

Citation: *R. v. Smarch*, 2013 YKTC 114

Date: 20131206
Docket: 13-00085
13-00085B
13-00085C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Cozens

REGINA

v.

JAMES WILLIAM SMARCH

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:
David McWhinnie
Brook Land-Murphy

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS C.J.T.C. (Oral): James Smarch has been charged with having committed sexual assault, contrary to s. 271 of the *Criminal Code*.

[2] Several witnesses testified. Constable Hartwig testified that on May 2, 2013, just prior to 10:00 p.m., he was notified by dispatch that there had been a complaint of a possible sexual assault that involved two individuals “having sex” at a location near the Kanoe People building on the Yukon River. Constable Hartwig was not able to provide

any details regarding the time that the complaint was made to the RCMP dispatch operator in relation to his being notified of a complaint by dispatch.

[3] Constable Hartwig drove from his location in the Normandy Drive area of Takhini, arriving at the scene in his police cruiser shortly thereafter. He testified that he likely had the cruiser's lights and siren on while proceeding through the areas of heavier traffic, although he was likely in accordance with his usual practice of turning the siren off as he approached the scene.

[4] As Constable Hartwig approached the scene, the police cruiser observed Mr. Smarch lying on the ground behind M.B. in what he described as a "spooning" position. M.B. was not moving and Mr. Smarch was moving only a little. There was a third individual lying on the ground approximately 10 feet off to the side.

[5] As Constable Hartwig approached M.B. and Mr. Smarch, he noticed that M.B.'s pants were down below her buttocks, exposing her backside. He also noted that Mr. Smarch's pants were somewhat lowered, although it did not appear that his genitals were exposed. He observed Mr. Smarch, in his opinion, pulling up his pants as he arrived.

[6] Constable Hartwig "stood" Mr. Smarch up and arrested him for sexual assault, subsequently placing him in the police cruiser. The arrest took place approximately three and one-half minutes after Constable Hartwig left the Takhini area in response to receiving the call from the dispatch operator.

[7] Constable Hartwig noted that Mr. Smarch was significantly intoxicated, rating him a seven to seven and a half on a scale of one to ten. He stated that Mr. Smarch did not react to him very much, although he did respond appropriately to Constable Hartwig's questions and he identified himself without difficulty.

[8] Constable Hartwig noted that M.B. appeared to be intoxicated and stated that she was completely passed out and non-responsive, although at one point he was able to assist her in partially sitting up. He assessed her as being a 10 on a scale of one to 10 for intoxication. M.B. was subsequently transported from the scene to Whitehorse General Hospital. Constable Hartwig testified that M.B. could also have been under the influence of drugs.

[9] He also noted that the other individual, subsequently identified as a Darryl Charlie [phonetic], was passed out and unresponsive. He was dealt with by other police officers and taken to the arrest processing unit; although not, to my understanding, charged with sexual assault in relation to this incident.

[10] M.B. testified, and her testimony I found to be of little assistance. She had no recollection of the events that occurred on May 2nd, other than waking up in the hospital, stating that she was in the midst of a prolonged drinking binge at that time. M.B. stated that she had gone drinking with Mr. Smarch in the past, although she placed the last time she recalls doing so as being sometime earlier in Dawson City. She had no recollection of drinking with Mr. Smarch in the days immediately prior to May 2, 2013.

[11] Cynthia Dickson testified that she was walking with a friend on the path along the Yukon River waterfront on May 2nd in the late afternoon or evening when she observed three individuals near the Kanoe People factory and a nearby building. Two individuals who she believed to be a male and a female were lying on their sides, and the third individual was off to the side. The male who was with the female had his pants down to his knees and his backside and the tops of his legs were exposed. She stated that it looked like the female still had her clothes on. She stated that the male was moving and that as she observed them, the male turned and looked at her quickly before turning his face away. She stated that the female was not moving at all and she had doubts that what she perceived as sexual activity was consensual. Her first reaction was that the woman was being assaulted. She testified that she did not see any intercourse or thrusting action occurring or any exposed flesh other than the male's backside and legs.

[12] Ms. Dickson stated that it was light out at the time. She did not see the face of the female and she did not really see the face of the male as she was too far away, which she estimated to be approximately two lengths of the courtroom. She stated that what was occurring between the male and the female was not appropriate, stating that it was shocking to her to see the male with his pants down in daylight. She called 9-1-1 as a result. She said she did not hear anything being said by these individuals. She believed that she observed them for more than seconds, perhaps as long as a minute.

[13] Ms. Dickson remained on the line with the 9-1-1 operator at the operator's request, answering questions as she continued walking along the path, until she stopped at the nearby Cultural Centre, which was approximately a four-minute walk for

her at that time. She looked back as she was walking to see if the individuals got up, but did not observe them to do so. She said she was not able to see the three individuals while she was walking or from her location at the Cultural Centre. She stated that there were no other people on the path while she was walking and she did not recall anyone else coming by or did not think anyone did so.

