

Citation: *R. v. Harry*, 2019 YKTC 7

Date: 20190208
Docket: 18-00046
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

HAROLD HANS HARRY

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

Appearances:

Kevin W. MacGillivray
Malcolm E. J. Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] Harold Harry is before me for trial on a single count of sexual assault, involving an incident of digital penetration. While Mr. Harry has no specific recollection of the penetration, he does not dispute touching the complainant, C.S., in the vaginal area for a sexual purpose; however, he asserts that the touching was consensual. A determination of whether the Crown has proven beyond a reasonable doubt that the sexual touching was not consensual, as required to prove the offence, turns on an assessment of witness credibility. Four witnesses testified at the trial: Phillip Asp, Cst. Boehmer, and C.S. for the Crown; and Mr. Harry in his own defence; however, only C.S. and Mr. Harry gave evidence on the issue of consent or lack thereof.

[2] It is clear that, on April 5, 2018, Mr. Harry and C.S. travelled together by cab to the home of Phillip Asp, located on Jeckell St. in Whitehorse, Yukon. Mr. Asp is Mr. Harry's son in law, and C.S.'s cousin. Mr. Harry and C.S. went to the basement of the home, where they shared vodka from a bottle purchased by Mr. Harry. According to Mr. Asp, the accused and complainant were in the basement for two to three hours. It was during this time that the sexual touching took place, while the two were on a mattress on the basement floor. C.S. then left the residence.

[3] Mr. Harry and C.S. provide differing accounts with respect to the circumstances in which the touching occurred. Mr. Harry says that the touching was consensual, involving mutual kissing, and him touching C.S. on the chest and buttocks. He also admits to touching her in the vaginal area, but says he cannot recall if he inserted his fingers in her vagina. He says C.S. reciprocated by touching him in the penis area. He says the encounter ended when he asked C.S. to take off her pants, and she refused. He was miffed at the refusal, and asked for his bottle back. C.S. left the residence.

[4] C.S. says that she and Mr. Harry shared some of the bottle of vodka, and then she fell asleep. She woke to find Mr. Harry with his hand down her pants, inserting his finger into her vagina. She says he scratched her inside and it hurt. C.S. says she then got up and left the residence.

[5] In assessing the credibility of these conflicting accounts, I am bound by the decision of the Supreme Court of Canada in *R. v. W.D.*, [1991] 1 S.C.R. 742. The *W.D.* test requires that if I believe the evidence of the accused, I must acquit. Even if I do not believe the evidence of the accused, I must ask myself whether his evidence

nonetheless raises a reasonable doubt, and, if so, I must acquit. Finally, even if I do not believe the evidence of the accused and his evidence does not leave me with a reasonable doubt, I must ask myself whether the evidence I do accept is sufficient to satisfy me beyond a reasonable doubt that the offence was committed. In establishing the *W.D.* test, the Supreme Court made it clear that the role of the trial judge in assessing credibility is not to prefer one version over the other, but, rather to keep the focus, at all times, on the question of whether the Crown has met the burden of proof beyond a reasonable doubt.

[6] In considering the evidence of Mr. Harry, I have serious concerns about the reliability of his recollection. Mr. Harry was forthright in his evidence relating to his significant and longstanding problem with alcohol. While he manages to maintain both sobriety and seasonal employment over the summer months, he is a binge drinker through the winter months with a self-described pattern of drinking until he passes out, getting up and starting all over again when he feels sober.

[7] In relation to the date of the offence, Mr. Harry says he had begun binging on April Fool's Day and continued until two or three days after the offence date. However, he says that on the actual offence date, he had shared a mickey of vodka with five or six adults, of which he maybe had one shot. He was adamant that he was not impaired when he encountered C.S. and his memory was not affected at all.

[8] However, Mr. Harry's assertion that he was not impaired and has no issues with his recollection of the events on the date of the incident makes his description of how he encountered C.S. strikingly bizarre.

