

Citation: *R. v. F.J.*, 2018 YKTC 29

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Docket: 17-10008B  
17-10038A  
Registry: Watson Lake

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Chief Judge Chisholm

REGINA

v.

F.J.

**Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.**

Appearances:  
Paul Battin  
Lynn MacDiarmid

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] It is alleged that F.J. sexually abused three children, resulting in sexual assault and sexual interference charges with respect to each of the three complainants. F.J. denies these allegations.

[2] During the course of the trial, the Crown requested and was granted leave to withdraw Counts 3, 8 and 9 of the 13-count Information.

[3] The parties submitted an Agreed Statement of Facts at trial which essentially describes the timeline of the police investigation from the time the initial complaint was made to police.

[4] The Crown called seven witnesses during the trial, including the three complainants who were each under the age of 14 at the time of the allegations.

[5] In the case of the complainant, H.S., she had previously provided a statement to police which had been video recorded.

[6] The video recording of the statement of H.S. was played in court in the course of her testimony. While testifying, she adopted the contents of the video recording. The recording became evidence in the proceedings pursuant to section 715.1 of the *Criminal Code*.

[7] The Crown also led evidence of a statement that F.J. provided to police, which the defence conceded to be voluntary.

[8] F.J. testified in his own defence.

### **Summary of Relevant Facts**

[9] On April 16, 2017, Whitehorse police received information about a possible sexual assault committed by F.J. on J.O.

[10] It was learned that a sister of J.O. had discovered J.O.'s diary and upon reading the contents, she suspected that J.O. had been sexually abused by F.J.

#### *Evidence of J.O.*

[11] J.O. is 14 years of age. She is a cousin of F.J. She stated that on the summer break in 2016, she was at a sleep over with her cousin, A.S., who is also a complainant

in this matter. J.O. and A.S. were watching television in the early morning hours in a bedroom at the house of A.S.'s aunt, D.C.

[12] J.O. was sitting on the bed in the room, with A.S. seated beside her. F.J. entered the room and lay on the bed. J.O. noted that F.J. touched her with his right foot both on the side of her hip and in the "crotch area". She stated that the touching of the crotch and of the outside of her leg by her hip was not of long duration. It was less than 10 seconds and as short as three to four seconds in each case.

[13] J.O. became upset as a result of F.J.'s actions and started crying. She left the bedroom with A.S. A.S. went with her to the kitchen area, where J.O. disclosed what had occurred. The girls then both went to A.S.'s aunt's room where they slept.

[14] J.O. believed that F.J. was under the influence of alcohol when this occurred.

[15] J.O. admitted that prior to this incident she had always been a little bit scared of F.J. when he drinks alcohol, but not because of anything he had done previously.

*Evidence of A.S.*

[16] A.S. is a cousin of J.O. She is 14 years of age.

[17] A.S. recalls an incident in the summer of 2016 when she, her sister, H.S., and J.O. were at her aunt D.C.'s house. The three girls were watching television when F.J., her uncle, came into the room and sat down on the floor with them. He was drunk and had his eyes open.

[18] A.S. left the room and when she came back, J.O. and F.J. were on the bed. While on the bed, J.O. was sitting up with her back positioned against the wall. F.J. was lying down on the bed. A.S. testified that she noticed the bed shaking, but realized it was not J.O. who was causing it to shake. Although F.J.'s feet were under the blankets, she observed what she believed to be his foot moving towards J.O.'s legs.

[19] She noticed that J.O. started to cry around this time. Upon A.S.'s suggestion, J.O. and she went to the kitchen. After the two spoke about what had occurred, they went to D.C.'s room and made a bed on the floor where they both slept. D.C. was asleep at the time.

[20] Aside from the incident involving J.O., A.S. testified that F.J. had touched her inappropriately on three occasions which pre-dated the incident involving J.O.

[21] A.S. stated that an incident occurred in Ross River when she was 11 or 12 years old. She was visiting the community with her grandmother, her aunt, and F.J. They all stayed at her uncle's house. F.J. was away from her uncle's house one evening. She and her grandmother watched television before going to sleep. A.S. testified that she had forgotten to lock the door. She was sleeping alone in a bed when she woke up to F.J. touching her vaginal area with his foot. She tried turning to the wall, but he kept grabbing her by the shoulder.

