Citation: *R. v. Asp*, 2020 YKTC 30

Date: 20201028
Docket: 18-00587
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge De Filippis

REGINA

v.

PHILLIP GARRETT ASP

Pursuant to s. 486.4 of the *Criminal Code,* there is a ban on publication of any information that could identify the complainant.

Appearances:
Paul Battin — Counsel for the Crown
Norah Mooney — Counsel for the Defence

REASONS FOR JUDGMENT

Introduction

[1] The defendant was charged with sexual assault, contrary to s. 271 of the *Criminal Code*, said to have occurred on December 2, 2018, at the City of Whitehorse. I heard from nine witnesses, including the defendant and complainant. Before trial, the Crown served notice seeking to tender evidence of the complainant's state of mind after the alleged assault, as reflected in her demeanour and (prior consistent) statements. The *voir dire* with respect to this motion was held as part of the trial proper (i.e. a blended hearing).

[2] At the time of these events, the defendant and complainant were in their late 30s. On the day in question, both were intoxicated. The complainant had no place to stay and accepted an invitation by the defendant to go to his home. Not long after arriving there, the complainant left the home and banged on the front door of a neighbour and was assisted by the two occupants.

[3] The complainant asserts that after arriving at the defendant's home, she was taken to a room with a mattress on the floor. She lay down and fell asleep, only to be awakened to find the defendant on top of her and feeling something penetrating her vagina. The defendant admits that while laying on a mattress with the complainant, he kissed her and placed his hands on her buttocks and thigh. He claims she consented to this but abruptly told him to stop. He did so and she left his home. There is little forensic evidence, and none by way of DNA, to assist me in deciding this case.

[4] I find the defendant not guilty.

[5] In explaining this verdict, I will begin at the end, with an account of the complainant's departure from the defendant's home and the events that followed, leading to the arrest of the defendant. This evidence is not controversial. I will next describe how the parties met and found themselves at the defendant's home. What may have occurred there, as recounted by the complainant and defendant, will be dealt with in more detail.

Non-Controversial Evidence

[6] On Sunday, December 2, 2018, Melodie Brock was teaching her roommate, Bruce Campbell, how to play the piano. They live in a house, near that of the defendant, in the McIntyre subdivision. At about 3:00 p.m., they heard someone pounding on their front door. It was the complainant. Ms. Brock described her as "very stressed…hyper-hysterical…balling her eyes out". Over the course of one hour, Ms. Brock managed to calm the complainant somewhat and was told by her that she had been in the basement of a nearby home and her pants had been lowered by a "big guy". She explained that she had come to this house with the big guy, by taxi, from the Salvation Army Shelter in the city. At the complainant's request, Mr. Campbell and Ms. Brock drove her back to the shelter.

[7] Brian Bunning works at the shelter, now known as the Whitehorse Emergency Shelter, and was on duty on December 2, 2018. He said that day, for reasons he can no longer recall, she had been prohibited from staying at the shelter. He told her in the afternoon that she would have to make other plans. The defendant was present for this conversation and he offered her a place at his home. Mr. Bunning saw the two of them leave in a taxi for the McIntyre subdivision.

[8] A few hours later, Mr. Bunning saw the complainant return to the shelter in the company of Mr. Bruce Campbell. He described her as "emotionally overwhelmed and distraught". She said that "he had his way with me and after he left, I left through the basement window and went to a neighbour".

[9] Mr. Bunning confirmed that the complainant had been barred from the shelter on other occasions. He said this was due to the fact that the complainant and her girlfriend [T.S.] often quarrelled and "were quite a handful for the staff…because of their behaviour". Mr. Bunning knows the complainant is an alcoholic and drug addict but cannot say if she was intoxicated on the day in question. He added that he has seen her "agitated before, but not like this".

[10] Rose Ann Renaud has stayed at the shelter with the complainant and saw her there in the late afternoon of December 2, 2018. She was in the bathroom and crying. The complainant told her she had been "raped". Ms. Renaud has seen the complainant in an emotional state on prior occasions "when she had problems with her girlfriend… but not as bad as this". Ms. Renaud accompanied the complainant to the hospital and returned with her to the shelter after tests had been completed. She added that the complainant was not intoxicated at this time.

