Citation: *R. v. C.S.,* 2019 YKTC 43

Date: 20191010
Docket: 18-03523A
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

C.S.

Publication of information identifying the young person(s) charged under the *Youth Criminal Justice Act* is prohibited by section 110(1) of that *Act*.

Publication of information that could identify the complainant or a witness is prohibited by section 111(1) of the *Youth Criminal Justice Act*.

Appearances:
Paul Battin — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR JUDGMENT

[1] C.S. has been charged with having committed the offence of sexual assault, contrary to s. 271 of the *Criminal Code*, as well as two offences under s. 137 of the *Youth Criminal Justice Act ("YCJA")*. C.S. was 15 years of age at the time that the offences are alleged to have been committed.

[2] Counsel for C.S. is not disputing that C.S. is guilty of having committed the two s. 137 *YCJA* offences of failing to abide by his curfew and for possessing and consuming alcohol.

[3] The Crown called three witnesses, the alleged victim, C.T. her mother, P.T., and a friend of C.T.'s, S.S. The accused did not testify or call any evidence.

Evidence of Witnesses

C.T.

[4] C.T. was 16 years of age at the time of the alleged sexual assault.

[5] C.T. testified that on the evening of August 1, 2018, she was at a house party with her friend, S.S., and others. Her plan was to spend the night at S.S.'s place, which was a different location than the house party. She and three others were drinking vodka mixed with water.

[6] The accused, C.S., came to the house party later at approximately 11:30 p.m. He was with another individual. They threw rocks at the house for approximately 20 minutes before they left. C.S. returned approximately 20 minutes later on his own, at or around 12:30 a.m. He came into the house after the door was opened for him.

[7] Once inside, some of the individuals at the house party began to hit and kick C.S., as these individuals did not want him to be there, because he had been throwing rocks at the house. C.S. was "going nuts" at the house. He was drunk and staggering, as well as "not talking right". He refused to leave.

[8] C.S. was on the floor, freaking out and crying. He ended up sitting beside the others at the kitchen table. C.T. put her arms around his shoulders and hugged him once, because she felt bad for him.

[9] C.S. put his hands on C.T.'s hips and his arms around her waist. She told him to stop, but he didn't. She walked away and sat with the others at the kitchen table. She said that she was "done drinking" at that time. To that point, a 60 oz. bottle of vodka had been shared between four individuals, including C.T.

[10] After a further 20 minutes C.S. was "still freaking out" so he was told to go sleep in a bedroom off the kitchen, which he did. Individuals other than C.T. took C.S. to the bedroom.

[11] Subsequently, approximately 10 or 15 minutes later, or within the hour, C.T. went into the bedroom where C.S. was sleeping, to see if he was okay and to put him on his side so he wouldn't choke on his vomit. She said that she went into the bedroom because she was worried about C.S., in particular because the others had been "beating on him". C.S. was lying upwards on the bed. She moved him onto his side. She said that C.S. was awake at the time. She did not remember either her or C.S. saying anything. The last thing that she remembered at that time was leaving the bedroom door open when she went into the bedroom.

[12] C.T. was wearing a shirt and grey, legging-style pants with an elastic waistband at that time.

[13] The next thing that she remembered was coming to on the bed lying on her back with C.S. on top of her with his penis in her vagina. She had her legs wrapped around him. She only had her bra on. C.T. described "coming to" as being "when you are blacked out and start remembering again". She believed that she blacked out because she had been drinking vodka earlier.

[14] After about 10 seconds, C.T. blacked out again. Neither she or C.S. had said anything to each other.

[15] The next thing that C.T. was aware of was trying to put her clothes on. She still only had her bra on. She had no idea how much time had elapsed since her last memory.

[16] As C.T. was unable to put her clothes on, she grabbed a blanket, put it over her, and left the bedroom. She was crying. She couldn't stand straight. Only she and C.S. were in the room when she came to. C.T. was sitting up on the bed. They did not say anything to each other at that time.

[17] C.T stated that she tried unsuccessfully to wake S.S. C.T. blacked out again and next remembers coming to while walking home. She blacked out again until she was at her home. Her home was approximately a one-minute walk from the house party.

