

Citation: *R. v. Charlie*, 2021 YKTC 13

Date: 20210407
Docket: 19-00819
Registry: Whitehorse
Heard: Old Crow

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

CARL RUFUS CHARLIE

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

Appearances:
Paul Battin
Christiana Lavidas

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] Carl Charlie (“Mr. Charlie”) has been charged with having committed the offence of sexual assault contrary to s. 271 of the *Criminal Code*. The offence is alleged to have occurred on or about Saturday, December 14, 2019.

[2] The trial took place over two days and judgment was reserved to today’s date.

This is my judgment.

S.S.

[3] The complainant, S.S., was 17 years old at the time of the alleged sexual assault, and 18 when she testified. She is a member of the Vuntut G'wichin First Nation.

[4] She testified that on December 14, 2019, she was drinking at Peter Charlie's residence in Old Crow with several other people, including her on and off boyfriend, S.F. (also "S."), Peter Charlie ("Peter") is the brother of Mr. Charlie. Peter was present and drinking as were Mr. Charlie, Gordon Frost ("Gordon"), and Wilfred Josie ("Wilfred"). Peter is also S.F.'s father, as well as K.F.'s father. K.F. was a friend of S.S. at that time, although that is no longer the case.

[5] S.S. said that she and S.F. arrived at Peter's residence at approximately 6:00 p.m.

[6] S.S. said that she was intoxicated by alcohol that evening, but not to the point where she did not know what was happening.

[7] Later in the evening, she and S.F. went into one of the two bedrooms in the residence, which was the spare bedroom, and lay down on the bed to sleep. She was wearing stretch black Lululemon yoga pants/leggings, a tank-top and a zip-up sweater.

[8] Sometime later S.F. got up and left the bedroom to use the bathroom.

[9] She said that the lighting was dim in the bedroom, as light was coming in from the kitchen through the open bedroom door. Also, the walls did not go all the way to the roof as they were partition walls.

[10] S.S. subsequently woke up when she felt a hand under her pants and underwear and fingers penetrating her vagina. She said: "S., don't bother me while I'm sleeping. I don't like that". She said "S." because that is the person she fell asleep with.

[11] The person touching her said: "This is not S."

[12] S.S. said that when she heard this she was shocked and felt fear.

[13] She said that she turned her head and the individual who was touching her was sitting near her feet at the edge of the bed. His hand was no longer touching her at this time.

[14] In direct examination, when S.S. was asked who said: "This is not S." to her, S.S. replied that it was "Carl".

[15] S.S. agreed that Mr. Charlie never identified himself to her in the bedroom. She also agreed that she was not looking at Mr. Charlie when he spoke these words to her. S.S. testified that she turned her head towards the person who said: "This is not S.", and saw that it was Mr. Charlie. When she was asked whether she thought that it was Mr. Charlie, S.S. responded "Correct".

[16] S.S. testified that she noticed Mr. Charlie was sitting on the end of the bed when she "had gotten up to see who was there".

[17] She testified that on that evening, and in the bedroom, Mr. Charlie was wearing the same snowsuit that he had on in court at the time she was testifying, as well as a fur hat.

[18] When asked by counsel for Mr. Charlie whether she agreed that it may have been someone other than Mr. Charlie who touched her sexually, S.S. disagreed. She further disagreed with counsel when she was asked whether she would agree that “perhaps it wasn’t Mr. Charlie that had his hands in [her] pants”.

[19] S.S. said that she instantly got up after she heard the words “This isn’t S.” She was screaming S.’s name.

[20] S.S. stated that she thought it was maybe between 12:00 a.m. to 1:00 a.m. when this incident occurred. She agreed that she was not sure exactly word-for-word what was said, and that this was because she was intoxicated. She said, however, that she remembers clearly what had happened to her.

[21] Mr. Charlie left the room. S.S. also left and went to the other bedroom where S.F. was passed out and sleeping and yelled his name. S.F. did not wake up, however, but Gordon, who was also in the bedroom, did. S.S. told Gordon what had just happened. Gordon then left the bedroom and went into the kitchen area and spoke to Mr. Charlie.

[22] Peter was also in the bedroom, but he did not wake up.