[11] Alesi Kozak was working at Salvation Army Shelter on the day in question. She saw the defendant and complainant leave the shelter and get into a taxi. Ms. Kozak added that the complainant was usually emotional when intoxicated and appeared to be drunk as she left in the taxi. She was present when the complainant returned a few hours later with a man and woman. She described her as "distraught, crying, and hard to understand what she was trying to say". The complainant said she had been sexually assaulted while on a mattress during which her pants had been pulled down and a tampon removed.

[12] Cst. Lightfoot is assigned to the Kwanlin Dün First Nation that includes the McIntyre subdivision. On information received, he went to the Big Bear Donair in the city in the late afternoon. This is an off-sales liquor outlet, across from the Salvation Army Shelter. He found the defendant there and arrested him for the present charge. The defendant was intoxicated and agitated. The officer has had many dealings with the defendant and added that he is "polite when sober, but aggressive, violent and rude when drunk".

[13] Cst. Heidman is the lead investigator in this case. He saw the complainant at the hospital. He found her to be "very distraught". He has dealt with her before and has never seen her this emotional. He seized clothing belonging to the complainant at the hospital, including pajamas with a tear at the waist.

[14] The next day, on December 3, 2018, he executed a search warrant at the Asp residence. He was looking, in particular, for a shoe and tampon because the complainant had reported leaving the former on her departure and that the defendant had removed the latter from her vagina during the assault. He found neither item in the bedroom in question. However, he found a discarded tampon outside at the garbage. A DNA analysis did not confirm the tampon came from the complainant. Indeed, according to the officer, there is no relevant DNA evidence with respect to the defendant or complainant in this case.

The Complainant's Version of Events

[15] The complainant is a member of a First Nation in Manitoba. She came to Whitehorse in 2014 for employment and to see her daughter. The latter lives with her father as the complainant is an addict and "voluntarily handed her over to him".

[16] She had been living at the Salvation Army Shelter for two months before this incident – except for "quite a few nights" when she was in "the drunk tank" as the shelter had a zero tolerance policy with respect to alcohol.

[17] On the day in question, the complainant had breakfast and lunch at the shelter. She was drinking alcohol between these meals, on the street, just outside the shelter. This began with a group of people, including her partner [T.S.], sharing a bottle of vodka. The complainant had "several shots". During this time, the defendant arrived, carrying a "home-made Stanley Cup" – a cardboard replica wrapped in tin foil. This "got everyone's attention" and he joined the group in drinking from the vodka bottle. The complainant had not met the defendant before.

[18] One member of the vodka drinking group was "too intoxicated" and this attracted the attention of the police. As a cruiser arrived, the crowd dispersed and the complainant lost sight of her partner. She was told by the defendant that her partner had gone to the McIntyre subdivision. He offered to take her there. The complainant testified, "I gladly went as I wanted to be with [T.S]".

[19] The complainant joined the defendant in a taxi. She does not recall the trip from the city to the McIntyre subdivision. She said, "I blacked out". What she does

remember is approaching the door of a house, going downstairs, and sitting down on a mattress that lay on the floor. She said, “I slumped over and passed out…I was too intoxicated”.

[20] According to the complainant, the defendant was in the room when she first sat on the mattress. She wore a pink shirt with a zipper hoodie along with jeans over a pajama bottom. She was menstruating at the time and had inserted a tampon.

[21] What happened next is described by the complainant as follows:

> I woke up on my stomach, Phillip’s body weight was on me, my pants were down, and Phillip was asking me if I was on my period…My jeans were down, but the pajamas were not down all the way – they were below my waist but not pass my bottom, just below my bottom…I did not have underwear.
>
> I felt his hand in my pants, I panicked, right away I figured what was going on, I tried to get up, I heard a rip sound in pajamas and I tried to find my coat and get out of there, everything happened so fast.
>
> I felt penetration in my vagina but I wasn’t sure, I can’t say with what, I assume it was his hand because his hand was down my pants.

