

Citation: *R. v. Charlie*, 2021 YKTC 14

Date: 20210318
Docket: 18-00781
Registry: Whitehorse
Heard: Carmacks

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

DAVID TIMOTHY CHARLIE

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

Appearances:
Kevin Gillespie
Amy Steele

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] David Timothy Charlie has pleaded not guilty to a charge of committing a sexual assault on C.J., on April 15, 2018 in Carmacks, Yukon, contrary to s. 271 of the *Criminal Code*. This matter has a somewhat convoluted procedural history. Initially, Mr. Charlie was facing an additional charge of anal intercourse contrary to s. 159(1), arising from the same set of circumstances. While the alleged offences date back to the spring of 2018, charges were not laid until February 21, 2019. Crown elected to proceed by indictment. Mr. Charlie elected to proceed to trial before a Supreme Court Judge and Jury on September 6, 2019. At the preliminary inquiry, Mr. Charlie was committed to

stand trial on the s. 271 charge, but discharged on the s. 159(1) charge. Mr. Charlie subsequently re-elected, with the consent of the Crown, to proceed to trial in the Territorial Court of Yukon on the remaining charge.

[2] In brief, the evidence indicates that a number of individuals were socializing at Mr. Charlie's home the night before the offence. All were consuming alcohol and/or drugs. Three individuals, including C.J., slept at Mr. Charlie's residence. C.J. says that she was awoken the next afternoon when Mr. Charlie penetrated her anally. Mr. Charlie says that there was some consensual kissing between him and C.J. at the end of the evening of socializing, but denies any other contact between them of a sexual nature.

[3] As a result, a determination of whether the Crown has proven the remaining charge in this case turns entirely on an assessment of the credibility of the three civilian witnesses: B.T.M. and the complainant, C.J., called on behalf of the Crown; and Mr. Charlie, who testified in his own defence.

[4] An assessment of witness credibility occurs within a well-established legal framework. Firstly, I am bound by the decision of the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which states that 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. Even if the accused's evidence is not believed and does not raise a reasonable doubt, I must ask myself whether, based on the evidence I do accept, I am satisfied beyond a reasonable doubt of the guilt of the accused.

[5] The B.C. Court of Appeal, in *R. v. Ay* (1994), 59 B.C.A.C. 161, added an additional refinement to the *W.D.* test, noting that if I do not know whether I believe the evidence of the accused or the complainant or if I am unable to reject the evidence of the accused, I must acquit.

[6] Lastly, several cases, including *R. v. J.J.R.D.* (2006), 218 O.A.C. 37, at para. 53 (leave denied 2007 S.C.C.A. 69), have concluded that an accused's evidence can be rejected "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence".

[7] It is crucial, when assessing credibility, particularly where the credibility of the accused's evidence is assessed in relation to the credibility of the complainant's evidence as in *J.J.R.D.*, that the court not approach the assessment as a question of preferring one version over the other; in other words, by deciding which version is more believable. The focus must remain, at all times, on the question of whether or not the Crown has met its burden of proving the offence beyond a reasonable doubt.

[8] Often in a credibility case, the court has only the opposing versions of the complainant and accused to consider, with little independent evidence to assist in assessing the credibility and reliability of the opposing versions. In this case, the evidence of B.T.M. offers some key facts relevant to the assessment of the credibility of the main parties.

[9] B.T.M. testified that after visiting a couple of other homes in the Carmacks area, a small group of people went to Mr. Charlie's home. The group included B.T.M., her brother J.T., J.T.'s best friend B.G., B.G.'s brother K.G., C.J., and Mr. Charlie.

Everyone had been consuming alcohol. She describes C.J. as being six on a scale of 10 in terms of her level of intoxication when they first met up, and likely more drunk when they arrived at Mr. Charlie's residence, though she was not paying much attention to what C.J. was consuming. Similarly, she paid little attention to Mr. Charlie's state of intoxication.

[10] B.T.M. had consumed a couple of beer herself, but was primarily smoking marijuana over the course of the evening. She consumed two shots of hard liquor, possibly whisky, after arriving at Mr. Charlie's home. She describes feeling unwell, getting "the spins", and vomiting both outside Mr. Charlie's home and in the bathroom five or more times. She attributed this to the fact she does not normally consume alcohol.