[18] C.S. followed her to her home, saying her name. At her home, she grabbed the house keys from their storage place, but she was unable to open the door with them. She was standing on her front steps. C.S. was standing in front of her. He was saying her name, but she did not respond. She was "freaking out". She sat on her front steps, blacking in and out.

[19] The next thing that C.T. remembered was waking up in her bed. She was only wearing her bra. Her vagina was sore and she had bruised arms. Only her mother and father were in the house.

[20] C.T. did not go to a doctor because she did not want to.

[21] Her vagina was sore for a couple of days and her arms were bruised for approximately a week. She does not know how her arms became bruised, but stated that they were not bruised before that evening and morning.

[22] C.T. stated that she told S.S. what happened later that morning, but that she didn't tell anyone else until October.

[23] C.T. returned sometime later to the location of the house party to retrieve her clothes. These were located inside the bedroom beside the door.

[24] C.T. testified that she didn't tell anyone else about the incident because she felt that it was her fault. In cross-examination, C.T. stated that the reason she felt that the incident was her fault was because she knew that she was drunk and she knew that she blacked out, so maybe she consented when she was blacked out. She had no memory as to whether she consented or not.

[25] In redirect, C.T. agreed that it was her thinking when she provided her statement that maybe she did consent. The following exchange took place between Crown counsel and C.T.:

> Crown: *Now today, do you think that you consented to what happened with C?*
>
> C.T.: *I do. When I was blacked out yes.*
>
> Crown: *You think you did?*
>
> C.T.: *It could be a possibility. But I wouldn't have if I was conscious.*

[26] C.T. testified that she had no idea how she ended up on the bed and how her clothes were taken off of her.

[27] She stated that she did not want to have sex with C.S., and that they had no prior close relationship. She had known C.S. since kindergarten.

[28] C.T. testified that she was very drunk that night, as much as a ten on a scale of one to ten. In redirect, she agreed that in her statement provided to the RCMP in October 2018 she had stated that she was approximately a seven out of ten. She explained the difference between the two ratings as being due to her current non-drinking state, and thus a better present ability to look back and assess her level of sobriety at the time of the incident.

[29] C.T. stated that it was normal for her at the time of the incident to drink that much and to black out. She agreed that people sometimes acts differently when they are drunk.

[30] C.T. stated that C.S. was also drunk and staggering and that he needed help to walk. She testified that C.S. was intoxicated to a level of maybe an eight out of ten, and that S.S. was maybe a six out of ten.

[31] C.T. stated that when she went to the bedroom where C.S. was she could walk and talk all right, but that she was on the verge of getting more drunk.

P.T.

[32] P. T. testified that on the evening in question, C.T. had asked to sleep over at a friend's house. At approximately three or four a.m., she heard C.T. come in by the back door, which was unusual, and go to her bedroom. She heard C.T whimpering so she got up to check on her. C.T. had fallen asleep. She noticed a wet blanket by the back door and that C.T. was half-naked in bed, which was also unusual as she generally slept in her pajamas. C.T. had a blanket over her head.

[33] P.T. went back to bed. In the morning, she received a text from C.T., which said: "I'm so sorry, messed up, never drink again, don't want to live like this". Usually C.T. would only text her and say good morning.

[34] P.T. thought that something shocking had happened to C.T.

[35] C.T. got up and went into the bathroom wrapped in a blanket, before returning to her bedroom.

[36] At approximately noon, S.S. came over and went into C.T.'s bedroom, where she stayed for approximately 20 to 30 minutes. S.S. came out, visibly upset and biting her lip. C.T. then came out looking tired and not saying much. P.T. found C.T.'s bag on the front door porch with the house keys on the ground.

[37] P.T. washed the wet blanket, which was unknown to her. It was subsequently taken back to where it belonged.

S.S.

[38] S.S. testified that C.S. is her first cousin. She and C.T. have drifted apart as friends since the time of the incident for unrelated reasons. She stated that while she and others were drinking at a house party, C.S. came over. He was intoxicated and acting differently. People were unhappy that C.S. had shown up. C.S. came and left and came again.

