

Citation: *R. v. T.C.*, 2017 YKTC 4

Date: 20170208  
Docket: 15-11042  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Lilles

REGINA

v.

T.C.

**Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 of the *Criminal Code***

Appearances:

Jennifer Grandy

Malcolm E.J. Campbell

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] T.C. has been charged with a sexual assault, an offence contrary to s. 271 of the *Criminal Code* ("Code"). The complainant and alleged victim of this assault is C.C. It is alleged that the assault took place on the evening of November 27 or early morning of November 28, 2015.

[2] The Court heard from four witnesses. Constable Harnett attended at the residence of C.C.'s parents, located approximately 20 minutes' drive outside of Dawson City, where she was present when her partner, Constable Bunt, interviewed the

complainant, C.C. The complainant testified, as did her sister, E.C. and the accused T.C.

[3] Although Constable Bunt was the lead investigator, he did not give evidence as he was out of town and unavailable at the date of the trial. Constable Harnett stated that she attended the residence to interview the complainant around 5:30 pm on November 29, 2015. When interviewing C.C., her sister E.C. was present. Constable Bunt acknowledged that it was neither her usual practice nor best practice to have witnesses together when statements are taken. As a result of the conflicting evidence presented at the trial, in hindsight, it was very poor practice.

[4] Constable Harnett identified three photos that were taken of C.C. The first is of C.C.'s neck. She complained of a sore neck, but the photograph did not disclose any skin surface abnormalities. Photo 2 is of C.C.'s left lower leg. This photo is not a close-up and it was difficult to discern anything relevant with any certainty. Photo 3 is a close up of C.C.'s inside left leg. A small bluish bruise is noticeable. In addition, several thin long markings on her leg were discernable. It was suggested that these might be scratch marks.

[5] C.C. stated that she was at a local drinking establishment known as the "Pit" on the evening prior to the alleged assault. She stated she had been drinking that night and the bartender "cut her off". She expressed a concern that someone had drugged her, presumably to explain her behaviour, her incomplete recall of the events of that evening, and why the bartender refused to serve her.

[6] During the interview, Constable Harnett suggested that she should see a doctor. C.C.'s evidence indicated that she did subsequently attend at her doctor's office and some samples were taken. Apparently no effort was made by the police to speak to the doctor or to subpoena the medical records relating to these samples.

[7] The following day, Constable Harnett and Sgt. Morin went to T.C.'s residence. T.C. was present and was very co-operative. T.C. expressed disbelief that he was being charged with sexual assault.

#### Evidence of C.C.

[8] In November, 2015, C.C. was living with her sister E.C., her sister's partner T.C., and E.C.'s two children aged two and five years old. T.C. is the father of E.C.'s children. C.C. had her own bedroom in their three bedroom duplex.

[9] When C.C. arrived home after work shortly after 5:00 pm on Friday, November 27, 2015, E.C. and T.C. appeared to have started drinking already. They were drinking a "40 pounder" (oz.) of vodka and she joined them. When that bottle was finished, T.C. went out to get another 26 oz. bottle of vodka which they also drank but may not have finished.

[10] It should be noted that E.C. and T.C.'s children were not home and were staying with their grandparents, C.C.'s and E.C.'s parents.

[11] Later that evening, all three went to the Westminster Hotel, to the bar called the "Pit". C.C. described having drinks and talking to the people at the bar. She

remembered telling someone that she was going home and would they please tell her sister.

[12] The next thing C.C. remembered is waking up in her bedroom hearing the noise of the stereo speaker moving along the floor. It was placed behind the door to keep it closed. She described in some detail that she had her panties on, and a blanket covering her from the waist down. She was lying on her stomach, her left leg straight, and her right leg bent. Her left arm was under the pillow and her right arm was over the pillow.

[13] She was able to see T.C. enter the room because the hall light was on. Without saying anything, he started to undress. She said she tried to move but her body was “frozen”. She said she told T.C. “No, Leave, Get out, Get out”.

[14] Instead, T.C., now undressed, got on the bed and got on top of her from behind, with his knee on her left leg. She said she told him “no”, but he said, “No, this is going to happen.” She described how his hand went up and grabbed her breast and down to her hips. He penetrated her vagina, then her anus, and again her vagina with his penis. She described her body “freezing”, in an “unconscious mode”.

[15] She said that at the beginning, when he was removing her underwear, she was kicking, or at least was trying to kick her legs back and forth sideways.

[16] Suddenly, T.C. got off of her and quickly ran out of the room. She heard her sister’s voice from the hall yell “What the fuck!”. E.T. came into the room, put the light on, pulled the blanket off her, and asked whether C.C. was having sex with T.C. She

denied it, saying “No I wasn’t, No!” E.T. left the room and turned the light off. C.C. said she just lay there and couldn’t move. C.C. does not remember how long she remained in bed. When she woke up she got dressed, went downstairs, saw T.C. sleeping on the couch, and drove to her parents’ home.