[22] The touching with his foot continued for a couple of minutes. The buttons on her pants came undone during the incident, but the touching was over her clothing. It ended when she got up to go to where her grandmother was. A.S. and F.J. were both lying on the bed when this occurred.

[23] The second incident occurred at her grandmother's house. A.S. was lying down on the bed in F.J.'s room and watching television while F.J. made a meal in the kitchen. A.S. testified that F.J. entered the bedroom and rubbed her vaginal area with his knee. This lasted for a couple of minutes, but nothing was said between them. Nobody else was home at the time.

[24] The third incident occurred in Carcross. A.S. explained that she was visiting Carcross with her grandmother, her aunt, F.J. and his friend. She believes it was in the fall and she was 12 years of age at the time.

[25] A.S. was sleeping by herself in a bed. She awoke to F.J. waking her up to roll over. She declined to do so and tried falling asleep. She felt his hand touching her over her pyjamas as it moved up her leg. She tried to push his hand away, but he would not stop. The touching started at the top of her knee and progressed to the top of her thigh. This went on for one to two minutes. She had been sleeping by herself before this incident occurred.

[26] A.S. got up and went to the bathroom after the unwanted touching. She noted that F.J. was still in the bed, so she proceeded to find a way to sleep beside her grandmother who was on the couch. She used the "foamie" that F.J. had been using to sleep on.

[27] A.S. explained she was too scared to tell anyone about this incident as she was worried she would not be believed.

*Evidence of H.S.*

[28] H.S. recounted an incident in which she alleges F.J., her uncle, touched her inappropriately when he was quite drunk. The incident occurred at her aunt's home in Watson Lake on August 29, 2017 when H.S. was 10 years old. H.S. was sleeping on the couch when she felt his hand on her. F.J. was lying on the floor beside the couch she was sleeping on when this happened. She smelled alcohol from him and saw a bottle of alcohol on the floor beside the table. He was rubbing his hand on her leg and vaginal area over her pyjamas. She told him to stop and kept pushing his hand away, but he did not relent. She explained that she starting crying as a result of what F.J. was doing to her. While this was occurring, H.S.'s aunt exited the washroom and questioned her about her emotional state. H.S. explained what had occurred which led to her aunt ejecting F.J. from the house.

[29] Although H.S. initially had some hesitation in describing the second area of her body that F.J. touched, she ultimately drew a diagram during her testimony which became an exhibit on the trial. The area of touching which she circled included her vaginal area. She said the touching occurred above her knees and below her waist. She subsequently agreed that F.J. had touched her on her "private parts".

*Evidence of D.C.*

[30] D.C., who is H.S.'s aunt, testified that H.S. woke her up during the night on one occasion when H.S. was staying with her. H.S. complained of something that F.J. had done to her. She was "tearing up" and asked if she could sleep in D.C.'s room. D.C.

located F.J. and advised him, in no uncertain terms, to leave the house. D.C. said that after F.J. exited the house, she held H.S. in her arms until she fell asleep.

*Evidence of F.J.*

[31] F.J. denies that he touched any of the three complainants for a sexual purpose. Regarding the allegation made by J.O., he testified that he recalls watching television in a bedroom in D.C.'s house when both J.O. and A.S. were present.

[32] F.J. stated that he lay down across the end of the bed and that J.O. and A.S. were beside each other at the head of the bed. His legs were, therefore, perpendicular to J.O.'s legs. He agreed that he would have had to have swung his legs around in order to have touched J.O. in the area she described.

[33] F.J. described being asleep or half asleep on the bed. He indicated that he moves around a lot to become comfortable when sleeping and that, although he may have touched J.O., it was completely inadvertent. He recalls being awakened when J.O. and A.S. left the room. He acknowledged that he had consumed alcohol that evening.

[34] F.J. recalled being in Ross River, Carcross, and at his grandmother's house in Watson Lake in the presence of A.S., however, he disputes her version of what occurred on those three occasions.

