

Citation: *R. v. J.G.B.*, 2020 YKTC 14

Date: 20200417
Docket: 18-11036
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

J.G.B.

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

Appearances:

Leo Lane
Malcolm E. J. Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] J.G.B. has entered a not guilty plea in relation to a single count of sexual assault on R.S., alleged to have occurred in February 2017. The charge was laid in March 2019. The trial proceeded on February 25, 2020 in Dawson City. The case turns on an assessment of the credibility of the four witnesses called to testify at trial: Cst. Boyko, L.M., and the complainant, R.S., on behalf of the Crown, and J.G.B. in his own defence.

[2] As with any case in which credibility is the central issue, 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.* credibility test is three-fold: if I believe the accused, I must acquit; even if I do not

believe the accused, I must ask myself whether his evidence, nonetheless, raises a reasonable doubt, and, if so, I must acquit; and even if I do not believe the accused and find that his evidence does not raise a reasonable doubt, I must ask myself whether the evidence I do accept is sufficient to prove the offence beyond a reasonable doubt. In applying the test, each witness's testimony is considered not in isolation, but in light of the evidence as a whole. The importance of the *W.D.* test is to ensure that the focus remains, not on a credibility contest to determine which side's evidence is more persuasive, but on the central question of whether, on all of the evidence, the Crown has met its burden to prove the offence beyond a reasonable doubt.

[3] The concept of credibility imports not just the question of believability, but of reliability as well. Given the frailties of human memory, credibility cases are amongst the most difficult cases before the courts, particularly where memory is compromised by the passage of time and the consumption of mind-altering substances to the extent that questionable reliability makes it unsafe to convict. This is just such a case.

[4] Having considered the evidence in its entirety, I conclude that while I do not believe the accused, nor does his evidence raise a reasonable doubt, I am, nonetheless, of the view that the remaining evidence before me is not sufficiently reliable for me to conclude that the offence has been proven beyond a reasonable doubt. In so concluding, I am not finding that the offence did not happen; rather I conclude that concerns with respect to the reliability of the evidence before me leaves me in a position where it would be unsafe to convict. In layman's terms, I cannot conclude with any degree of certainty whether the offence did or did not happen. Accordingly, an acquittal must be entered.

[5] The reasons that follow set out the basis for the conclusion I have reached.

Overview of the Allegations

[6] In brief, R.S. says that in February of 2017, she, the accused, and a few others were at L.M.'s home. All were consuming alcohol and snorting the drug gabapentin, a drug prescribed to J.G.B. for pain management. R.S. went to the spare room to pass out. She says the next thing she remembers is waking to find her pants down and someone on top of her having sex with her. She pushed the person off her, got up, pulled her pants up, and went into the bathroom. Upon coming out, she says she saw J.G.B. in the spare room, and that is when she realized who had assaulted her. She left the residence, and noted J.G.B.'s jacket and shoes on her way out, which she says confirmed for her the identity of her assailant.

Evidence of the Accused

[7] J.G.B. denies the assault. His version is that he went to L.M.'s home with C.B. around 5:00 p.m. on the night in question. He listed a number of individuals who were there, and said they were all drinking, snorting coke, and smoking weed. He says he was drinking vodka. His evidence was somewhat contradictory on the issue of his gabapentin prescription. At first, he said both he and C.B. were snorting "gabbies" from the prescription he had just picked up at the hospital, but then changed his story to only C.B. was snorting them. J.G.B. stated he was popping them as he found that snorting them did not result in the desired high.

[8] J.G.B. says he confronted R.S. about a mask, a painting, and \$1,000 of his that he says she stole from him when he was living with her in Whitehorse in the early 2000s. He says R.S. got mad, but he did not pay attention to what she was saying. He says that he has asked her for the artwork and money on a number of occasions over the years, including at least once after this charge was laid, and she would get mad and ignore him.

[9] J.G.B. says he drank too much and passed out either on the couch or a foamy on the floor, while the party was still going on. He was awakened by the sound of the front door closing the next morning. He got up and went to the bathroom where he dry heaved. He watched some television, but as he continued to feel sick, he left to walk around town until he got enough money to buy a mickey.

[10] He denies sexually assaulting R.S. and insists that she is like a sister to him and the idea of having sex with her would, in his words, “be gross”.

[11] As noted, I do not believe J.G.B.’s version of events, nor does his evidence raise a reasonable doubt for me. My reasons for this conclusion are two-fold: firstly, J.G.B.’s evidence contradicted the statement he made to the police upon his arrest, and secondly, his version presented as contrived and tailored to fit the remaining evidence before me at trial.