[22] The complainant testified these events lasted a “couple of minutes” and that she had not consented to them. She said, “I kept asking where my wife was, [T.S.], I was panicked, scared, trying to get out of there…Once I got my pants up, I found the stairs and ran out of the house because I was scared. I went to the neighbours across the street, there was no answer, I went next door and they offered to drive me back to the shelter….”

[23] On arrival at the shelter, she told Mr. Bunning what had happened. While in the washroom, she realized her tampon was gone. She then went to the hospital with Ms. Renaud where “they did a rape kit and took my clothing”.

[24] The complainant was initially reluctant to call the police about this matter but soon changed her mind. When asked about this she said, “I was on a no contact order with [T.S.] at the time but [otherwise] my relationship with the police was good”. The complainant did not suffer physical injuries. However, she has seen the defendant “around town” several times since his arrest and noted that “it makes me feel sad and angry – I just walk away”.

[25] Under cross-examination, the complainant provided these additional details: At the time of these events, she was struggling with an alcohol addiction and was on the methadone program. She does not recall if she spent the previous night in the drunk tank but did so on 17 occasions in November 2018. She and others in the group consumed two 26-ounce bottles of vodka outside the shelter between breakfast and lunch.

[26] The complainant agreed that her intoxication was such that she cannot recall many details of the day. She explained that when she is “blacked out” she is “walking and talking…I am awake, but have no memory”. She does not recall offering to perform oral sex on the defendant in conversation while in the taxi. She denied telling the defendant he “must have a big dick” but conceded she may have “blacked this out”. The complainant testified she did not kiss the defendant after inviting him to lay beside her on the mattress, “because I was passed out”. When counsel responded to this by

asking, “or blacked out”, the complainant said, “I may have been”. When counsel later returned to this issue, the complainant replied, “I wouldn’t be kissing him, I’m gay”.

[27] The complainant rejected the suggestion she tried to pull the defendant’s pants down while they kissed. She cannot say if he then went upstairs to find a condom. However, she does remember hearing her pajamas rip, after which she “got up and walked out of the house”.

[28] The complainant has a criminal record that includes convictions for failure to comply with court orders and possession of a controlled substance. There is a warrant for her arrest in Ontario for failure to appear on a charge of trafficking in a controlled substance. While in Ontario, she was in a treatment facility but left without permission. She awaits two trials in Whitehorse on charges of assaulting her partner [T.S.] and, at the time of these events, was bound by a court order not to have any contact with her.

The Defendant’s Version of Events

[29] Phillip Asp is a member of the Kwanlin Dün First Nation and lives in the McIntyre subdivision with his wife and four children. He awoke on the morning of December 2, 2018, with a hangover. He went to a bar in the city called “The 98” and “bummed some money for beers”, after which he walked to the Salvation Army Shelter and joined the group of people the complainant was with. The defendant said they were “sharing shots” from “a couple of bottles” until the police arrived and then everyone went their separate ways. He joined the complainant and another person, behind a nearby bakery, and continued drinking. They were “joking and laughing” together.

[30] This small group moved to the front of the shelter where the complainant met her partner. The defendant testified that, the complainant "started arguing with her girlfriend…and grabs [T.S.] by the shoulders and threw her toward a large flower pot and then [T.S.] took off". He said the complainant wanted to leave before the police arrived and asked if she could go with him. She did not want to go to the drunk tank. According to the defendant the complainant offered to "suck my dick". She said this several times and added that he "must have a big dick". The defendant testified that he said to himself, "Hmm, I might as well" and went inside the shelter to hustle some money for a taxi.

[31] The defendant said the complainant was "walking and talking fine" and was "being kinda flirty" with him in the cab. When they arrived at his home, he told the taxi driver that he did not have enough money to pay for the fare; "I gave him 10 bucks and received his card, but never paid him back [the balance]".

