept the evidence of Ms. V.

[31] On the whole, I found Ms. V.'s evidence to be credible, but it was not without some concerns. In particular, she was clearly convinced in her own mind that Mr. Sydney had pulled the blanket down, to the point of insisting that he had not lifted the blanket off of her, he had pulled it down; and yet, whatever happened with the blanket, happened while she was asleep. Ms. V.'s conclusions as to what had happened to the blanket were clearly based on assumptions.

[32] While the conclusion that Mr. Sydney removed the blanket covering Ms. V. is one possible explanation, it is by no means the only one. It is also possible that Ms. V. pushed down the covers in her sleep. She maintained that she did not normally wake with the blankets pushed down around her feet, but she also said that she was normally a light sleeper and would normally feel a blanket being pulled off of her even in sleep, but that she was very tired in this instance. In my view, the evidence simply does not establish beyond a reasonable doubt that Mr. Sydney removed the blanket covering Ms. V.

[33] With respect to the touching, Ms. V. described a brief, light touch on the inside of her knee which woke her from sleep. She clearly concluded that Mr. Sydney had touched her with his hand for a sexual purpose. I am not, however, satisfied that this has been proven beyond a reasonable doubt.

[34] Ms. V. was clearly in a deep sleep when she felt the touch, and, by her own admission, the touch was brief and light. There was nothing in her description of the touch to persuade me that whatever she felt was Mr. Sydney touching her with his hand, or that she was even in a position to distinguish what had touched her. Furthermore, while she referred to one of Mr. Sydney's arms being bent a ninety degree angle, she also conceded that, when she awoke to see Mr. Sydney 'pulling back', his hand was no where near her.

[35] It is clearly possible on the evidence that Mr. Sydney touched Ms. V. Indeed, given some of the highly suspicious evidence such as where he was seated, the fact he was seen 'pulling back' from Ms. V. and his repeated apologies, one might even say that it was probable that Mr. Sydney touched Ms. V. on the inside of her knee, but 'possible' and 'probable' are not sufficient to amount to proof beyond a reasonable doubt.

[36] It is my conclusion that the evidence as presented is simply insufficient to satisfy me beyond a reasonable doubt that Mr. Sydney touched Ms. V. Having so concluded, the offence is not made out and I have no option but to dismiss the charge.

RUDDY T.C.J.