[12] In his statement to the police, J.G.B. essentially told them that, contrary to his evidence at trial, he had never stayed the night at L.M.’s home. He told the police that he usually left with friends, and when asked what he meant by usually, he changed his answer to “always”. When this major discrepancy was put to J.G.B., he explained that

there is a difference, in his mind, between staying at someone's house and passing out there. He says you stay at someone's house when you are invited to and you do other things like watch movies. When pressed on the contradiction, he said he didn't realize that it would be so important.

[13] J.G.B. provided none of the details he gave in his evidence to the police in his statement. When asked, on cross-examination, whether he recalled the details he provided when he gave his statement to the police, or whether he remembered them later, he simply responded again, that he did not realize it would be so important. When asked if he chose not to tell the police, he replied that he passed out or he would have left with his friends. Not only were his answers non-responsive when pressed about the contradiction between his statement and his evidence, but his repeated explanation that he did not believe it would be so important makes little sense to me. It certainly does not persuade me that there is a reasonable explanation for the differences between his statement and his evidence at trial.

[14] My second major concern with J.G.B.'s evidence is that it felt contrived. When I consider that the Crown's evidence showed a marked lack of certainty with respect to the timing of the alleged offence – whether it was in January or February, whether it was in 2017 or 2018 – I find it absolutely incredible that J.G.B. would be able to recount the events of the evening in such detail. Despite telling the police simply that he had never stayed the night at L.M.'s home, he now remembers the specific night R.S. is referring to including the time he went to L.M.'s home, who was present, who was consuming what, his discussion with R.S. about the artwork and money, what woke him up the next

morning, how he felt physically, and so on. He even now remembers that he just picked up his prescription at the hospital.

[15] J.G.B.'s evidence had a surprising amount of detail about a night some time ago which, on his own evidence, would not have been at all unusual. J.G.B. may well have been describing a fairly typical night and morning after for him, but I am satisfied that he has no actual recollection of what did or did not happen on the night referred to by R.S. Rather, it would seem he has concocted a version of events to meet the evidence called at trial.

[16] For these reasons, I do not believe J.G.B.'s version of events, nor does his evidence raise a reasonable doubt. That being said, however, the fact that I do not believe J.G.B. does not mean that the case against him has therefore been proven beyond a reasonable doubt. This requires an examination of the credibility and reliability of the remaining evidence before me, primarily that of R.S.

Evidence of R.S.

[17] With respect to R.S.'s version, as summarized above, I have similar concerns as with J.G.B.'s version, in terms of inconsistencies and elements that feel contrived. In terms of R.S.'s evidence, my concerns are not sufficient for me to conclude that the entirety of her evidence is concocted, but they are sufficient to raise a concern for me with respect to whether her evidence is sufficiently reliable to support a conviction.

[18] Before examining specific concerns with the reliability of R.S.'s evidence, I would note that a conviction does not require a flawless recollection of events. As noted,

memory is far from perfect; however, a conviction does require a recollection that is sufficiently reliable for the Court to conclude that the offence has been proven beyond a reasonable doubt.

[19] R.S. provided two prior statements to the police. In January 2019, she gave a statement to Cst. Boyko in her mother's home, but given her state of intoxication, he asked her to attend the RCMP detachment to provide a statement. This ultimately happened on March 10, 2019.

[20] The first of the inconsistencies between her evidence and the various statements is the question of when the alleged incident occurred. In January 2019, R.S. told Cst. Boyko that the offence happened about a year before, namely January 2018. In her statement in March, R.S. said it occurred in February 2017. In her evidence at trial, there were numerous instances where R.S.'s evidence regarding time was internally inconsistent. This occurred both with respect to her evidence on when the offence occurred and on when she had lived in various places or moved to others.

[21] In this particular case, I am satisfied that time is not an essential element of the offence. Accordingly, R.S.'s inability to provide clear and uncontradicted evidence with respect to timing is not, in and of itself, fatal to the Crown's case. It is, however, indicative of the fact that her recollection, particularly with respect to the passage of time, is extremely unreliable.

[22] Next, R.S. said in her March statement that she was only sure that she and the accused had been snorting the gabapentin. At trial, she says she was certain that everyone was. When this inconsistency was put to her, she said she cannot recall what

she said to the police. She did not really review her statement because she did not want to remember.

[23] A similar inconsistency relates to whether J.G.B. came out of the bedroom as she said in her testimony, or whether he did not, as she said in her statement.

