

Citation: *R. v. M.P.*, 2018 YKTC 2

Date: 20180116
Docket: 15-10705
Registry: Watson Lake
Heard: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

M.P.

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*. Check with the court registry for details.

Appearances:
Paul Battin
Joni Ellerton

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] I provided these reasons in court on December 15, 2017 and advised counsel that I would publish them in writing at a later date. With the exception of some very minor editorial changes, these written reasons are identical to what counsel heard on December 15.

[2] M.P. has been charged with having committed the offence of sexual assault, contrary to s. 271 of the *Criminal Code*. The offence is alleged to have occurred on or

about November 7, 2014. The trial took place on November 24, 2017. Judgment was reserved.

Evidence at Trial

[3] An Agreed Statement of Facts (“ASF”) was filed as an Exhibit at trial. In brief, the ASF states that the RCMP first became aware on December 11, 2015 that a sexual assault may have been committed against Z.G. The follow-up investigation resulted in a statement being taken from Z.G. on January 8, 2016. A statement was also taken from a potential witness, K.C., on January 15, 2016.

[4] M.P. was arrested on the allegation of sexual assault on February 2, 2016.

[5] Z.G. and K.C. testified for the Crown. The defence called no evidence.

Testimony of Z.G.

[6] Z.G. was 14 years old at the time of the alleged offence.

[7] She testified that she and M.P. were cousins. They lived down the street from each other. They attended the same school. At times they would smoke marijuana together, including occasions when they were in M.P.’s bedroom. They would also drink alcohol together, sometimes in the company of friends.

[8] Z.G. testified that she and M.P. were friends only, and that they had never been in a romantic relationship. She said that there had been occasions when M.P. would try to kiss her, but that she had always told him “No”.

[9] Z.G. testified that her friend, K.C. had slept over at her house the evening of November 6, 2014. They got up, ate breakfast at approximately 1:00 p.m., and went out to look for somewhere to drink. She said it was cold, around 30 below zero, so they went to the first place they could, which was M.P.'s. She was not sure if he would be there and they did not call first. They knocked on M.P.'s window. She said that this was around 1:00 p.m.

[10] Z.G. was pretty sure that they went out on November 6, because it was the day after a community member had died.

[11] Z.G. said that she, K.C. and M.P. were downstairs in M.P.'s bedroom. They smoked some marijuana and drank some alcohol. She believed it was vodka. They were all sitting on the futon, which was in an upright position. She was in the middle, K.C. was on her right and M.P. was on her left.

[12] K.C. had passed out after having thrown up. Z.G. stated that she herself had simply fallen asleep. She awoke when M.P. put his hand down her pants and put his fingers inside her. When asked whether inside her meant in her vagina, Z.G. said yes. Z.G. testified that she did not consent to this being done to her.

[13] Z.G. stated that she was angry and she pushed M.P. off of her, calling him a pervert. She said that she woke K.C. up when she was freaking out on M.P. They left M.P.'s residence together and returned to Z.G.'s home. Z.G. estimated that they had only been at M.P.'s residence for a couple of hours before leaving.

[14] Z.G. said that she didn't go to the police right away because she was scared. It was only after she heard that M.P. had done this to another person that she decided to tell this person that it had happened to her as well. This person told the police who then approached Z.G.

[15] Z.G. said that, although she has seen M.P. at school and at a party here or there, there has been no relationship between them since this incident. She has also been at M.P.'s residence several times, but this was in the company of M.P.'s sister, who is approximately the same age as Z.G. M.P. was not there on these occasions.

[16] In cross-examination Z.G. stated that she had not been drinking before going over to M.P.'s. She stated that she had consumed part of a 26 oz bottle of alcohol the day before but had saved the rest. When asked about an apparent conflict in the statement she provided to the police in January 2016, in which she said she had been drinking before going over to M.P.'s residence, Z.G. stated that she must have been mixed up. Z.G. stated that the police officer who had taken the statement had come to her school and put her on the spot.

[17] When asked about her statement in which she said that they had "smoked a lot of weed", Z.G. said that her recollection today is that they had actually only smoked a little.

[18] Z.G. testified that she was not pushing the idea of giving the police a statement but did not mind doing so as she felt she had an obligation to in order to protect women.

Testimony of K.C.

[19] K.C. testified that although she and Z.G. hung out a lot together around the time of the incident, she and Z.G. are not really friends anymore. She has known both Z.G. and M.P. since they were kids. She and M.P. started to hang out together in Grade 8. While they were once good friends, they don't really speak to each other very much. She said that she did not really have much of a relationship with M.P. after the day of the incident.

[20] K.C. stated that, in 2014, she, Z.G. and M.P. were just friends. There was no sexual interaction between them and no flirting.

[21] K.C. stated that on November 7, 2014 she and Z.G. were at Z.G.'s residence. They had planned on drinking the night before but had not as they had learned of the death in the community that day.