[14] Ms. Dickson was still on the line when she observed the police arrive at the scene. She did not provide any information as to how long she was on the line with the 9-1-1 operator or how much time had passed between her calling in the complaint and the police arriving. She did not recall hearing any sirens as the police arrived.

[15] There was video evidence. Constable Hartwig had activated the onboard VICS system as he was in the Takhini area en route to investigate the complaint. He testified that while the time noted on the DVD taken from the VICS system and filed as an exhibit is inaccurate with respect to the time of day indicated, it is accurate as to the time elapsed. I note that from the time the VICS is activated in Takhini to the time the blue building where Mr. Smarch and M.B. are located becomes clearly visible, is approximately two minutes and 58 seconds, and Mr. Smarch is arrested approximately 30 seconds later and placed almost immediately in the police cruiser. I note from the DVD that the visibility at the time was good.

Positions of Counsel

[16] Crown counsel submits that there was clearly sexual contact between Mr. Smarch and M.B., given the evidence that Ms. Dickson saw Mr. Smarch's exposed backside and legs as he was pressed up against M.B., who was also noted by

Constable Hartwig to have her backside exposed. Counsel further submits that even on the evidence of Constable Hartwig, a sexual assault was occurring. Counsel submits that M.B. was clearly incapable of consenting and counsel concedes there is no evidence to support a finding that intercourse actually occurred.

[17] Defence counsel submits that there is insufficient evidence to support a finding that the individuals observed by Ms. Dickson were the same individuals observed by Constable Hartwig when he arrived on the scene. She further submits that there is insufficient evidence to support a finding that there was any sexual contact between Mr. Smarch and M.B. or intent to have sexual contact. While counsel concedes that M.B. was incapable of providing consent to sexual activity at the time Constable Hartwig arrived on the scene, she submits that there is no evidence to establish when she would have become incapable of providing her consent. She further submits that if I find that there was sexual contact between Mr. Smarch and M.B. while she was incapable of providing her consent, Mr. Smarch, nonetheless, had an honest but mistaken belief that M.B. was consenting, although this was not an argument strongly pursued.

Analysis

[18] Firstly, I find the evidence of Constable Hartwig and Ms. Dickson to be reliable and credible. I find that when Ms. Dickson first observed Mr. Smarch and M.B., Mr. Smarch's pants were down below his knees. I further find that when Constable Hartwig arrived at the scene, M.B.'s pants were down and her backside was exposed. Mr. Smarch's pants were down, although certainly not as low as Ms. Dickson had observed earlier.

[19] It is clear from the video that Mr. Smarch attempts to and, to some extent, does pull his pants up somewhat when Constable Hartwig is approaching. Mr. Smarch was pressed against M.B.'s back in a spooning position. I find that Mr. Smarch was having contact with M.B. and that this contact was sexual in nature. While there is certainly a sufficient basis to find this to be the case from Constable Hartwig's observations alone, I have also the evidence of Ms. Dickson. I find it inconceivable, having heard the evidence and observed the three individuals in the video, that these were any other than the three individuals Ms. Dickson had observed and which prompted her 9-1-1 call. It defies logic to think otherwise.

[20] I appreciate that there was no time estimate provided between the time Ms. Dickson first observed these individuals and made the 9-1-1 call, to the time Constable Hartwig arrived on the scene. This evidence, although likely available, was simply not proffered at trial. Certainly a matter of several minutes at a minimum passed by and perhaps longer. This does not, however, in my mind, impact upon my decision.

[21] When Ms. Dickson observed Mr. Smarch and M.B. she was certainly close enough to make several observations: Mr. Smarch's pants were down and he was pressed up against M.B.'s back. She thought that the contact appeared to be sexual in nature. Mr. Smarch was moving somewhat, whereas M.B. wasn't. Mr. Smarch apparently looked up and saw Ms. Dickson. While Ms. Dickson thought that M.B. was fully clothed, it is clear that she was not when Constable Hartwig arrived.

[22] I have no doubt, putting the observations of Ms. Dickson and Constable Hartwig together and reviewing the video, in concluding that Mr. Smarch was intentionally

having contact of a sexual nature with M.B. I further find, given the condition of M.B. and the totality of the evidence, that there is no air of reality to counsel's submission that Mr. Smarch had an honest but mistaken belief that M.B. was consenting to his having sexual contact with her. M.B. was intoxicated to the point of being unresponsive, whether by alcohol alone or in combination with drugs; and there is no basis to support a finding that she had at any time conveyed her consent to this sexual activity to Mr. Smarch and he was operating under such a belief, and no basis to even raise a reasonable doubt in this regard.

[23] While I conclude that Mr. Smarch was having sexual contact with M.B. without her consent, I cannot however find that there was any intercourse or that penetration occurred. I find the actions of Mr. Smarch to have been those of a highly intoxicated individual who likely somewhat spontaneously and opportunistically engaged in sexual contact with the unresponsive M.B. Therefore I find Mr. Smarch guilty as charged.

COZENS C.J.T.C.