

Citation: *R. v. T.D.S.*, 2008 YKYC 6

Date: 20080717
Docket: T.C. 07-03577
Registry: Whitehorse
Heard: Teslin

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Overend

REGINA

v.

T.D.S.

Publication of identifying information is prohibited by s. 110(1) of the *Youth Criminal Justice Act*.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Melissa Atkinson
Fia Jampolsky

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] OVEREND T.C.J. (Oral): Briefly, I am going to set out the relevant facts in this case. The complainant, S.J., is a 22-year-old woman whose home is Teslin and who, at the relevant time, was working out of Haines Junction, operating a pilot car. She worked night shift and came home following her last night shift to arrive in the early evening hours of the evening in question. She did not have any sleep after her night shift. On arrival in the community in the late afternoon, she began to drink. She was

with her friends and eventually ended up at a location known as the Pit, where she was joined by the accused, the alleged young offender in this case.

[2] Everyone was either drinking before they got to the Pit or started drinking at the Pit. Specifically, the young person did not start drinking until he arrived at the Pit, where he received some beer from S.J. S.J. had purchased beer in Whitehorse and brought it with her to Teslin.

[3] With them was W.J. and A.J. Johnston and Brittany Desjarlais, S.J. and T. They drank for a period of time and eventually ended up at the residence of S.J., where more drinking took place, some outside, some in the kitchen, and eventually everyone gravitated to the living room, allegedly for the purpose of watching a movie, although it was obvious that everyone was either so tired or had had so much to drink, or both, that very little movie-watching was in fact done.

[4] W.J., who gave evidence, which I accept, said that Brittany did not have that much to drink. S.J. had quite a few, T. had quite a lot, more than S.J. By his own admission, T. had nine beer, eight or nine beer, throughout the course of the evening. The last five, his evidence was a little fuzzy here, but as I understood it the last five at S.J.'s house.

[5] S.J., quite understandably, was very tired and under the influence of alcohol and was the first to go to sleep in the living room. The arrangements in the living room were a queen-size mattress on the floor, and two couches. W.J. laid on or put himself on the smallest of the couches, his brother A.J. on the larger, the three remaining, T., S.J. and Brittany, on the mattress. S.J., as I say, was the first to go to sleep. Brittany slept

beside her. Both of them were on the longest part of the mattress, that is, their head-to-toes was on the longest part of the mattress, and T. was invited to sleep at the bottom of the mattress at their feet, perpendicular to the way in which they were on the bed.

[6] During the following period of time, S.J. remained asleep. Brittany, whose back was to S.J. but facing in the same direction; that is, S.J. was facing Brittany's back, Brittany was facing the wall or the window. During that period of time, Brittany heard movement from T. She assumed without looking that he was moving -- she assumed he was trying to get comfortable, more comfortable, in the bed. During the course of that movement at one point she finally noticed that his face was, as she put it, up near S.J.'s butt. In his own evidence he said that he had moved up in the bed, although he placed himself between S.J. and Brittany. Brittany had placed him on the outside of the bed behind S.J.

[7] I find, because of the small amount of alcohol she had had to consume and her relative sobriety, that her evidence is the evidence I accept with respect to the placement on the bed of T., and I reject his evidence.

[8] When the parties went to bed they were all fully clothed. S.J. had a T-shirt and jeans and underwear, and similarly T. had jeans and underwear. I am not certain that I heard evidence but I believe he had a T-shirt as well. He certainly had a top of some kind. They were all in that condition when they got under the blankets.

[9] T. and S.J. were under the same blanket, that is, they shared a blanket and were under the same portion of the blanket. At some course, after hearing the movement, Brittany heard whispering from S.J., and while she did not specifically hear S.J. say the

words, she said that the words were mouthed to her that she was naked, that is that she, S.J., was mouthing the words "I'm naked." She shortly thereafter noticed that in fact S.J. was not wearing underclothing, that is, her underpants or her jeans. Very shortly thereafter, S.J. -- and she also noticed that S.J. appeared scared, that her eyes were wide and that she was clearly angry as she was yelling at T., telling him to get out and striking him with a pillow.

[10] Brittany noticed shortly thereafter that T. got up; after being struck with this pillow and after having been yelled at, he rose from under the blanket and Brittany noticed that he was also undressed below the waist, that is, his jeans and underwear were not on. She noticed that his jeans were at the foot of the bed.

[11] The parties, that is, S.J. and T. began -- she began pushing him trying to get him out of the house. He pushed back and eventually, with the assistance of A.J. and W.J., T. was removed from the house. He went to his mother's house, was followed there by S.J. and Brittany and eventually S.J. spoke to T.'s mother, was advised to go to the police, went to the police, and reported this matter to the police. The police thereafter apprehended T.

[12] In her evidence, S.J. said that she did not remove her pants; she was unaware until she awakened that her pants had been removed, that during the course of this she felt T. up against her with his penis on her back. I want to make sure I get her precise evidence; she said, "It wasn't possible I took off my pants." She says she felt threatened and violated by what had happened that evening. When she arrived at the

police station she noticed her shirt was ripped, as had been observed by the police officer; it was ripped at the shoulder, and stretched on one side.

[13] Her evidence in general, in chief, was fairly straightforward, although there were many things she could not remember. In cross-examination much of what she said in chief was qualified in cross-examination by saying she could not remember. However, she did say she did remember that she did not agree to his putting his penis on her bum. She did remember that he did in fact touch her in a sexual way on her backside, and she was certain about that.

[14] T., when he gave evidence, said that he did not touch her in a sexual way, he did not intend to touch her in a sexual way, but he did say that it was possible "I was rubbing up against her." He said "I don't know if my penis touched her bum. I don't remember my skin on her skin, I don't think I was feeling excited." So with respect to his evidence, similarly, he was less than positive about what took place in the bed that evening. He had no explanation for why his pants were off and said he did not take her pants off.

[15] On her evidence alone, there would be a reasonable doubt about T.'s guilt, but I therefore must consider -- I do not accept his evidence, not because he is necessarily being untruthful, but I do not believe him because I am not satisfied that he was in complete possession of his faculties at the time of these events; that is, not in complete possession because of his consumption of alcohol.

[16] Looking at all of the circumstances, it is overwhelmingly clear that this complainant did not remove her own clothes under the bed. It is overwhelmingly clear

that while it did not appear to Brittany that T. was moving up the bed for a sexual purpose, the fact that his pants were removed, for which he has no explanation, leaves me no other conclusion but that he removed his pants and they were done for a sexual purpose and that her pants were removed by him for the same reason. I find you guilty as charged.

(SUBMISSIONS BY COUNSEL)

[17] THE COURT: There will be a pre-sentence report.

OVEREND T.C.J.