[17] When describing the photographs that had been entered as exhibits, C.C. identified the bruise on her leg as resulting from T.C. climbing on her from behind. She said that the other marks on that same leg were a result of scratches when he pulled off her underwear.

[18] C.C. did not seek medical help until November 30, and then only after the recommendation of the police officer. She had a urine test to see if she had been drugged. Her evidence was that she did not have a physical exam but the reason for not having one was not explained to the Court. In any event, the doctor who examined her was not called as a witness nor was a medical report filed as evidence.

[19] C.C. gave two statements to the police. In the first statement, which was given while her sister was present, she told the police that she couldn’t remember if there had been penetration. After speaking to her father in January, approximately six weeks later, she gave a second statement to the police where she disclosed the fact that T.C. had penetrated her vaginally and anally. The father was not called as a witness and there was no evidence as to the nature of the discussion between them that resulted in the second statement.

[20] A number of relevant issues arose on the cross-examination of C.C.

(1) After returning home on early Saturday morning, she had no recollection of any events until Sunday, around 5:00 p.m. when she was interviewed by two police officers. She appeared to have skipped a full day and night and part of another day.

(2) In her first statement, she said she left the Pit and went home alone. Today she has no memory of these facts.

(3) When telling T.C. to stop the sexual assault, she said she spoke to him in a normal tone of voice. She did not yell or shout at him because she is a quiet person and does not raise her voice.

(4) Although she did not know when she left to go to the Pit, she told the police “around 11:00 pm”. She now says she did not know the exact time and was only guessing.

(5) The statement that she was at the bar perhaps for 1.5 hours was merely a guess. She did not know how long she was there.

(6) Prior to talking to the police on November 29, she discussed what happened with her sister.

(7) C.C. said E.C. wanted to stay with her during the interview and she went along with it, although she would have preferred to speak to the police alone. This differs from E.C.’s evidence.

[21] C.C. was cross-examined in detail about her activities at the Pit, including dancing with T.C., the two of them leaving together to go home, and their physical interactions while walking home. Her answers were consistent: that she did not remember but that it was possible that the interactions occurred. By way of contrast, when asked about engaging in consensual physical contact with T.C. in her bedroom, she was adamant that it did not occur.

#### Evidence of E.C.

[22] E.C.'s evidence as it related to the evening of November 27 was generally consistent with that given by C.C. She described drinking with T.C. in the afternoon. C.C. joined them when she returned home after work. They went to the Westminster Hotel between 9:30 and 10:00 pm. She acknowledged that she was upset because T.C. was dancing with C.C. and that she felt left out. It was not clear why she left the bar for a while, possibly to smoke or to visit with friends, but when she returned, both C.C. and T.C. were gone. A friend told her that they had left together by the back door.

[23] Upon hearing this, she rushed home, apparently suspicious that something was going on between C.C. and T.C. Upon entering the house, she saw T.C. dash out of C.C.'s bedroom naked and run into his bedroom. E.C. went into C.C.'s bedroom and observed her covered by a blanket and apparently sleeping. E.C. pulled the blanket off of C.C., yelled at her, and observed C.C. to be naked. According to E.C., C.C. did not say anything in response. This contrasts with C.C.'s evidence, when she said that she spoke to E.C. and repeatedly denied having sex with T.C. E.C. responded by saying "Two people I love the most in my life caught cheating".

Evidence of T.C.

[24] T.C.'s evidence in relation to the afternoon and evening of November 27 was similar to that of C.C. and E.C. He described drinking with E.C. beginning in the afternoon and with C.C. when she arrived home after work. Later in the evening, they went to the Westminster Hotel, where he played pool, visited with people, and danced with C.C. He described C.C. as dancing provocatively with him. T.C. and C.C. left the bar together, leaving E.C. behind. He described ongoing mutual physical contact as they walked home. They had another drink at home. He described C.C. as talking, laughing, and somewhat "giddy".

[25] After C.C. retired to her bedroom, he heard her call his name. He went upstairs to see what she wanted and she gestured towards him to sit on the bed. While holding a blanket up to her neck with one arm, he said they talked and she pulled him closer to kiss him. T.C. said C.C. started to take his shirt off, while kissing and fondling him. He took his clothes off and "cuddled" on the bed with C.C., but with the blanket still between them.

[26] Suddenly he heard E.C. slam the front door as she entered the house yelling "You had better not be doing what I think you are doing." He ran to his room to put his shirt and shorts on. E.C. confronted T.C. before departing, telling him "I am leaving you".