[35] F.J. remembered going to Ross River with his mother and A.S. and staying at his brother's house. On one evening during this stay, F.J. went out with his friends and

drank some alcohol. When he returned home, A.S. was sleeping beside his mother. He watched television, but never lay beside A.S., and never touched her.

[36] F.J. explained that he recalls a situation at his grandmother's house in Watson Lake, where he confronted A.S. about being in his room. He described cooking noodles in the kitchen. When he went to his room, he located A.S. on his bed, either lying down or sitting up. Her legs were off the bed. F.J. denies touching A.S. in any manner. He simply told her to leave his room. A.S. did not follow his direction. F.J. ultimately returned to the kitchen to tend to the boiling noodles.

[37] Regarding the third allegation, F.J. recalled travelling to and being in Carcross with his aunt, D.C., his mother, his friend, W.W., and A.S. On the trip to Carcross, he and his friend drank a significant amount of alcohol, so much that F.J. started feeling ill. Afterwards he slept in the vehicle for one hour and a half or so.

[38] Once in Carcross, approximately 30 minutes after waking up in the vehicle, he began drinking more alcohol. He and a friend in Carcross shared a 26 ounce bottle of whiskey while gaming. He described himself as not being drunk.

[39] F.J. recalled sleeping beside his mother who was on the couch, until A.S. got up and went to the bathroom. At that point, he took the bed that A.S. had been sleeping in. He denies having touched A.S. in any fashion. He said he could not have reached that far because he was on the floor beside his mother.

[40] With respect to the allegation made by H.S., F.J. explained that he was drinking alcohol with his friend, W.W., that evening. He was drunk and ended up going to the

residence of D.C. He believed he was let into the house by D.C.'s boyfriend. He fell asleep in front of the couch where H.S. was sleeping.

[41] D.C. woke him up some time later and told him to leave the house. She was upset with him and accused him of having done something to "that kid". It bothered F.J. that he was being accused of harming a child. He testified that he did not touch H.S.

[42] He noted that he did not see H.S. before he left the house as she was in the back room with D.C.

### **Analysis**

[43] Although three complainants who know each other well have made sexual offence allegations against the accused, the defence, quite properly, does not argue that the complainants colluded in any way with respect to the allegations. There is no evidence of any sort that the complainants colluded in any matter. Instead, the defence argues that the evidence of the complainants is, at times, vague and unreliable. The defence submits that if there was any physical contact between F.J. and the complainants, the Crown has not proved that it was for a sexual purpose.

[44] In contrast, the Crown contends that the evidence, as a whole, is detailed and reliable and clearly demonstrates that F.J. touched each of the complainants for a sexual purpose.

[45] The Crown also urges me to use testimony from J.O. as similar fact evidence with respect to A.S., and vice versa, for the counts that allege F.J. committed sexual offences with his foot or knee.

[46] The defence responds that I should decline to do so, as this would be highly prejudicial to F.J. Also, the defence submits that the evidence with respect to the Watson Lake incident as alleged by A.S. is not sufficiently similar. Finally in this regard, the defence argues that A.S.'s knowledge of the allegation made by J.O. may have influenced her allegation that F.J. employed his foot to abuse her. As a result, counsel contends that I should be hesitant to use J.O.'s allegation as similar fact evidence when considering A.S.'s Ross River allegation.

[47] This is not a credibility contest between the Crown and defence witnesses. The burden is, of course, on the Crown to prove the charges beyond a reasonable doubt. This burden never shifts to the defence.

[48] When assessing the evidence of younger witnesses with respect to credibility, I am not to hold them to adult standards. As stated in *R. v. W.(R.)*, [1992] 2 S.C.R. 122:

26 ...Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. ...

[49] This does not lead to a different standard of proof in criminal cases involving a child witness. It does mean that in assessing a child's evidence, I should be cognizant of the child's mental development in taking a common sense approach to his or her testimony: *R. v. B.(G.)*, [1990] 2 S.C.R. 30. I should assess a child's evidence in the context of his or her age at the time of the events and at the time of testifying.