[9] In his version of events, Mr. Harry went to Big Bear off sales to buy a bottle of vodka. He asked the clerk to call him a cab. He got into the front seat of the cab, and when he looked back, C.S. was sitting in the back seat. He appeared to have no idea how she got there, but seems to believe she just hopped into his cab. When asked if he spoke to C.S. in the cab, Mr. Harry replied not that he can remember, and he has no recollection of anything at all being said between them as they travelled to Mr. Asp's residence on Jeckell Street.

[10] It should be noted that there is no historical relationship of significance between Mr. Harry and C.S. The evidence indicates that they had met each other through C.S.'s brothers several years before, and may have drunk together on the street on a couple of occasions in the past. However, there was certainly no relationship between them that would make it reasonable to expect that C.S. would hop into Mr. Harry's cab without his permission or any prior discussion, or that Mr. Harry would simply accept her presence in the cab and allow her to accompany him without asking a single question as to what she was doing there.

[11] Mr. Harry's version of the encounter is not indicative of someone with a clear and relatively sober recollection of events. One can only conclude that he is grossly under-stating his level of intoxication, and grossly over-stating his level of recollection.

[12] Concerns with respect to Mr. Harry's reliability are compounded as events unfold given the additional consumption of alcohol. Indeed, his evidence regarding consumption is itself unreliable. Initially, he testified to both him and C.S. consuming three to four shots out of the 40-ounce bottle of vodka he had purchased. He then

suggested he may have consumed more of the bottle himself after C.S. left, referring at one point to drinking himself silly, only to testify later that the missing half of the bottle, some 20 ounces, had been consumed by both him and C.S. before her departure, decidedly more than the three to four shots he initially testified to each consuming.

[13] Finally, it appears that Mr. Harry told Cst. Boehmer, in his statement, that he had no recollection of what had happened on April 5 because he was drunk. When asked about whether he was telling the truth when he gave his statement, Mr. Harry said that as far as he knows he was telling the truth, but says when he was being questioned by Cst. Boehmer he was drunk. Counsel for Mr. Harry suggests Mr. Harry's statement to the police is not reliable if Mr. Harry was drunk when he gave the statement, and notes that Mr. Harry told Cst. Boehmer that he was drunk at least three times during the taking of the statement. However, Cst. Boehmer was clear in his testimony that he has dealt with Mr. Harry on numerous occasions since taking his statement, including during periods of extreme intoxication. He rates Mr. Harry's state of intoxication when giving his statement at only two or three on a scale of one to ten.

[14] Overall, Mr. Harry's evidence, in my view, is simply not reliable. It may well be what he wants to believe happened, but I am not persuaded that it is what happened. Indeed, I am persuaded that he was telling the truth when he told Cst. Boehmer that he had no recollection of what had happened. I conclude that I do not believe his evidence. Nor for much the same reason, does his evidence raise a reasonable doubt.

[15] That, however, is not the end of the matter. A rejection of Mr. Harry's evidence does not lead, necessarily, to the conclusion that he therefore must be guilty of the

offence. I must still consider whether the remaining evidence is sufficient to satisfy me beyond a reasonable doubt that Mr. Harry committed the offence.

[16] This depends almost entirely on an assessment of C.S.'s evidence.

[17] C.S. says that she was staying at the Salvation Army shelter. While she had been drinking heavily the night before, she had not been drinking on the morning of the incident. She was, however, very hung over and described herself as 10 out of 10 in relation to wanting a drink to deal with her hangover. She says she met Mr. Harry at the Salvation Army and he asked her if she wanted to go with him to his daughter's house. She says she agreed as she thought it would be a safe place to sleep. It was also clear that the promise of alcohol influenced her decision. She says she called for a cab to the Salvation Army. Both got in the cab, which stopped first at the Big Bear across the street where Mr. Harry bought a bottle of vodka, then took them to Mr. Asp's house on Jeckell. She and Mr. Harry went downstairs. C.S. says they passed the bottle back and forth. She had a few shots from the bottle, maybe four, of about an ounce each. She says she then went to sleep on the mattress on the floor. She woke up to find Mr. Harry's hand down her pants with his finger in her vagina. She says Mr. Harry scratched her inside and it hurt. He removed his hand when she got up, and left the residence.