[39] There was an argument, although she was not sure what it was about. There was a fight and a window was broken by a rock.

[40] C.S. was allowed to sleep in a bedroom.

[41] S.S. stated that C.T. went to the bedroom to calm C.S. down. There had been an argument between S.S. and C.S. before this. C.S. was swearing and angry. She stated that C.T. closed the bedroom door after she went in.

[42] S.S. did not see what happened in the bedroom. She said that C.T. was in the bedroom for a while, although she estimated it to be at most 1/2 hour. She woke up but was told by the householder that C.S. had left. She was asleep when C.S. left. She slept on the couch at the house.

[43] She testified that didn't really remember much from that night and morning.

[44] She said that C.T. contacted her the next morning through Facebook, (as she had C.T.'s phone with her.) She went to C.T.'s house in the morning to talk to her.

She brought the blanket back to where the house party was and grabbed C.T.'s clothing.

[45] S.S. said that she was probably a 7 out of 10 for intoxication that night and morning. She estimated C.T. as being about the same as her, and said that C.S. was an 8 out of 10. She agreed in redirect that she could be off in her assessment of the level of intoxication of C.T. and C.S.

[46] She agreed that C.T. could be unpredictable when she was drunk, including being less shy and inhibited.

Submissions of Counsel

[47] Crown counsel submits that I should believe most of the testimony of C.T. and therefore C.S. should be convicted of the offence of sexual assault. On C.T.'s testimony, C.S. was having sexual contact with her without her consent. C.T. did not want to have sexual contact with C.S. and she was too intoxicated to provide a valid consent.

[48] With respect to the testimony of C.T. as to her admission or thinking that she "might have consented" to the sexual contact, counsel asks that I disregard that evidence as not reliable.

[49] Counsel for C.S. submits that I should have a reasonable doubt as to whether C.S. committed the offence of sexual assault, based in large part on the evidence that C.T. thinks she "might have consented" to the sexual contact. Further, counsel

submits that there is insufficient evidence that C.T. was so intoxicated that she was incapable of providing her consent.

Analysis

[50] In order to establish that a sexual assault has occurred in this case, the Crown must establish beyond a reasonable doubt that C.S. committed the *actus reus* of the offence and that he had the necessary *mens rea*.

[51] The *actus reus* of the offence is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being recklessly blind to, a lack of consent, either by words or actions, from C.T.

[52] The *actus reus* of the offence requires proof of three elements:

(1) that C.S. knowingly touched C.T.;

(2) that the touching was of a sexual nature; and

(3) that C.T. did not consent to that sexual contact.

[53] The first of these two elements are objective. It is enough for the Crown to prove that C.S.' actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that C.S. had any *mens rea* with respect to the sexual nature of his behaviour.

[54] The absence of consent is subjective and determined by reference to C.T.'s subjective internal state of mind towards the sexual touching at the time that this touching occurred. (See ***R.*** v. ***Ewanchuk***, [1999] 1 S.C.R. 330, at paras. 23-26)

[55] Section 33.1 of the *Code* makes it clear that self-induced intoxication is not a defence to a charge of having committed a sexual assault.

[56] At all times during a sexual assault trial, as in any other criminal trial, the accused is entitled to the presumption of innocence. In order for an accused to be found guilty of having committed the offence of sexual assault, the trier of fact must be satisfied on a consideration of the whole of the evidence that the accused is guilty of the offence. The standard of proof is beyond a reasonable doubt, and not that the accused is more likely than not to have committed the offence.

[57] As stated by Molloy J. in ***R.*** v. ***Nyznik***, 2017 ONSC 4392, in which she provided an informative analysis of the approach to be taken with respect to the evidence in sexual assault trials:

> 10 The presumption of innocence applies to a person accused of sexual assault in the same way that it applies in any other criminal offence. The Crown must prove that this was an assault rather than consensual contact. There is no burden on the defence to prove that AB consented to the sexual contact between them. Rather, the burden is on the Crown to prove beyond a reasonable doubt that the defendants had sexual contact with her without her consent. (see also paras. 4-7).