[23] When S.S. came out of the spare bedroom, Wilfred was sitting at the kitchen table.

[24] Mr. Charlie left the residence through the front door shortly after Gordon spoke to him. Gordon left the residence approximately 15 minutes after Mr. Charlie. S.S. watched from the window as Mr. Charlie and then Gordon left the residence.

[25] S.S. said that she went back into the spare bedroom and sat up by herself for a while. It was the middle of the night and she did not want to walk back to where she was staying at the time. S.F. remained sleeping in the other bedroom.

[26] S.S. said that she then woke S.F. up, and he came back to the spare bedroom with her. S.S. said that she told S.F. what happened in the morning while they were in the spare bedroom. She said that S.F. was not supportive of her when S.S. told him who had touched her.

[27] S.S. said that Mr. Charlie and Gordon returned to the residence later that morning. Mr. Charlie brought some alcohol which he and others shared. She said that she had a few shots of this alcohol. S.S. said that she had these shots because she felt uncomfortable. When she was uncomfortable she would turn to alcohol to help her deal with the situation.

[28] S.S. said that Mr. Charlie was trying to talk to her. At some point Mr. Charlie's phone rang and he told S.S. that it was his wife and, "jokingly" asked her to answer the phone and tell his wife that he was okay. S.S. said that she did not answer the phone.

[29] S.S. stated that she left the residence at approximately noon, shortly after Mr. Charlie was attempting to speak with her in regard to the phone call. When she left, several other people were at the residence who had not been there the night before. These others had arrived at approximately 10:00 a.m.

[30] S.S. went to her friend K.F.'s house around noon, where she stayed for the night. S.F. went with her. She said that she was still intoxicated when she went to K.F.'s

house and that she felt very confused. She said that she did not know how to handle the situation and was still in shock. S.S. said that she had continued to drink alcohol after the incident occurred, including that morning, and into the evening at K.F.'s residence.

[31] S.S. disclosed, on the following Monday, what had happened to her to an individual, S. P., who had been her teacher. This is where S.S. had been staying. As a result of this discussion with S.P., S.S. then made a complaint to the RCMP, and provided a statement.

[32] S.S. said that she had known Mr. Charlie previously from being in the community enough that they said "Hi" to each other. When she was younger, approximately 15 years old, she had received some Facebook messages from Mr. Charlie on an older account she was unable to access. They had not ever dated. She did not give Mr. Charlie permission to touch her and she did not want him to.

[33] S.S. agreed that she did not tell the RCMP about Mr. Charlie's fingers penetrating her vagina. She said that this was because she was confused, ashamed, and very uncomfortable about disclosing this.

[34] S.S. said that she went to the nursing station on Tuesday, the day after she made the complaint to the RCMP.

[35] S.S. said that as a result of this incident she no longer has a relationship with S.F. and K.F. She attributes this to them both being related to Mr. Charlie.

Cst. Perro

[36] Cst. Perro testified that S.S.'s demeanour when she took the statement from her was sad. S.S. looked like she had been crying. S.S. made no eye contact with her, and was slumped and fidgeting in the chair.

[37] Cst. Perro stated that she had attempted to obtain statements from the other witnesses, but she either was unable to contact them, they said that they had no recall of events, or that they were not otherwise cooperative.

Carl Charlie

[38] Mr. Charlie testified that he started drinking after work on Friday night, December 13, 2019. He was at home watching hockey while his family was in Whitehorse. He continued drinking all day Saturday.

[39] He went over to Peter's residence Saturday in the daytime, and he was there Saturday night. However, he also testified that the first time he went to his brother's house was Saturday night.

[40] Mr. Charlie said that he probably had a sleep sometime during the day, woke up and continued drinking, fell asleep at Peter's house and woke up alone at approximately 8:00 p.m. Nobody was in the house. He said that he went back to his residence at that time. He then left his residence at approximately 9:30 p.m., and stopped at a couple of friends' residences before going back to Peter's residence.

[41] However, Mr. Charlie also testified that during the day Wilfred, Peter, Gordon, and S.F. were at Peter's house. He also said that this was at midnight. He also

testified that he was at Peter's house all day and night. He said that he was probably drinking with everyone. Sometimes throughout the day it was only himself, Peter, and Wilfred. People would come and go.