[22] K.C. and Z.G. were just relaxing until the afternoon. She said that she and Z.G. went to the skate park where the two of them sat around drinking and smoking marijuana. They stayed there for about an hour. As it was cold, they decided to go to M.P.'s house. She said that the idea to go there was mutual. They did not call first as they just expected him to be there. She said that they also sat on the trail a bit before going there. K.C. estimated that she and Z.G. had consumed one-half of a 26 oz. bottle of Wiser's before going to M.P.'s house. She said that they had also smoked a little marijuana.

[23] K.C. stated that after arriving at M.P.'s house, she and Z.G. drank a few more shots. She did not recall M.P. drinking. She stated that Z.G. was talkative and seemed happy. She thought that Z.G. was intoxicated like she was.

[24] Shortly afterwards, K.C. threw up and passed out on the futon where she had been sitting. The futon was located in the downstairs bedroom of M.P. Z.G. was sitting beside her in the middle and M.P. was on the other side of Z.G. K.C. stated that she passed out in an upright position.

[25] K.C. said that she woke up to Z.G. shaking her. She was not sure how long she had been passed out for. Z.G. seemed stressed, with a look on her face, and wanted to leave really badly. Z.G. was not yelling at the time. M.P. was sitting on the futon playing a video game on the television. As they left, K.C. said "see you" to M.P.

Positions of Counsel

[26] Counsel for M.P. submits that M.P. should be acquitted on the basis that there are major inconsistencies in the testimony of Z.G. Further, counsel points to the leading question the Crown asked Z.G. in regard to where M.P.'s fingers were, as another ground of concern.

[27] Counsel points to the following inconsistencies:

- Whether Z.G. and K.C. were drinking vodka or Wiser's;
- Whether Z.G. had been drinking or not before going over to M.P.'s residence;
- Whether M.P. had been drinking at his residence when they were all there;

- Whether Z.G. had been yelling after the alleged sexual assault; and
- Whether Z.G. and K.C. had gone directly to M.P.'s house from Z.G.'s residence or not.

[28] Counsel also submits that the evidence that M.P.'s fingers were in Z.G.'s vagina was only after Crown counsel directly put the issue of them being in her vagina to Z.G., as before that Z.G. had not been able to articulate with any specificity where M.P.'s fingers were inside her.

[29] Crown counsel's position is that, to the extent that there were any inconsistencies, these are not unexpected considering the passage of time and K.C.'s and Z.G.'s youth. Further, such inconsistencies are peripheral to the incident itself, about which the testimony of Z.G. is clear and uncontradicted.

Analysis

[30] If M.P. touched Z.G. as she testified that he did, then he has committed the offence of sexual assault.

[31] I am not concerned by the leading question put to her by Crown counsel when he asked her whether "inside her" meant inside her vagina. Z.G. had already testified that M.P.'s hand was down her pants. There are only two possibilities of where his fingers could have been if they were inside her. Whether they were inside her vagina or inside her anus is not significant as either would constitute a sexual assault. The question asked by Crown counsel and the answer provided by Z.G. simply clarified the location of the sexual touching.

[32] While ideally Z.G. would have been able to articulate on her own that “inside her” meant inside her vagina, without Crown counsel having to put the question specifically to her as he did, in the circumstances I am satisfied that no harm in the evidentiary process resulted.

[33] The more important question is whether the testimony of Z.G. is reliable and credible enough to satisfy me beyond a reasonable doubt that M.P. sexually assaulted her.

[34] I agree with Crown counsel that the inconsistencies in the evidence between the testimony of Z.G. and her earlier statement, and between the testimony of Z.G. and K.C., are not unexpected, given Z.G.’s youth at the time of events and the passage of time. I also take into account K.C.’s youth and the passage of time.

[35] These inconsistencies also occur in the context of many consistencies between the testimony of Z.G. and K.C.

[36] Further, these inconsistencies are not linked in any significant way with the incident forming the basis for the allegation of sexual assault.

[37] I find that these inconsistencies while still necessarily a factor to be considered when assessing the whole of the evidence, do not undermine the credibility of Z.G.

[38] I find Z.G. to have been a credible and reliable witness in regard to her testimony as to the sexual assault. I find that the evidence of K.C., to the limited extent it is capable of assisting, supports the testimony of Z.G. in this regard.

[39] As there is no evidence before me that I consider capable of undermining Z.G.'s credibility and reliability, or evidence that would otherwise raise a reasonable doubt, I find M.P. guilty of the offence of sexual assault.

[40] In so finding, I wish to make it clear that any testimony I heard in relation to M.P. having "done the same thing to a different girl" was not at all a factor in my decision.

[41] Nor was the manner in which this allegation eventually surfaced, and Z.G.'s testimony in this regard, a factor.

[42] My decision is based solely on my acceptance of the testimony of Z.G. as to what happened on the futon that day, as being reliable and credible evidence.

COZENS T.C.J.