[11] Mr. Charlie's residence is a two-bedroom unit located at the back of the Interpretive Centre. A map of the interior, drawn by C.J., was filed as exhibit 1. For clarity, it is undisputed that the bedroom nearest to the bathroom was Mr. Charlie's bedroom. The bedroom nearest the living room area was the spare room. Each room had one bed.

[12] B.T.M. testified that J.T. passed out first going to sleep on the bed in the spare room. B.T.M. was going to sleep in the same room, but C.J. had also passed out on the bed in the spare room next to J.T. B.T.M. went into Mr. Charlie's bedroom to sleep. B.G. brought her some water, then she recalls hearing him yell goodbye and hearing the door close. She believes both B.G. and K.G. left at that point. She is unsure about

Mr. Charlie, but believes he went to sleep on the couch in the living room. B.T.M. went to sleep alone in the bed in Mr. Charlie's room.

[13] B.T.M. woke around noon the next day. She recalls the approximate time as her grandfather was coming by to pick her up and take her back to Whitehorse for school, and he is unable to drive after dark. She says J.T. was in the living room, but C.J. was still asleep on the bed in the spare room. She tried to wake C.J. by shaking her, but was unsuccessful. B.T.M. asked Mr. Charlie if it was okay for C.J. to stay there, as B.T.M. could not miss her ride. She says Mr. Charlie replied that he was going to the bar anyway, which she took to be assent. B.T.M. watched Mr. Charlie ride away on his bike in the direction of the bar. B.T.M. and her brother then departed with their grandfather. At that point, C.J. was the only one left in the residence.

[14] In assessing credibility, I note that there were no material inconsistencies in B.T.M.'s evidence. There were no major gaps in her recollection, beyond what one would reasonably expect given the consumption of substances and the passage of time. She was clear on what she remembered and what she did not. Nor were there any real inconsistencies in her recollection. Furthermore, while she had consumed both alcohol and marijuana, she was not overly intoxicated during the evening of socializing, and certainly was not intoxicated the following day.

[15] B.T.M. indicated that she has known both C.J. and Mr. Charlie for her entire life. She described C.J. as a friend and cousin, and Mr. Charlie as a friend or acquaintance. She clearly has a closer relationship with C.J., but nothing in the content or manner of B.T.M.'s testimony suggested that her evidence was biased or embellished in any way.

She testified that C.J. had told her what had happened to her after B.T.M. left, but that she does not really remember the specifics of what C.J. said. B.T.M. does not recall telling C.J. what she herself saw, and B.T.M. did not help C.J. remember what happened that night beyond correcting C.J.'s mistaken belief that I.G. was the other occupant in the bed in the spare room when C.J. went to sleep rather than J.T.

[16] Overall, I found B.T.M.'s evidence to be both credible and reliable, and have little difficulty accepting it.

[17] Mr. Charlie's version of events differs on several key points from B.T.M.'s. He agrees that J.T., B.T.M., and C.J. came to his home on the evening of April 14, 2018. However, he says that I.G. was also there, and does not believe that B.G. and K.G. were ever there.

[18] Mr. Charlie says the majority of people were drinking whisky, though he does not recall B.T.M. drinking anything. The other four in the group, including Mr. Charlie, consumed two 26-ounce bottles of whisky. He says he consumed about one quarter of the two bottles, or half of one bottle. Mr. Charlie maintains that he did not get drunk or black out. He admits that he is an alcoholic, and says that he has a high tolerance for alcohol. He says his memory is clear other than he cannot remember the specifics of conversations.

[19] Mr. Charlie says I.G. left the residence, and J.T. went to sleep on the bare mattress in the spare room. B.T.M. and C.J. were on the couch talking. Mr. Charlie says he began cooking bacon, then went to his bedroom and laid down. He says C.J. came into his room and laid down beside him. Mr. Charlie sat up and says they talked

for about five minutes, but cannot recall what they spoke about. According to him, he and C.J. then kissed each other on the lips for about one minute.

[20] Mr. Charlie then says the fire alarm went off. He went into the living room and pulled the alarm off the wall. He opened the door to air things out and took the frying pan outside. After airing out the house, Mr. Charlie returned to his bedroom and jumped on the bed. He says C.J. said, “what the fuck; what are you doing; get out of here”. Mr. Charlie left the room and went to sleep on the couch.