[42] Mr. Charlie remembered S.S. being at Peter's residence in the mid-morning.

[43] He remembered S.F. going to sleep. He said S.S. was sleeping beside S.F. He did not remember seeing S.S. before she was in the spare bedroom with S.F.

[44] Mr. Charlie went out to get some alcohol. When he returned he went into the spare bedroom to try to wake S.F. up so that he could drink with him. He shook S.F.'s arm, but was unable to wake him up. S.S. was sleeping. Mr. Charlie estimated that the time was 3:00 a.m. when this occurred.

[45] Mr. Charlie said that he went back to the kitchen table to drink with Wilfred. Peter was asleep in the other bedroom.

[46] Mr. Charlie said that he left the residence again to get more alcohol from his place, and when he returned 30 to 45 minutes later everyone was up, including S.S. and S.F., and they were all sitting at the kitchen table.

[47] Mr. Charlie said that Gordon had gone with him to get alcohol the first of the two times that he left to get alcohol.

[48] Mr. Charlie said that he was talking with S.S. when he returned, and that she cooked them some sausages.

[49] He was asked by his counsel whether he received a phone call from his wife that evening. Mr. Charlie said that he did, but that he never answered the phone call because he knew that she would be disappointed in him. In cross-examination he agreed that his wife had called him Saturday.

[50] Mr. Charlie was asked in cross-examination what time he went to bed Saturday morning, and he said that he fell asleep at the kitchen table at Peter's place at around 4:00 a.m. to 5:00 a.m. He agreed that this was after about 10 hours of drinking. He said that he woke up at approximately 9:00 a.m.

[51] Mr. Charlie stated that he had not eaten any food from 6:00 p.m. Friday night until he had sausages Sunday morning.

[52] Mr. Charlie acknowledged that he had a problem with binge drinking, and that he was binge drinking the weekend of December 14, 2019. He said that his memory of events was not affected by his drinking that weekend and that he remembered everything that occurred, although there were some blurry spots.

[53] Mr. Charlie agreed that he had sent Facebook messages to S.S. in the past, some of which were encouraging her to stay in school.

[54] Mr. Charlie denies ever sexually assaulting S.S. in the bedroom as alleged. He did not recall hearing S.S. or anyone screaming that night.

Analysis

[55] Mr. Charlie is able to be convicted of the offence of sexual assault only if the Crown has been able to prove beyond a reasonable doubt that the offence occurred.

The Crown need not prove that every aspect of S.S.'s testimony is true beyond a reasonable doubt, only that her testimony as to the allegation of the sexual assault itself is true.

[56] This case turns on the credibility of S.S. and Mr. Charlie, and the reliability of their evidence.

[57] As Mr. Charlie testified in his defence, I must apply the considerations as set out in *R. v. D.(W.)*, [1991] 1 S.C.R. 742, and as further considered by the courts.

- If I believe Mr. Charlie's testimony that he did not commit the offence of sexual assault, I must find him not guilty;
- Even if I do not believe Mr. Charlie's evidence, if it leaves me with a reasonable doubt about his guilt, I must find him not guilty of the offence; and
- Even if Mr. Charlie's evidence does not leave me with a reasonable doubt of his guilt, I may convict him only if the rest of the evidence that I do accept proves his guilt beyond a reasonable doubt.

[58] It is fundamental to remember that the burden of proof rests on the Crown to prove that the sexual assault occurred on the standard of proof beyond a reasonable doubt. The burden of proof never shifts to Mr. Charlie to establish his innocence.

[59] Molloy J. explained the concept of proof beyond a reasonable doubt in *R. v. Nyznik*, 2017 ONSC 4392, in paras. 6 and 7 as follows:

6 The concept of proof beyond a reasonable doubt is not an easy one to define. It is clearly more rigorous than the balance of probabilities standard applied in civil cases. The balance of probabilities requires the party bearing the onus to establish that the proposition they advance is "more likely than not" -- *i.e.* better than 50/50. In its landmark 1997 decision in *R. v. Lifchus*, [[1997] 3. S.C.R. 320], the Supreme Court of Canada held that the following definition would be an appropriate instruction for a criminal jury:

[...]

