Date: 20030318
Docket No: T.C. 02-10121
Registry: Whitehorse

R. v. T.S., 2003 YKTC 56

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Judge Faulkner)

REGINA

v.

T. S.

Kevin Drolet — Appearing for Crown

Gordon Coffin — Appearing for Defence

REASONS FOR JUDGMENT

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[1] FAULKNER T.C.J. (Oral): The defendant, T.S., is charged with sexually assaulting M.H. on the 22nd of December, last year.

[2] Firstly, I have no doubt that the complainant was sexually assaulted. She did not consent to any sexual activity and, indeed, was not in any position to consent owing to the consumption of alcohol and perhaps other intoxicants. I am also satisfied that someone removed her pants and I am further satisfied that that would have been for a sexual purpose. Indeed, I can conceive of no other purpose for that having occurred.

[3] The fact of her pants being removed, of course, is testified to by the complainant, but it is also corroborated by other witnesses. I should also add that while there is evidence of a sexual assault in removing the pants, there is nothing to prove that anything beyond that actually occurred.

[4] The issue in this case, in my view, is whether there is proof beyond a reasonable doubt that the accused was the perpetrator of the sexual assault. The complainant herself, as I have already indicated, was extremely intoxicated and her memory of the evening in question is patchy, vague and foggy. She does recall that the accused sat with her on her bed in her bedroom and she described it as “bugging her” while she was speaking on the phone with her boyfriend, G.S., who, incidentally, is the brother of the accused. She has a vague memory of the accused removing her pants and she described her memory of seeing the accused as something along the lines of being able to see him through the fog. Clearly, it would be unsafe to convict the accused on her evidence standing alone. She was extremely intoxicated and there is obviously the danger that her evidence is a confabulation of sorts because her thinking process was along the lines of, “Well, since it was T.S. who was bothering me earlier, therefore, it must have been T. who ultimately ended up sexually assaulting me.”

[5] However, there is additional evidence in the case. The evidence of some of the witnesses really goes no further than to place the accused, T.S., at the scene, but there are two witnesses, G.S., the brother, and Martin Stone, who was one of the other revellers at the party, who do give some evidence capable of supporting the complainant's version of the events.

[6] Firstly, G.S. is able to confirm that he spoke to the complainant several times during the evening and that while he was doing so, Ms. H. was, in effect, complaining that the accused was bothering her, and he is further able to say that he could hear his brother in the room while he was talking to the complainant. More importantly than that, however, G.S. testifies that during the course of the conversations with his girlfriend that at one point he spoke to the accused on the telephone and the accused said words to the effect of, “Don't you share with your brother?” or something along those lines. That comment clearly implicates the accused as being intent upon having some sexual contact with his brother's girlfriend, the complainant, M.H.

[7] The additional witness who gives some evidence, potentially corroborative, is Mr. Stone. Mr. Stone was obviously a reluctant witness and he is one whose evidence should be viewed with caution because not only did he provide different versions of the events to the police prior to today - I should say actually to the police and prosecution prior to today - but he is also contradicted in some respects by the evidence of other witnesses, most particularly with respect to his actions and whereabouts toward the end of the events of the evening in question. Nevertheless, the evidence that he gives of first hearing M.H. call for assistance and then seeing the accused struggling with Ms. H. on the bed and further noting Ms. H.'s pants were off, is, in my view, credible evidence. As I have already said, he was very reluctant to give that evidence and for that reason, when he does give it, it strikes me as being credible.

[8] Taking into account the evidence of those witnesses, that is G.S. and Mr. Stone, I am satisfied that the Crown has presented, in the end, a sufficient case.

[9] I should refer, before concluding my remarks, to the matter of the necklace. The evidence respecting the necklace, in my view, was unsatisfactory. Firstly, the evidence that it belonged to the accused was less than crystal clear, and secondly, even assuming that it was his necklace, it really proves no more than that he was present in the bedroom, which is clearly proved by other evidence. So I do not think that anything particularly turns on the finding of the necklace even if one were to speculate that it had somehow been removed from him during a struggle with the complainant. I heard no evidence that the necklace, for example, was broken and, indeed, even if that were the case, obviously there had been some unpleasant interaction between the accused and Ms. H. prior to the sexual assault which could have as easily resulted in the removal of the necklace.

[10] In any event, at the end of the day and in considering, as I say, the support found for Ms. H.'s evidence and the evidence of the other witnesses, I am satisfied that the Crown has proved that a sexual assault was perpetrated by the accused on Ms. H., albeit, as I have earlier indicated, one which was limited to the removal of her pants.

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FAULKNER T.C.J.