[21] Mr. Charlie says that he woke up with a hangover. J.T. and B.T.M. both got up. Mr. Charlie spoke to J.T. for a while, then J.T. and B.T.M. indicated they were leaving with their grandfather. Mr. Charlie says he insisted they take C.J. with them, as he was afraid that his girlfriend would return and find C.J. there, which would piss her off and lead to a fight.

[22] J.T. and B.T.M. left without C.J. Mr. Charlie says he laid back on the couch and watched TV, dozing off and on. C.J. woke him up, asking him if he had seen her phone. He told her to check the big couch and believes she found her phone in that area. According to Mr. Charlie, C.J. then gathered the rest of her belongings and left his residence. He denies any sexual contact with C.J. other than the brief kissing the night before.

[23] In assessing credibility, there are some issues with Mr. Charlie’s evidence. As with B.T.M.’s evidence, I am neither surprised nor troubled by gaps in Mr. Charlie’s recollection relating to peripheral things like unrelated conversations between the various parties. However, I am troubled by elements of his story that do not ring true

and by major contradictions between his evidence and the credible, independent, evidence of B.T.M. on key points.

[24] Examples of elements of his evidence that did not have a ring of truth include his story about cooking bacon in the middle of the night. He then, apparently, left it on the stove and went to lie down. This makes no rational sense, unless Mr. Charlie was significantly more intoxicated than he is willing to admit.

[25] Similarly, his account of C.J. as a willing participant in kissing only to then swear at him and kick him out of his room, after he returned from dealing with the fire alarm, makes little sense absent some explanation for the dramatic change in behaviour over such a short time frame.

[26] In so concluding, I am not suggesting that Mr. Charlie should somehow be able to say what was happening in C.J.'s mind. I am only saying that the narrative does not ring true absent some intervening event beyond the brief passage of time to have caused the complete about-face.

[27] These questionable elements of Mr. Charlie's evidence would certainly not be a sufficient basis, in and of themselves, to justify rejecting his evidence; however, without the primary concern with his evidence, the contradictions between his version and the evidence of B.T.M.

[28] While there are a number of external inconsistencies, some are not particularly concerning. For example, whether it was the G. brothers, as indicated by B.T.M., or

I.G., as indicated by Mr. Charlie, who were or was present the night before the incident, is a minor inconsistency, which is immaterial.

[29] Other inconsistencies, however, are significant and go to the heart of the credibility of Mr. Charlie's account. Firstly, Mr. Charlie's account of C.J. following him into his bedroom and engaging in consensual kissing could not have happened as described. According to B.T.M., C.J. went to sleep in the spare room where J.T. was sleeping and not Mr. Charlie's room as he suggests. B.T.M. was clear that she slept in Mr. Charlie's room. She does not describe either Mr. Charlie or C.J. ever entering the room. Furthermore, B.T.M. confirmed that C.J. was still in the spare room asleep the next afternoon when B.T.M., then completely sober, went to try to wake her up.

[30] Next, Mr. Charlie's description of the fire alarm going off, something that would be very memorable, was contradicted by B.T.M. who denied that there was a fire alarm that night.

[31] Mr. Charlie's account of the next day's events is also entirely contradicted by B.T.M. His evidence that he insisted that C.J. be taken with B.T.M. when she left, so as not to upset Mr. Charlie's girlfriend, is entirely contrary to B.T.M.'s evidence that she asked Mr. Charlie if C.J. could stay when she was unable to wake C.J. to which Mr. Charlie apparently agreed, saying he was going to the bar anyway. Furthermore, Mr. Charlie's assertion that he then remained on the couch dozing off and on is also contradicted by B.T.M.'s evidence that she observed Mr. Charlie riding off on his bicycle in the direction of the bar.

[32] These inconsistencies in the sequence of events, particularly who went to sleep where, are significant and cause me major concern with respect to the overall credibility of Mr. Charlie's testimony. Indeed, they are enough to persuade me that his evidence should be rejected. I find that I do not believe his evidence, nor does his evidence raise a reasonable doubt, in my view.

[33] This then leaves the question of whether the evidence I do accept is sufficient to satisfy me that the Crown has met its burden in proving the offence beyond a reasonable doubt. This depends largely on the evidence of C.J.