[32] The defendant entered his home with the complainant. He said, "my wife was standing there, mad, so I went downstairs with [the complainant], then went back upstairs to see my wife. She was mad because she doesn't like it when I drink". The defendant noted that his daughter was also angry; "She gave me the finger. My wife grabbed the kids and took off".

[33] The defendant went back downstairs. He testified that the complainant was on the mattress and said "come lay down beside me". He described her position as "laying kinda diagonal" and he did the same beside her. They started kissing. He placed his hands on her hips and felt the complainant's hand join his as they pulled her pants

down. He said, “I was helping her a little bit…her pants went down to mid-thigh. She had two pairs of pants on”. The defendant added that the complainant was also trying to lower his pants, but she failed because “I have a shoe lace rope belt and she couldn’t do it”. He untied the rope, unzipped his pants, and kissed her again. He testified that, “I was feeling her ass and she said spank me and I gave her a light tap and continued kissing her and rubbing her ass”.

[34] At this point the defendant said, “hold on”, and ran upstairs to find a condom. He did not have any and returned to the complainant. She was still laying there but had pulled up her pajama pants. He said they resumed kissing and she lowered her pajama pants again. According to the defendant, the complainant suddenly said, “stop”. She stood up, said, “what am I doing”, and walked upstairs. The defendant described her as “freaking out…confused…acting weird”. He testified, “I didn’t know what she was doing. I thought she was in the washroom. I waited five minutes and went to look for her inside and outside, but couldn’t find her”.

[35] The defendant borrowed twenty dollars from a friend who lived nearby and hitch hiked back to the city. He later saw the complainant at the shelter. He said she was “freaking out inside the front door and saying ‘he raped me’”. The defendant left and bought “a mickey” at the Big Bear Donair. He testified that he knew the police would be coming for him and he drank his mickey as he waited for them.

[36] The defendant testified that the complainant had not “passed out” while in his house. He said he was never on top of her and added that he weighs over 300 pounds.

He denied asking her if she was “on her period” and said he never inserted anything in her vagina or removed a tampon.

[37] Cross-examination revealed inconsistencies between the defendant’s trial testimony and a prior statement given to police. In particular, contrary to his testimony, he told the police that he did not bring the complainant home because she offered oral sex and only pursued this after his wife and children left the house. He explained that his initial intent had simply been to give her a place to stay. When pressed on this point, he testified that he had, in fact, been interested in obtaining oral sex and this is why he took her home. Bizarrely, he added that he knew his family would be home and explained that “my wife has cheated on me about 10 times”. The defendant initially told the police that the complainant did not ask him to spank her. Later in the same statement, as he testified at trial, he reported that he did so only after she asked him. He blamed these inconsistencies on the fact he was drunk in giving a statement to the police.

[38] The defendant conceded that he has difficulty controlling his emotions and behaviour when he drinks alcohol and that he and his wife have many arguments over such drinking. He has a criminal record with many prior convictions, including failure to comply with court orders.

Submissions

[39] Defence counsel accepts that the Crown is entitled to rely upon the evidence of the complainant’s demeanour and utterances after the alleged sexual assault. This

concession is a fair one; see, *R. v. Khan*, 2017 ONCA 114, and *R. v. Lennie*, 2019 YKSC 51. Counsel argues, however, that this evidence is not enough to get Crown counsel over the line he must cross to justify a finding of guilt because of the issue of the complainant having "blacked out".

[40] Crown counsel points to the inconsistencies between the defendant's prior statement and trial testimony as the basis for rejecting his testimony[1]. Counsel anchors his submissions on the evidence of the post event utterances and demeanour by the complainant. Several witnesses attest to the fact that she was "completely distraught" and "in this highly emotional state tells several people that a big guy had had his way with her". Most of these witnesses know the complainant and all said that her emotional state was unlike anything they had seen before. The Crown argues that this proves the complainant's evidence is truthful and accurate.

Analysis

[41] The Crown carries the burden of proving guilt beyond a reasonable doubt. This fundamental principle of law means that if the defendant has called evidence, there must be an acquittal: (i) where the testimony is believed, (ii) where the testimony is not believed, but leaves the trier of fact in reasonable doubt, (iii) where testimony is not believed and does not leave a reasonable doubt, but the remaining evidence fails to convince, beyond reasonable doubt, that the defendant is guilty: *R. v. W.D.,* [1991] 1 S.C.R. 742.