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

7 This instruction, with very little modification, is now the standard instruction on reasonable doubt given to criminal juries throughout Canada. The same standard is applied by judges sitting without a jury on criminal trials. The bottom line is that probable or likely guilt is insufficient. If all I can say is that the defendants in this case are likely guilty, I must acquit. It would not be safe to convict someone of a criminal offence with only that degree of confidence. Before I can find the defendants guilty, I must be sure that they committed the offence charged.

[60] The evidence of Mr. Charlie must not be considered and scrutinized any differently than the evidence of S.S. The consideration of the evidence of both must be even-handed.

[61] As stated by *R. v. Renaud*, 2020 CMAAC 5, in para. 8, citing paras. 11 and 12 of the Military Judge's findings in *R. v. Renaud*, 2019 C.M. 4021:

8 ...

[11] The most important thing to remember about credibility is that it is not a competition between the prosecution witnesses and the accused. Indeed, in a criminal trial, the accused is presumed innocent, not only before and at the commencement of the trial, but also throughout it. It is not because I was impressed by the prosecution evidence at the commencement of the trial that the burden of proof was then transferred to Captain Renaud. That burden always rested with the prosecution. I cannot presume guilt before the close of the evidence and arguments. Before I can find an accused guilty, I must be convinced, beyond a reasonable doubt, of the existence of all the essential elements of the offences with which he is charged. The standard of proof beyond a reasonable doubt is inextricably linked to the presumption of innocence, a fundamental principle governing all criminal trials. That standard applies to the assessment of credibility. Therefore, if I were to find that two witnesses with contradictory statements are equally credible and I do not know whom to believe, it would mean that the prosecution was not able to displace the presumption of innocence that belongs to the accused and I would have to find the accused not guilty.

[12] Therefore, I must not return a finding by deciding whether I believe the defence evidence or the prosecution evidence. When contradictory testimony is given, the approach to take is set out in *R. v. W.(D)*, [1991] 1 S.C.R. 742, where the Supreme Court of Canada explained, at page 757, the credibility assessment method that triers of fact must follow to respect the fundamental obligation imposed on the prosecution to prove offences beyond a reasonable doubt. If I believe the accused's testimony in light of all of the evidence, I must acquit the accused; if I do not believe the accused's testimony, but it raises a reasonable doubt in me, I must also acquit the accused. Lastly, even if the accused's testimony does not raise any doubt in me, I must ask myself whether, considering the evidence that I accept, I am convinced of the accused's guilt beyond a reasonable doubt.

[62] See also *R. v. Campbell*, 2018 YKSC 37, in para. 4, where Vertes J. stated:

I must remind myself that a criminal trial is not a credibility contest. It is a trial to determine whether the Crown has proved the guilt of the accused on the specific charge alleged beyond a reasonable doubt. Therefore, it is wrong to decide a criminal case where, as here, there is conflicting evidence simply by deciding which version of events is the preferable one. The decisive question is whether, considering the evidence as a whole, the Crown has proved the guilt of the accused beyond a reasonable doubt.

[63] And as stated in *R. v. Quartey*, 2018 SCC 59, in para. 2:

Moreover, the trial judge did not err in his credibility analysis. He did not shift the burden of proof or hold the appellant's evidence to a higher standard of scrutiny than that applied to the complainant's evidence. As the majority at the Court of Appeal observed, the trial judge instructed himself on the principles of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and, based on internal contradictions in the appellant's testimony and on the strength of the complainant's testimony, he was entitled to conclude that the Crown had met its burden of proving the appellant's guilt beyond a reasonable doubt.

[64] The exculpatory evidence of the accused can be rejected solely on the basis of an acceptance of the evidence of the complainant, as long as the entirety of the evidence, including that of the accused, be given proper and fair consideration. As stated in *R. v. J.J.R.D.* (2006), 218 O.A.C. 37, at para. 53 (leave denied 2007 S.C.C.A. 69), by Doherty J.:

...An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

[65] In *R. v. W.K.*, 2020 ONSC 6735, Doyle J. noted in para. 260:

As stated in *R. v. R.E.M.* 2008 S.C.C. 51, at para. 66, where a complainant's evidence conflicts with that of an accused and the trial judge gives reasons for accepting a complainant's evidence, it follows:

...of necessity that [the trial judge] rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt.