[50] This case requires an analysis of the principles set out in *R. v. W.(D.)*, [1991] S.C.R. 742. Although I am not required to review the evidence in any particular order, in the circumstances of this case, I will commence with the evidence of F.J.

[51] As with the complainants, F.J. testified regarding events that transpired some time ago. Except for the allegation made by H.S., none of the other allegations was brought to his attention until a significant period of time after the allegations arose. It is understandable that F.J. recalls to some extent, despite his level of intoxication, the alleged incident involving H.S., as he was accused on that very evening of having inappropriately touched H.S. and then told to leave the house.

[52] On the other hand, he testified to having a very detailed recollection of other fact situations involving the complainants which, based on his denial of the complaints, were seemingly unimportant to him. For example, he testified in a detailed fashion as to the evening J.O. and A.S. were present at his sister's residence. It was not the first time that he had seen J.O. at his sister's home. He testified that he was living with his sister at the time and had his own room in the house. Despite the passage of time, F.J. recalled how much alcohol he had consumed that evening at the house of his friend, W.W. He testified to remembering what movie he watched, where he lay on the bed, and the fact that the J.O. and A.S. got up and left the room together at some point. He recalled this latter point, even though he had been consuming alcohol and was half asleep.

[53] It was only during cross-examination regarding this incident, that he finally admitted that his memory of the incident might be a little "foggy".

[54] At the end of his direct examination, F.J. testified that with respect to the allegations in question, he remembers “everything”. However, it became clear in cross-examination that his memory is, at times, quite poor and unreliable, especially when under the influence of alcohol. F.J. ultimately agreed that his memory is not always 100 percent when he consumes alcohol.

[55] As a result, I find that I must treat F.J.’s evidence with caution.

*Counts 1 and 2*

[56] As indicated, J.O. testified about an incident that took place over a very short period of time in 2016. She was 12 years of age. She initially indicated that F.J. touched her with his foot for only one or two seconds. Upon further questioning by the Crown, she estimated that the touching lasted for less than 10 seconds. In cross-examination, she agreed that it might have been three or four seconds in length.

[57] J.O. was clearly upset by F.J. touching her with his foot in what she described as her “crotch area” and around her hip. When he touched her hip area, it was close to, but not on her buttocks and when he touched her crotch area, he came close to touching her vagina. A.S.’s evidence adds some corroboration to J.O.’s version of events.

[58] As indicated, F.J.’s touching of J.O. with his foot was of very short duration. F.J. does not disagree that this may have occurred, however he states that he did not do so intentionally.

[59] I find that in all the circumstances, the Crown has not proved beyond a reasonable doubt that the touching was for a sexual purpose. I make this finding as I have a reasonable doubt as to whether the brief touching may have been inadvertent. In coming to this conclusion, I have considered the Crown's application to admit evidence on counts 10 and 11 as similar fact evidence. This evidence may well be probative of the *actus reus* of J.O.'s allegation and there is some similarity with respect to the allegations. Nonetheless, even if I were to admit the similar fact evidence, I would still have a reasonable doubt with respect to the allegation involving J.O. The reasonable doubt stems from the brevity of the touching alleged by J.O. and the fact that, in all the circumstances of that incident, it may have been unintended.

[60] In the result, I find F.J. not guilty of counts 1 and 2.

*Counts 4, 5, 6, 7, 10 and 11*

[61] As noted, A.S. testified to three separate incidents involving F.J. which occurred when she was in the 11- to 12-age range.

[62] A.S. gave her evidence in a straightforward manner. It is of note that she provided a detailed account of both her trip to Ross River and to Carcross, where she testified that, on both occasions, F.J. touched her inappropriately.

[63] When challenged on details of her recollection, she answered in a responsive and detailed fashion. An example of this is the following exchange with respect to the allegation in Ross River, where she alleged he was lying behind her:

Q. How do you know he was awake?

A. Because I turned around and opened – like I said in the other statement, I turned around, opened my eyes and seen (sic) him. And his eyes were open.