[24] While these inconsistencies are relatively minor, there were also inconsistencies in relation to the offence itself. In her initial statement to the police in January 2019, she said that when she woke to find someone on top of her, she yelled, “What the fuck are you doing?”, punched him in the face and said, “Get off me”. In her statement, she said she pushed him off her, but nothing was said. At trial, she says that she cannot recall what was said or done. In direct, she said she might have pushed, punched, said something, but she was really upset. On cross-examination, she agreed that she did, in fact, say the words referred to in the January statement. When asked if she punched him in the face, she said words to the effect of “maybe, but it’s really foggy, I was very upset, I know I pushed him off”.

[25] R.S.’s state of intoxication during the January statement provides a partial explanation, at least for the differences between her January statement and her trial evidence, but what is concerning, is that at trial, her evidence varied to the point it appeared she was not really certain about how she had responded.

[26] R.S. also contradicted herself when questioned about J.G.B.’s artwork and money. While I tend to agree with her that being asked about artwork and money apparently lost at some time in the early 2000s would be a rather flimsy motive upon which to fabricate a rape allegation some 15 years later, her responses to questions

about the artwork and money were both evasive and contradictory. Several of her answers were non-responsive, and she said at one point that she had returned the items to J.G.B., and at another, that she has no idea what happened to them.

[27] R.S.'s evidence was also inconsistent with that of L.M. L.M. advised Crown the night before trial, when asked if she had ever seen R.S. and J.G.B. in her spare room together, that she recalled an instance where she had seen both R.S. and J.G.B. in her spare room, with him lying on the mattress, and R.S. sitting up on her cell phone. This scene differs significantly from that described by R.S. who was adamant that this was the only night that she and J.G.B. were ever in L.M.'s spare room together.

[28] L.M. did not suggest that what she had seen was the same night R.S. describes. The end result is that R.S.'s evidence is inconsistent with L.M.'s in relation either to what occurred on the night in question or with respect to whether she and J.G.B. had been in L.M.'s spare room together at any other time.

[29] Crown argues that I should discount L.M.'s evidence given her difficulties with recollection and her admitted lifestyle. I would, however, note that the admitted lifestyle and its impact on the reliability of recollection are applicable to all of the civilian witnesses called at trial. L.M. was very frank about her difficulties with recollection. She was very careful not to volunteer information she was not sure of, with "I don't remember" being her most frequent response to questions asked. In the circumstances, I do not have difficulty accepting what little she does remember.

[30] With respect to a concern about evidence from R.S., which felt contrived, I would note that I had serious concerns about the credibility of her evidence relating to the

photos and videos on her phone which she says allowed her to determine the date of the offence. Specifically, she says that she had taken photos and videos at L.M.'s home on the night in question and that they had been sorted into a folder on Snapchat dated February 2017, giving her a reference point for the offence date. She stated she deleted the pictures and videos as she wanted no reminders of what had happened. Her evidence on that point is not at all troubling. It makes perfect sense that someone who had been victimized would want to delete media that might remind them of the incident. What is troubling for me is the timing.

[31] While her evidence at trial varied about whether she deleted the material between the January and March statements or shortly after the March statement, she was clear that she did so at a time proximate to the investigation of the offence. As already noted, R.S. differed dramatically on evidence of offence date between the January and March statements and her evidence at trial. With the clear lack of certainty on dates, it makes no sense that she would not at least have told the police, during an active investigation, about potential evidence in her possession that might assist in determining the date of the offence. Rather R.S. does not disclose how she came to the timing of the offence in her mind until interviewed by the Crown the night before trial.

[32] On the whole, this evidence feels contrived to address the clear lack of certainty R.S. has with respect to the offence date. I do not believe her evidence in this regard, and while rejecting this particular evidence, does not preclude me from accepting other evidence from R.S., the fact that I am satisfied she concocted this evidence does raise concerns for me about her overall reliability.

[33] On the question of reliability, I would highlight one final point. When testifying about a conversation she had with L.M., R.S. said it was around the time she started telling people, and, as she was not really sure what had happened, she wanted to know what L.M. remembered. Comments such as this, and her references to her recollection being foggy, underscore my concerns about the overall reliability of R.S.'s evidence.

[34] The combined effect of the inconsistencies and the concocted evidence of the photographs is such that I have concerns about the reliability of R.S.'s evidence to the extent that I am not satisfied that it would be safe to convict.

RUDDY T.C.J.