

COURT OF APPEAL FOR YUKON TERRITORY

Citation: *R. v. Johnson*,
2003 YKCA 0002

Date: 20030321
Docket: YU0476

Between:

Regina

Respondent

And

John Dale Johnson

Appellant

Before: The Honourable Madam Newbury
The Honourable Madam Huddart
The Honourable Madam Saunders

Oral Reasons for Judgment

B.A. Beresh

Counsel for the Appellant

D.A. McWhinnie

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia
March 21, 2003

[1] **HUDDART, J.A.:** This appeal from conviction for sexual assault raises the troubling possibility that a miscarriage of justice may have occurred. The appellant was convicted of having assaulted the complainant during the late evening of 26 June 2000 or early morning hours of 27 June 2000 in Whitehorse. Because I would grant a new trial, I will refer to the evidence only as much as necessary to provide an understanding of my reasoning in reaching that conclusion.

[2] The complainant testified she accepted a ride in the appellant's truck, that she thought he was the friend of an acquaintance; and that he drove to a secluded area in or near Whitehorse rather than take her home. There he forced her to perform oral sex on him several times. After the encounter the appellant drove her back to downtown Whitehorse so she could purchase liquor. At an off-sales liquor store she asked an employee to contact the police. When the police attended at the store about 1:45 a.m., they found the appellant in his truck outside the store waiting for the complainant. The complainant had forgotten she had been sexually assaulted. The police officer observed the complainant was intoxicated. Before the jury the complainant explained significant inconsistencies in her statements and evidence by testifying

that she could not remember much of the event; that much of the evening was hazy.

[3] A police officer accompanied her to the Whitehorse Hospital, where Dr. Beaton examined her around 3:30 a.m. and oral and skin swabs and an expectorated mouth rinse sample were taken. Dr. Beaton observed no external injuries, bruising or signs of contusion on the complainant, although the complainant testified she had been hit about the head several times. Nor did the attending police officer or a different officer who interviewed the complainant the next morning see any physical injuries.

[4] The DNA evidence taken from her did not confirm her evidence that she had given oral sex to the appellant.

[5] The appellant agreed he had been with the complainant in his truck that night, but denied sexually assaulting her. He explained the presence of semen in his vehicle and on his clothing by a sexual encounter with another woman that evening. She confirmed his evidence.

[6] To have convicted, the jury must have rejected the appellant's evidence as not giving rise to a reasonable doubt and accepted that of the complainant as establishing guilt. Thus, the jury's assessment of the credibility of the

complainant was at the foundation of the conviction. The jury's task was made particularly difficult because the complainant's testimony included her description of a vision she experienced during the encounter she described with the appellant. Such an experience would be beyond the experience of most people.

[7] To assist the jury, the Crown called a forensic psychologist, Dr. John Yuille. The trial judge allowed him to testify as an expert in the area of trauma and human memory with emphasis on disassociation. Dr. Yuille told the jury that, in his opinion, the complainant's vision was consistent with dissociation (or de-realization) during a period of high stress and could be viewed as a natural psychological response, and that it was not alcohol induced or a manifestation of a continuing mental state. Dr. Yuille's written report is in an unusual form for an expert's report in a criminal trial. It consists of three parts. The first was entitled Trauma and Memory. The second contains Dr. Yuille's qualifications. The third bears the heading "An Evaluation of the allegations of [the complainant]." The title accurately describes its contents and raises questions as to the admissibility of parts of that section. For my purposes, it

is not material whether the report in its entirety was properly admitted.

[8] This is because the appellant applied to have admitted on this appeal as new evidence an affidavit of a forensic psychologist, Dr. Louis A. Pagliaro, in which he gave an alternative explanation for the visions the complainant described in her testimony. In addition to all the materials before Dr. Yuille, he had the benefit of a transcript of the trial and the record of an interview with the complainant's son in which he described another vision his mother had reported to him, as well as an assault his mother had described that occurred about 12 days before the trial.

[9] In my view the record of the interview with the son and the opinion of Dr. Pagliaro give rise to a real possibility of a miscarriage of justice. The evidence is capable of belief. Because the reliability of the complainant's testimony is the fundamental issue in this case, I consider the new evidence meets the test of relevance and materiality. It is well settled that the requirement of due diligence will not be strictly applied where a court is of the view an accused may have been wrongfully convicted. I would admit the new evidence.

[10] Because this evidence could affect the jury's assessment of the complainant's testimony, there must be a new trial. For the same reason the appellant is not entitled to the verdict of acquittal he seeks. The reliability of a witness's evidence is the province of the trier of fact not this Court.

[11] It follows I would set aside the verdict and direct a new trial.

[12] **NEWBURY, J.A.:** I agree.

[13] **SAUNDERS, J.A.:** I agree.

[14] **NEWBURY, J.A.:** The verdict is set aside and a new trial is ordered.

"The Honourable Madam Justice Huddart"