[58] Molloy J. identified some of the difficulties that can present themselves at times in prosecuting and adjudicating sexual assault trials. These difficulties are often due to the nature of the circumstances in which the alleged offence occurs, such as the

absence of probative independent or eyewitness evidence beyond that of the alleged victim and the accused, in those cases in which the accused testifies.

[59] This said, the law is clear that corroborative evidence is not required or necessary in order to prove that a sexual assault has been committed.

[60] In addressing some of the concerns that have been expressed, in particular that the application of the principles of criminal law are unfair to complainants in sexual assault cases, Molloy J. states:

> 16 It is sometimes said that the application of these principles is unfair to complainants in sexual assault cases, that judges are improperly dubious of the testimony of complainants, and that the system is tilted in favour of the accused. In my opinion, those critics fail to understand the purpose of a sexual assault trial, which is to determine whether or not a criminal offence has been committed. It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt. In many cases, the only evidence implicating a person accused of sexual assault will be the testimony of the complainant. There will usually be no other eye-witnesses. There will often be no physical or other corroborative evidence. For that reason, a judge is frequently required to scrutinize the testimony of a complainant to determine whether, based on that evidence alone, the guilt of an accused has been proven beyond a reasonable doubt. That is a heavy burden, and one that is hard to discharge on the word of one person. However, the presumption of innocence, placing the burden of proof on the Crown, and the reasonable doubt standard are necessary protections to avoid wrongful convictions. While this may mean that sometimes a guilty person will be acquitted, that is the unavoidable consequence of ensuring that innocent people are never convicted.
>
> 17 Although the slogan "Believe the victim" has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence. That is antithetical to the fundamental principles of justice enshrined in our constitution and the values underlying our free and democratic society.

[61] Molloy J. stated the following with respect to the issue of consent:

> 20 Consent is defined under s. 273.1(1) of the *Criminal Code* as being "the voluntary agreement of the complainant to engage in the sexual activity in question." Mere acquiescence in, or a failure to specifically object to, sexual contact does not constitute consent at this stage of the analysis. In Canada, there is no such thing as "implied consent." Rather, the question is whether, in the complainant's own mind, she was agreeing to the sexual activity in question.
>
> 21 The *Criminal Code* specifies some circumstances in which the sexual activity in question is deemed to have been without consent. For purposes of this case, the relevant provision is s. 273.1(2)(b) which states that no consent is obtained where "the complainant is incapable of consenting to the activity." Incapacity to consent is a broad term and encompasses both situations where a person is incapacitated due to mental disability and situations where a person who would otherwise be competent to consent has been rendered unable to do so, whether or not it was the defendant who caused her to be incapable. To use an obvious and extreme example, a complainant who is unconscious (whether, for example, from alcohol, drugs, or a blow to the head) lacks the capacity to consent. She has no conscious knowledge of what is happening and is not capable of directing her mind to whether she wants to engage in the activity in question. Therefore, any person who proceeds to have sexual activity with an unconscious person commits the offence of sexual assault. That is the case regardless of the defendant's involvement, or lack of involvement, in how the complainant came to be unconscious. As stated by McLachlin C.J. in *R. v. J.A.*:
>
> > The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code.*
>
> 22 Although an unconscious person is by definition incapable of consenting to sexual activity, the same is not the case for a person who is intoxicated by alcohol or drugs. There will be times when a person is so impaired by alcohol and/or drugs that he or she is incapable of consenting. Whether or not that state of incapacity has been reached is a factual finding to be made in the circumstances of each case. The fact that a complainant does not remember engaging in sexual acts, or has a

complete blackout of the time in question, is not the same thing as lacking mental capacity to consent.

23 In *R. v. J.R.* Ducharme J. noted:

> ...The question is whether or not the complainant was able to make a voluntary and informed decision, not whether she later regretted her decision or whether she would not have made the same decision if she had been sober. Thus, an obvious example of incapacity would be the complainant who was unconscious or in a coma at the relevant time. As I have already explained, memory loss, without more, is not sufficient proof of incapacity. Similarly, while intoxication, self-induced or otherwise, might rob a complainant of capacity, this is only a possible, not a necessary result...