[18] As conceded by defence counsel, C.S. testified in a straightforward manner. She was not shaken on cross-examination and did not shy away from unflattering evidence. Nothing in her manner of testifying suggested she was being untruthful.

However, defence counsel suggests there are four reasons why I should conclude her evidence is not sufficient to establish guilt beyond reasonable doubt.

[19] Firstly, he questions her explanation for going with Mr. Harry. He says that even though the Salvation Army does not officially allow people to sleep there during the day, the fact that some people do sleep on the couches, means C.S. could have stayed there to sleep. He further says that it was inconsistent for her to leave with Mr. Harry when she was waiting for her husband, who was out hustling for money to buy alcohol, to return.

[20] I do not find C.S.'s explanation of why she went with Mr. Harry to be suspect. It makes sense that she would prefer a place to sleep where she would not run the risk of being asked to leave rather than trying to sleep at the Salvation Army in violation of their rules. Furthermore, she was clear that she was also influenced by her desperate need for a drink to take the edge off her hangover. Leaving with Mr. Harry allowed her to meet that need in an immediate way that would not have happened remaining at the Salvation Army or continuing to wait to see if her husband was successful in his quest for alcohol. The explanation is a rationale one that does not, in my view, undermine C.S.'s credibility.

[21] The second concern raised by defence counsel is that C.S.'s evidence that they caught the cab at the Salvation Army and had it take them across the street and wait, with the meter running, while Mr. Harry purchased alcohol is problematic. However, I would note that it was Mr. Harry who was paying for the cab. Having already concluded that he was significantly more intoxicated than he would have us believe, I

am not surprised that it would not strike him that it would cost unnecessary funds to have the cab pick them up at the Salvation Army, rather than walking to Big Bear and having the cab pick them up there. As C.S. was not paying for the cab, I fail to see why it is problematic that she did not have a concern about the additional cost.

[22] The remaining two concerns raised by defence counsel relate to differences in the evidence of Mr. Asp and C.S., and are potentially more problematic. These include, firstly, the fact that C.S. indicated that nothing was said by her or Mr. Harry when she got up to leave; which is contrary to Mr. Asp's evidence that he heard Mr. Harry say give me back my bottle. Secondly, C.S. said that she was upset, possibly crying, and that Mr. Asp asked her what was wrong, which is contrary to Mr. Asp's evidence that C.S. did not seem upset, and he only recalls her asking for a cigarette, a fact they both agree on.

[23] In considering these inconsistencies, I conclude that there are two reasons that they do not undermine C.S.'s credibility or reliability regarding the offence alleged. Firstly, Mr. Asp, as a witness, clearly struggled with his recollection. He was poor, even inconsistent, on details; perhaps not surprising given that the date was not of any significance for him, and he was not asked to provide a statement until two days later, but it does raise concerns for me about the reliability of his recollection in its entirety. For these reasons, I am not prepared to accept his evidence as being completely accurate.

[24] Secondly, I would note that both of these identified concerns fall within the timeline immediately after the alleged sexual assault. It would not be at all unusual for

C.S.'s recollection of the specifics immediately following what would be a traumatic incident to be impacted by what had happened, such that her recollection of events immediately after the incident would be less clear and perhaps less reliable. This does not, however, cause me concern with respect to the reliability or credibility of her evidence regarding the incident itself.

[25] In the result, I am satisfied that I can and do accept C.S.'s evidence with respect to what occurred in the basement of Mr. Asp's residence. In particular, I find that C.S. fell asleep, and while asleep, Mr. Harry put his hand down her pants, inserted his finger inside her vagina. I further find that the digital penetration occurred without C.S.'s consent. Accordingly, the offence has been made out and a conviction will be entered.

RUDDY T.C.J.