[64] The only inconsistency of any consequence in A.S.'s evidence was the sequence of the three allegations. She indicated to police that the first occurrence was at her grandmother's house, but at trial she testified that the first incident in time took place in Ross River. She explained this discrepancy by indicating that it was a few weeks after speaking to the police that she recalled that the first occurrence was actually in Ross River, as opposed to at her grandmother's residence. I have no reason to question A.S.'s response in this regard. I do not consider this inconsistency to be significant when considering the whole of her evidence.

[65] In coming to this conclusion, I am mindful of the words of McLachlin J. (as she then was) in *R. v. R.W.*, [1992] 2 S.C.R.122:

24 ...Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. ...

[66] The defence argues that if I accept that F.J. was on the bed with A.S. in Ross River, her description of how they were positioned would have made it very difficult for him to sexually assault her with his foot. However, as conceded by the defence, the act described by A.S. would be physically possible.

[67] The defence submits that the touching of A.S. in Carcross may not have been for a sexual purpose. However, her evidence in this regard is quite clear. She testified that initially F.J. was attempting to wake her up, but the touching of her leg lasted for

approximately two minutes and consisted of him sliding his hand on her leg from below the knee to the thigh. I conclude that this is not the type of touching someone in F.J.'s position would employ to wake up a young person in order to have them change positions on a bed. I find that both subjectively and objectively, the touching was for a sexual purpose.

[68] On the whole of A.S.'s evidence, I find it to be both credible and reliable. I believe her evidence with respect to the sexual touching allegations both in Ross River and in Carcross.

[69] On both occasions, F.J. admits to having consumed alcohol. As set out above, I find his evidence to be generally unreliable, but more so in situations where he was consuming alcohol. I find his evidence regarding what occurred in Ross River and Carcross to be unreliable. In neither case does his evidence raise a reasonable doubt. Having considered the evidence as a whole regarding these two allegations, I find that the Crown has proved beyond a reasonable doubt the incidents described by A.S. at those two locations. I find F.J. guilty of counts 6, 7, 10 and 11.

[70] Regarding the alleged incident at A.S.'s grandmother's house, she described F.J. rubbing her vaginal area with his knee, but was unable to describe in any detail how this incident unfolded. She admitted having difficulty remembering exactly what happened on that occasion. On balance, I have a reasonable doubt as to F.J.'s guilt and therefore I acquit him of counts 4 and 5.

*Counts 12 and 13*

[71] H.S. was an impressive and compelling witness. Although I must be careful in my consideration of evidence of demeanour, H.S.'s testimony rang true. More importantly, she displayed an extensive recollection of the alleged assault. Her evidence was not only detailed, but it was not in any way challenged in cross-examination.

[72] H.S. indicated that F.J.'s initial entry into the home in the early morning hours woke her up, at which time she observed a bottle of alcohol. After falling back asleep, she awoke to F.J. touching her in a sexualized manner. Considering her evidence as a whole, H.S. had no motive to fabricate an allegation. Additionally, even though it was in the early morning hours, she was alert; when an opportunity presented itself, she complained to her aunt immediately. Unlike the allegation of J.O., there can be no suggestion that H.S. misconstrued some innocent or inadvertent action by F.J. since he denies ever touching her.

[73] It is also noteworthy that parts of the evidence of H.S. accord with that of her aunt, D.C., in terms of D.C. ejecting F.J. from the home. Additionally, H.S.'s description of F.J. as being really drunk is consistent with his evidence that he drank a significant amount of alcohol that evening.

[74] It is also of significance that F.J. explained that he fell asleep on the floor, beside the couch where H.S. was sleeping. Although F.J. denies the sexual touching, his state of intoxication significantly compromises the reliability of his evidence. F.J.'s evidence does not leave me with a reasonable doubt as to his guilt.

[75] When looking at the evidence of this incident as a whole, I have no hesitation in finding that the Crown has proved the allegation beyond a reasonable doubt. I find F.J. guilty of counts 12 and 13.

[76] In conclusion, F.J. is guilty of six offences, namely, counts 6, 7, 10, 11, 12 and 13. I enter a judicial stay on the s. 271 charges, namely counts 6, 10 and 12 pursuant to the *Kienapple* principle.

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CHISHOLM C.J.T.C.