24 Similarly, in *Meikle*, Trotter J. (as he then was) adopted the following observations of Duncan J. in *R. v. Cedeno* as follows:

> Cases where the complainant is said to be incapable [due to] consumption of alcohol or drugs are less clear-cut. Mere drunkenness is not the equivalent of incapacity. Nor is alcohol-induced imprudent decision-making, memory loss, loss [of] inhibition or self-control. A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at time[s].

[62] While Molloy J. was dealing with a very different set of circumstances than in the case before me, I consider the above comments, with which I agree, to be relevant and of assistance to this case.

Conclusion

[63] For the following reasons, I find that I cannot be satisfied beyond a reasonable doubt that C.S. committed the offence of sexual assault.

[64] This case presents a difficult situation. There is a 15-year-old accused who was perhaps, at least on the evidence of one independent witness at least as, if not more, intoxicated than the 16-year-old alleged victim.

[65] I find C.T. to have been a credible witness and, taking into account her intoxicated state at the time of the events testified to, also a fairly reliable witness.

[66] Based upon the evidence of C.T., I am satisfied that C.S. was having contact of a sexual nature with C.T. I accept C.T.'s evidence in this regard.

[67] C.S. is alone in a bedroom. C.T. subsequently goes in to check on him, because of her concern for him given his state of intoxication and involvement in several altercations. She turns him onto his side. Her actions can be seen as being compassionate and thoughtful.

[68] C.T.'s next memory is that of C.S. being on top of her with his penis in her vagina. She has no recollection of what took place between the time she turned C.S. on his side and the occurrence of the sexual contact.

[69] C.T. blacks out again and her next memory is that of her trying to get dressed, unsuccessfully, and returning to her house. Again, I find her evidence in this regard to be credible and reliable and further supported by the testimony of her mother.

[70] The problem that presents itself in this case, however, is a lack of evidence as to what actually happened in the bedroom between the time of C.T. turning C.S. on his side, and the sexual contact she testified to taking place.

[71] In particular, C.T. testified that she thinks she might have, while blacked out, consented to the sexual contact occurring.

[72] Crown counsel has submitted that I should reject this portion of C.T.'s testimony.

[73] I find that I am not prepared to accept the evidence of C.T. on the aspects of her evidence related to the events leading up to, during, and following the alleged sexual assault, and then reject her evidence only on that portion that provides evidence that could be viewed as possibly exculpatory for C.S.

[74] As I stated earlier, I find C.T. to be an honest and credible witness, who provided generally reliable testimony in my assessment of her evidence, and I will not reject that singular portion of her evidence. I am aware that I am able to accept or reject some of a witness' testimony without being compelled to accept or reject other portions of the witness' testimony. However, in this case I do not feel it would be appropriate for me to do so. I find that C.T. was doing her best to tell the truth as she remembered it, and her honest memory allowed for this possibility.

[75] In deciding not to reject this portion of the testimony of C.T., I wish to make it clear that I have turned my attention to the dynamics of sexual assault and the tendency at times, for victims of sexual assault to sometimes doubt whether a sexual assault has occurred and/or whether their conduct makes them responsible, at least in part, for the sexual assault. Such self-blame is very often misplaced. I do not see that as what is taking place here, however.

[76] Turning to the issue of intoxication and consent, while C.T. was clearly intoxicated, the law is clear that intoxication, even to the point where the individual blacks out and/or has no memory of events, is not on its own proof beyond a reasonable doubt that the individual was incapable of consenting to sexual contact.

[77] There was nothing in the conduct of C.T. prior to entering the bedroom where C.S. was located that would indicate she was so intoxicated as to establish beyond a reasonable doubt that she was incapable of consenting to sexual contact. I am mindful that she testified that she felt like she was on the way to becoming more drunk, even though she had stopped drinking by then.