[1] Voluntariness of the statement is not disputed by the Defence.

[42] The issues of consent and capacity in sexual assault cases were recently canvassed by the British Columbia Court of Appeal in *R. v. Capewell*, 2020 BCCA 82. The Court noted that:

> 46 As is set out in s. 273.1(2)(b) of the *Code,* lack of capacity is one pathway by which the Crown can prove non-consent at the *actus reus* stage of the alleged offence. Recently, the Ontario Court of Appeal held that where both non-consent and incapacity are potentially in issue, judges should first consider whether the Crown has proven beyond a reasonable doubt that the complainant did not consent to the sexual contact, before assessing whether any apparent consent is vitiated by a lack of capacity…
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> ...
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> 48 In cases where the complainant's memory of the sexual activity is limited, the same circumstantial evidence may be relevant to both consent and capacity. The relevant authorities on this point were recently reviewed by the Nova Scotia Court of Appeal in *R. v. Al-Rawi,* 2018 NSCA 10 at paras. 69 - 70:
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> > [69] Difficulties present where the complainant, due to the ingestion of drugs or alcohol, truly has little or even no memory of the event. Absent direct evidence from a complainant that subjectively she did not consent, the judge or jury frequently must rely on circumstantial evidence to determine the absence of consent…
> >
> > [70] Where a complainant testifies that she has no memory of the sexual activity in question, the Crown routinely asks: "Would you have consented?" Despite the potential to discount the typically negative response as speculation, the answer is usually received into evidence, and depending on the reasons, may or may not have a bearing on the determination if consent or capacity to consent were absent…
>
> 49 Even where the evidence falls short of establishing incapacity beyond a reasonable doubt, evidence of intoxication may be relevant in assessing whether any apparent consent was voluntary. … Similarly, evidence that the complainant would not have consented may serve as circumstantial evidence of both non-consent and incapacity…
>
> …

> [52] Consent is relevant to both the *actus reus* and the *mens rea* of sexual assault. However, consent at the *actus reus* stage is assessed from the point of view of the complainant, whereas at the *mens rea* stage, the focus shifts to the accused and his steps to ascertain consent: *R. v. Barton*, 2019 SCC 33 at paras. 89-90.
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> …
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> [55] The *mens rea* of sexual assault is met if the accused had the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched": *Ewanchuk* at para. 42. …

[43] Since the analysis at the *actus reus* stage is about the complainant's state of mind, it is obvious that an unconscious person cannot consent. However, the point at which a person becomes incapable of consenting, short of unconsciousness, is not so clear. In *R. v. Jensen* (1996), 90 O.A.C. 183, the Court of Appeal for Ontario defined capacity to consent as a "minimum state". This, it has been said, means "an operating mind". Intoxication or drunkenness does not necessarily determine this issue; a person may or may not become incapacitated by intoxication (*R. v. J.R.*, [2006] 40 C.R. (6th) 97 (O.N.S.C.)).

[44] Matters become more complicated where the complainant is unable to recall the events in question. As Major J. explained in *R. v. Esau,* [1997] 2 S.C.R. 777, "[t]he parties' testimony is usually the most important evidence in sexual assault cases… [a]ny number of things may have happened during the period in which she had no memory". Moreover, as noted in *J.R.,* at para. 18, where the complainant's lack of memory is due to intoxication, this may be circumstantial eviden ce going to the issues of consent and capacity or simply "direct evidence of nothing except the fact that the witness cannot testify as to what happened during a particular period".