[34] C.J. describes partying and drinking for much of the weekend. She has difficulty recalling specifics regarding who she was with and where, but does recall being at Mr. Charlie's house with others. She estimates her level of intoxication as eight or nine out of 10 when she went to bed in the spare room. She says she was fully clothed, wearing a sweatshirt, leggings and socks. She believed the other individual in the bed in the spare room to be her uncle, I.G., until B.T.M. told her it was J.T.

[35] C.J. says the next thing she remembers is waking up to a sudden stinging pain, almost like a tearing, in her anus. It was bright in the spare room with the light shining through the window. She was on her stomach with the left side of her face against the mattress. She described her butt as being up in the air and her leggings and underwear pulled down to her knees. She has no recollection of how her clothing came to be pulled down. She looked back and saw Mr. Charlie standing behind her with his penis inserted in her anus. She told him to stop, to which he replied, "Are you serious?"

[36] Mr. Charlie did stop. C.J. pulled her pants up, went to get her phone and other belongings and left the residence within five minutes. She says she just wanted to go home. She describes feeling dirty and that she could not shower enough. She also describes experiencing some bleeding because of the incident.

[37] C.J. describes her state of intoxication when awakened as three on a scale of 10.

[38] In assessing credibility, there were no major internal inconsistencies in C.J.'s evidence; nor were there major inconsistencies between her evidence and that of B.T.M., beyond her mistaken belief in the identity of the other individual in the bed in the spare room. Indeed, defence fairly concedes that C.J. was a young and sympathetic witness who exhibited no indicators that she was being deliberately untruthful. Instead, defence argues that I ought not to convict Mr. Charlie because C.J.'s extreme intoxication and lack of recollection makes her evidence too unreliable to support a conviction.

[39] Defence counsel points to the following examples:

- C.J. could not remember who was in the vehicle taking them to Mr. Charlie's residence, other than the identity of the driver;
- She could not recall the time they arrived at Mr. Charlie's residence, other than it was dark out;
- She could not recall who was at Mr. Charlie's residence, what everyone was doing, or where everyone was;

- She could not recall if she drank any alcohol at Mr. Charlie's residence;
- She believed that she fell asleep next to I.G. in the spare room rather than J.T.;
- She could not recall where Mr. Charlie's hands were during the alleged sexual assault; and
- She could not recall if Mr. Charlie followed her when she left the bedroom to gather her belongings.

[40] There is little doubt that C.J. had gaps in her memory, as did both Mr. Charlie and B.T.M. It is even fair to say, that given C.J.'s extreme state of intoxication, the gaps in her memory relating to the events of the night before were more significant than were the gaps in the other witnesses' testimony. I would even go so far as to say that C.J.'s recollection of the events of the night before is entirely unreliable due to her level of intoxication. This is evidenced, in particular, by her belief that it was I.G. she fell asleep beside, contrary to B.T.M.'s evidence that it was J.T.; I.G. was not even at Mr. Charlie's residence.

[41] However, it must be remembered, that the alleged offence did not occur during the evening's events; it occurred the following afternoon. C.J.'s level of intoxication had dropped dramatically – from eight or nine out of 10 down to three out of 10. Her unreliable recollection of the evening's events has no bearing on her ability to recall the events of the next day. I am satisfied that her level of intoxication the next afternoon was not sufficient for me to conclude that her evidence regarding the alleged offence

was inherently unreliable. Indeed, in my view, she has a clear and vivid recollection of the events of the afternoon, more vivid than she would perhaps like to have.

[42] Only two of the examples advanced by defence counsel relate to the events of the following day: C.J.'s inability to remember where Mr. Charlie's hands were during the alleged assault; and whether Mr. Charlie followed her out of the bedroom. Neither of these undermine her overall credibility, in my view. Firstly, C.J. was awakened from a deep sleep, deep enough that B.T.M. could not wake her earlier, and C.J. did not feel her pants being pulled down. This would account for some of her confusion. In addition, she was clearly focussed, upon waking, on two things: the pain of the anal penetration; and getting home. It is not surprising that some of the more minor details were lost.

[43] In my view, C.J. was entirely credible. I have absolutely no difficulty accepting her evidence regarding what happened in the spare room on the afternoon of April 15, 2018. Furthermore, I am satisfied that her evidence is sufficient to satisfy me that the Crown has proven, beyond a reasonable doubt, that Mr. Charlie sexually assaulted C.J. Accordingly, a conviction will be entered.

RUDDY T.C.J.