Citation: *R. v. Smith*, 2006 YKTC 62

Date: 20060609
Docket: 05-00251
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Barnett

R e g i n a

v.

Tyler John Smith

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486(3) of the *Criminal Code*.

Appearances:
Noel Sinclair — Counsel for Crown
Malcolm Campbell — Counsel for Defence

REASONS FOR JUDGMENT

[1] Tyler John Smith is charged with having sexually assaulted S.B. at Whitehorse on June 18, 2005. It is alleged that he had intercourse with her although she was unwilling.

[2] The trial of this charge was in Whitehorse on April 28, 2006. I requested that counsel provide written submissions and reserved my decision until today.

[3] The essential issue in this case is the one fundamental to all cases in Canada when a person is charged with criminal wrongdoing: has the charge been proved beyond all reasonable doubt?

[4] S.B. celebrated her 23rd birthday on June 17. She did a great deal of drinking. Late that night she went to the home of some acquaintances where a drinking party was happening. She became very intoxicated: she says she was "blanking in and out."

[5] S.B. met up with Tyler Smith at the party. She recalls that he wanted to talk with her and that they went outside for that purpose. She says that when they were outside Tyler Smith grabbed her arm and took her behind a neighbouring building where he insisted on having sexual relations with her although she said "I don't want to do this". She recalls that she was on her back with her legs above her shoulders during the incident.

[6] Tyler Smith tells a significantly different story. He says that he was drunk that night but "still knew what I was doing." He says that he and S.B. started "fooling around" at the party and that they went outside for a sexual encounter at her suggestion. But, he says, when he suggested that the encounter should progress to intercourse, she was unwilling and so they returned to the party. He says that intercourse did not happen and that the sexual play which did happen was entirely consensual.

[7] Duran Henry, a cousin of S.B., testified and said that he witnessed some material events. He was walking around the neighbourhood about 2:00 a.m. He was entirely sober. And it was, of course, seasonal daylight at 2:00 a.m. in Whitehorse on June 18.

[8] Duran Henry says he met up with S.B. and Tyler Smith and talked with them - briefly and unremarkably - near the party house and the neighbouring building. Then, he says, he continued on his way which brought him back to the same place a short time later. He says that he then saw that S.B. and Tyler Smith were having sexual relations and that they were doing this "doggie style" with S.B. on "all fours". He did not sense a problem and so continued on.

[9] S.B. says that Tyler Smith departed after completing the sex act and that he told her “don’t tell nobody”. Tyler Smith says that they both returned to the party for a time. Then S.B. left with some other persons. She says they wished to acquire more liquor. S.B. met up with Mr. Henry again and then told him that Tyler Smith had raped her. Some discussion followed about his observations.

[10] A few days after these events S.B.’s boyfriend asked her about them, he having heard about them from some other person. When S.B. told him that she had been raped by Tyler Smith he was, she says, insistent that she make a report to the RCMP although, she says, she was not really ready to do that.

[11] S.B. gave a statement to Cst. Smith on June 21. Her boyfriend accompanied her during the interview that day. Her statement was consistent with her testimony.

[12] The story told by Tyler Smith is something less than entirely convincing. I believe that Duran Henry saw what he said he saw: that Tyler Smith did have sexual intercourse with S.B. on June 18, 2005.

[13] The fact that I cannot believe significant elements of Tyler Smith’s testimony does not mean that he must be convicted.

[14] Trial judges were emphatically reminded in 1991 by the Supreme Court of Canada that “(t)he requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law.” One aspect of this principle is that even in a case where the court is not left in doubt by the evidence of the accused, it must still be asked if the accepted evidence is sufficient to establish guilt. See *R v W. (D)* (1991) 63 C.C.C. (3d) 397 at p 409 b to f.

[15] In the present case the evidence falls short: when I consider the accused's evidence in the context of the evidence as a whole I cannot say that I am convinced of his guilt. I therefore must and do acquit. To do otherwise in this case would be - to borrow and adopt the phrasing of judges wiser than myself - dangerous.

[16] I want however to say a little more. I do not wish my decision to be misunderstood. I have not said that I do not believe the essential story told by S.B. That was not the issue in this case. I have only said that the evidence heard during the trial does not prove criminal misconduct by Tyler Smith when the test is "proof beyond all reasonable doubt."

[17] I also wish to extend my appreciation to counsel for providing me with written submissions, all of which I found very helpful.

Barnett T.C.J.