[45] The fact of the matter is that it can be difficult to determine consent and capacity beyond a reasonable doubt if the complainant has no memory of what happened. The Court in *J.R.,* at para. 43, continued with these words:

> …memory loss, without more, is not sufficient proof of incapacity. Similarly, while intoxication, self-induced or otherwise, might rob a complainant of capacity, this is only a possible, not a necessary, result. In this regard, I would adopt the comments of Justice Duncan in *R. v. Cedeno* (2005) 195 C.C.C. (3d) 468 at 475 (O.C.J.):
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> > Cases where the complainant is said to be incapable due to consumption of alcohol or drugs are less clear-cut. Mere drunkenness is not the equivalent of incapacity [citations omitted]. Nor is alcohol-induced imprudent decision making, memory loss, loss of inhibition or self control [citations omitted]. A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at times. Expert evidence may assist and even be necessary, in some cases [citations omitted], though it is not required as a matter of law [citations omitted].

[46] The defendant and complainant have criminal records and were intoxicated at the time of the events in question. As such, I must approach their evidence with caution. However, both were candid about the impact that substance abuse has had on their lives. I am confident the complainant was truthful in trial testimony. It is the reliability of it that troubles me. While I do not have the same confidence in the testimony of the defendant, I cannot, as the Crown urges, reject his testimony because it conflicts with his prior statement to the police. Those inconsistencies are adequately explained by the fact that he remained drunk after the event and while giving his statement.

[47] The complainant has previously experienced intoxication to the extent that she would “black out”. She described this as a state of affairs in which she could talk and

walk, but have no memory afterward of what she had said and done. Indeed, she testified that on the day in question, she had blacked out during the taxi ride from the shelter to the defendant's home. She became aware of arriving there and laying on a mattress in a bedroom. The next thing she remembers is awaking with the defendant on top of her and feeling something – she thinks it was the defendant's hand or finger - in her vagina. Although insisting she did not consent to sexual activity because she had passed out, the complainant conceded she may have blacked out.

[48] It is reasonable to conclude that the complainant fled the defendant's house believing she had been sexually assaulted. Her demeanour and utterances attest to the sincerity of this belief. Those who know her testified they had never seen her in this emotional state. In other circumstances, this compelling evidence could establish the *actus reus* of the offence.

[49] What troubles me is that the complainant may have blacked out again once she lay on the mattress. If so, she could have spoken and acted, as described by the defendant, with no memory of it, until she came out of the blackout state, startled and confused, about what was happening. On the evidence before me this is not speculative. This is a reasonable possibility grounded in the complainant's own testimony. Accordingly, I cannot conclude beyond a reasonable doubt that the complainant did not consent to the sexual activity. In this regard, I confirm that the defendant is a very large man and it would take considerable effort to push him away if he was on top of the complainant, as she testified. I also note that the parties agree that he did not try to prevent her from leaving once she stood up. Moreover, it is clear,

contrary to what the complainant told Mr. Bunning, that she walked out of the house, and did not have to escape through a window.

[50] I am mindful of other circumstantial evidence of non-consent, but it does not alter my conclusion. First, is the tear in the complainant's pajamas. Both parties acknowledge this happened during the encounter. All the complainant can say is that it occurred as she struggled to get up, but this does little to shed light on the issue of consent. Second, is the tampon found outside the home at the garbage. This supports the complainant's testimony that she was menstruating at the time and it was removed by the defendant. It also conflicts with the defendant's testimony on point. However, it cannot be said, with enough certainty, that this tampon came from the complainant. Lastly, is the testimony by the complainant that she would not have consented because she is gay. I accept the Crown's submission that "the fact she is gay and has had sex with men in the past is irrelevant to this case".

[51] I must also conclude that the Crown has failed to prove beyond a reasonable doubt that the complainant was passed out or otherwise lacked the capacity to consent. A blackout may be circumstantial evidence, along with other evidence, permitting a finding of incapacity. However, in this case, for the reasons I have stated, it is only direct evidence that the complainant cannot recall what happened at the time in question.

Result

[52] The *actus reus* of this offence has not been proven beyond a reasonable doubt because of the complainant's experience of blacking out and the reasonable possibility

she had done so when the sexual assault is said to have happened. Accordingly, in assessing her state of mind, I cannot find that she did not consent or that she lacked the capacity to do so. As such, the charge must be dismissed.

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DE FILIPPIS T.C.J.