[78] C.T.'s difficulties in trying, unsuccessfully, to dress herself afterwards and to use her keys to enter her home are somewhat informative as to her state of intoxication at those times. I note that she was also quite upset at what had occurred.

[79] C.T.'s testimony that sexual contact with C.S. is not something that she had or would have wanted, is also evidence that I can consider in determining whether she may have been so intoxicated as to not being capable of making an informed decision as to whether she wanted sexual contact with C.S. or not, such as would make any "consent" invalid.

[80] C.T. did not testify that she was asleep or passed out and in an unconscious state when she became aware of the sexual contact. She stated that when she came to from her blacked-out state, she was aware, temporarily, of the sexual contact occurring. C.T.'s testimony that she might have consented to having sexual contact while she was blacked out carries with it the logical inference that blacked out did not mean unconscious or passed out. In saying this, I am aware that C.T. testified that she would not have wanted to have sexual contact with C.S. if she was conscious. Taken in context, however, her use of the word "conscious" is more consistent with meaning her blacked-out state of mind than of being passed out or similarly unconscious.

[81] As noted by Molloy J., in ***Nyznik***, and within other cases cited therein, blacked out does not necessarily mean unconsciousness or passed out or incapable of providing consent.

[82] I find that, on a consideration of the whole of the evidence, I am not satisfied beyond a reasonable doubt that C.T. was so intoxicated as to be incapable of consenting to sexual contact. This of course, does not necessarily mean that C.T. consented to the sexual contact. I certainly do not have the kind of evidence before me that would allow for such a definitive finding to be made.

[83] However, assuming for the moment that there was sufficient credible and reliable evidence that C.T. was too intoxicated to consent, even then, how would I therefore move from that to finding C.S. guilty of sexual assault?

[84] The simple reality here is that I do not have any reliable evidence as to what actually happened between C.T. and C.S. in the period of time that C.T. was blacked out.

[85] If C.T. might have expressed her “consent” to sexual contact while she was blacked out but not unconscious, what else might have occurred? Is it also not possible that C.T. might have initiated the sexual contact with C.S.?

[86] There is simply no reliable evidence as to who initiated the sexual contact, whether it was C.S. or C.T.

[87] I cannot assume that C.S., just because he is male and C.T. is female, must have been the one who initiated the sexual contact. That would be a gendered-assumption based upon stereotypes, and not based upon the actual evidence at trial.

[88] In addition, if C.T was too intoxicated to consent to sexual contact, it would appear on the evidence that C.S., who was younger and quite possibly more intoxicated than C.T., was at least equally, if not more so, unable to provide consent.

[89] I also cannot find or assume, because it would be inconsistent with and/or contrary to the evidence of C.T., that C.S. initiated sexual contact with her while she was in a state of sleep and/or unconsciousness. If I were to find that C.T. was asleep and/or unconscious at the time the sexual contact was initiated, I would be satisfied that a sexual assault was committed by C.S. The evidence, however, simply does not support that finding. The testimony of C.T. raises as a realistic possibility that she was not asleep and/or unconscious at the time, but rather simply that she has no memory.

[90] I accept C.T.'s evidence that having sexual contact with C.S. was something that she, in the normal course, would not have wanted. However, she honestly admitted that she does not know what happened or what she may have done or conveyed while she was blacked out.

[91] The simple reality is that not even C.T. knows what happened between the time she turned C.S. over on his side and when she next recalls him having sexual contact with her. With her admission that she might have consented, which at a minimum means she may have also conveyed her "consent" to C.S, I find that there is insufficient reliable evidence to convict C.S. of the offence of sexual assault. If I do not

know with sufficient certainty what happened, then I cannot know beyond a reasonable doubt that a sexual assault happened.

[92] In these circumstances, given the onus on the Crown to prove that the sexual assault was committed by C.S. on the standard of proof beyond a reasonable doubt, it would be entirely unsafe to find that the evidence supports such a finding being made.

[93] As such, C.S. is acquitted of the offence of sexual assault. He is convicted of the two s. 137 *YCJA* offences.

_____

COZENS T.C.