[27] T.C. said he went out and had a smoke, fell asleep on the couch in the living room, and when he woke up, he was the only person in the house.

## Summary

[28] In light of the significant amounts of alcohol consumed by T.C., C.C., and E.C. on November 27, 2015, some inconsistencies and gaps in their evidence are to be expected.

[29] Some of my concerns with C.C.'s evidence include the following:

- she was unable to construct a timeline for the events of November 27 with any degree of confidence;
- when questioned about numerous physical interactions with T.C., both at the Westminster Hotel and on the way home, C.C. repeatedly acknowledged that “it was possible” but she did not remember;
- C.C.'s lack of memory as to her interactions with T.C. earlier in the evening was in contrast with the detail provided in relation to the door of her bedroom opening and the noise of the stereo scraping the floor, the precise description of the position of her legs and her arms holding the pillow when T.C. entered her bedroom;
- according to C.C., she did not shout or yell at T.C. when he was undressing next to her bed but merely said “get out” in a quiet voice several times because she is a soft spoken person;

- there are a number of minor but material discrepancies between the two statements given to the police by C.C. and between the police statements and her *viva voce* evidence in court;
- when E.C. entered the bedroom moments after she had seen T.C. run out, she observed C.C. on the bed, apparently sleeping, but in fact feigning sleep, covered with a blanket. E.C. pulled off the blanket and saw C.C. naked. According to E.C., C.C. did not say anything, as would have been expected if she had been assaulted by T.C.

[30] The photographs taken by the police of a bruise on the inside of C.C.'s left leg, along with some marks that could be scratches are consistent with C.C.'s version of events. On the other hand, they are also not inconsistent with consensual sexual activity between C.C. and T.C.

[31] C.C. went to see a doctor on November 30, but it appears that her primary concern was whether she had been drugged at the Westminster Hotel. No medical reports were filed and the doctor was not called as a witness.

[32] I do not draw an adverse inference from the fact that C.C. did not report that penetration had occurred when she first reported the assault to the police. It is not unusual for sexual assault victims to minimize the extent and nature of the assault, especially if the alleged offender is a family member. Also, her sister, the accused's spouse, was present during that interview.

[33] On the other hand, C.C.'s failure to disclose the sexual assault to her doctor on the November 30 visit is not as easily explained.

[34] On the facts, there is also an apparent motive for C.C. to allege that she did not consent to sexual activity with T.C. Her explanation that she did not consent would place her in a better light with her parents and could also serve to recover or improve her relationship with her sister, E.C.

[35] T.C.'s recollection of the events of the evening appeared to be much better than that of C.C. It is evident that they were spending time together dancing and drinking, while E.C. was not directly involved with them. They left the Westminster Hotel together, as reported to E.C. by a patron at the Westminster Hotel lounge. As T.C. stated, they were having a good time that included physical interactions on the way home. According to T.C., C.C. called him into her bedroom and the touching and kissing that took place was consensual. T.C. insisted that C.C. held a blanket above her chest, limiting the nature of their physical contact. E.C. arrived home and interrupted what T.C. clearly intended to go beyond fondling and kissing.

[36] T.C.'s insistence that nothing more than kissing and fondling took place seems, in the circumstances, to be somewhat contrived. It could serve to minimize the seriousness of the sexual assault or alternatively, it is an attempt to recover his relationship with E.C. and his children by positing that sexual intercourse had not taken place.

### Conclusion

[37] This is a classic case for the application of the deductive framework established in the case of *R. v W. (D.)*, [1991] 1 SCR 742. The evidence of the three main witnesses, while consistent in relation to the events leading up to the incident in the bedroom, differed as to what actually occurred in the bedroom. There were in fact three different versions. C.C.'s evidence was that T.C. engaged in non-consensual intercourse with her. T.C. said that there was only consensual fondling and kissing, but no intercourse. E.C.'s arrival interrupted what was taking place, but her observations, including C.C. feigning sleep, permits the inference of consensual sexual activity.

[38] In the first instance, I do not believe the evidence of T.C. that he was merely engaged in kissing and fondling with C.C., while she was covered by a blanket. Nor am I left in a reasonable doubt by it. But when I consider all of the evidence, the evidence of C.C. including its gaps and uncertainties, the evidence of C.C. and T.C. leaving for home together and the physical interactions between them, along with the observations of E.C. when she confronted C.C. in the bedroom, I am not convinced beyond a reasonable doubt of the guilt of the accused, T.C.

[39] In other words, considering all of the evidence, the probability, more than a mere possibility, that the sexual activity between C.C. and T.C. was consensual, requires me to find T.C. not guilty of the charge contrary to s. 271 of the *Criminal Code*.

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LILLES T.C.J.