[66] As stated in *W.K.*, at para. 216

Secondly, with respect to the allegations of sexual assault on J.K. and indecent assault on A.D. I am guided by *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65, where the Supreme Court stated that there is no predictability or rule as to how victims of sexual assault will behave and that delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant due, in part, to a recognition that the reasons for delay are many, including, at least embarrassment, fear, guilt or a lack of understanding and knowledge.

[67] In *W.K.*, the Court provided an explanation of the difference between the credibility and the reliability of a witness in paras. 218-222:

218 Credibility has to do with the honesty or veracity of the testimony of a witness.

219 Whereas, reliability has to do with the accuracy of the testimony of the witness. The reliability of a witness' testimony is often gauged by the ability of the witness to observe, recall and recount the events at issue. See *R. v. H.C.*, 2009 ONCA 56, para. 70 of OCA decision in *R. v. H.P.S.*, [2012] O.J. No. 748.

...

221 A good description of the difference between credibility and reliability was provided by the Court of Appeal in *R. v. C. (H.)*, 2009 ONCA 56, at para. 41, where Justice Watt said:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately: i. observe; ii. recall; and iii. recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.

222 As here, reliability is affected as the witnesses were testifying about events which occurred decades ago. The passage of time may have an effect on the ability of the witness to recall events accurately.

[68] The demeanour of a witness is a factor for consideration in assessing the witness' credibility, however it is only one of the factors for consideration and must not be over-emphasized (*R. v. O.M.*, 2014 ONCA 503, at paras. 32-35).

[69] Where contradictions, or apparent contradictions, exist in the evidence, it is necessary to consider how this contradictory evidence fits within the whole of the evidence. As stated in *W.K.*, at paras. 264 and 265:

264 In *Gostick*, [121 O.A.C. 355] an important consideration in the determination of credibility is the extent of consistency of a witness's testimony within itself and with other evidence that the trier of fact accepts. That is, whether the evidence is contradicted by other uncontroverted or proven evidence. If there is found to be a contradiction, the trier must then determine the seriousness of the contradiction, that is, whether it involves a minor or peripheral matter or whether it is a material inconsistency that goes to an essential element of the Crown's case.

265 The Crown is not required to point to something inherently contradictory or demonstrably false in the accused's evidence in order for his evidence to be rejected. The complainants' evidence must be tested in light of all the other evidence presented and the Court is not to assess individual items of evidence in isolation. See *R. v. Morin* (1988), 44 CCC 193 (S.C.C.).

Application to the Evidence

[70] I find that the evidence of Mr. Charlie is not credible and reliable. His evidence was basically nothing more than a plain and simple denial of the occurrence of the sexual assault, against a backdrop of him having been binge drinking that weekend.

[71] Further, the chronology of events testified to by Mr. Charlie is, to say the least, very confusing. At times it was very unclear when the events he was talking about occurred, whether it was Saturday morning, afternoon or evening, or Sunday morning and afternoon.

[72] In fairness to Mr. Charlie, I believe that the way the questions were asked of him contributed somewhat to his answers being confusing. For example, his counsel asked him about a phone call from his wife that occurred in the evening, and Crown counsel cross-examined him on the phone call he received from his wife on Saturday.

Mr. Charlie testified that he received lots of phone calls from friends, mostly on Saturday afternoon. There was other evidence that would appear to have pointed to this phone call from his wife occurring on Sunday morning. Mr. Charlie answered the questions as were put to him, without independently volunteering or clarifying when this phone call from his wife was, whether in fact in the evening, or when on Saturday, or whether there was more than one call.

[73] Mr. Charlie was also asked about what time he fell asleep on Saturday morning at Peter's table. At other points, Mr. Charlie testified that he went over to Peter's residence Saturday morning or Saturday night.

[74] These types of questions and responses were typical and, unfortunately, left me with a confusing picture of the chronology of events from Mr. Charlie's testimony. I was unsure whether Mr. Charlie was actually turning his mind to the specific day and time that he was being asked about, or whether he was talking about events that occurred by simply agreeing to the day and time as put to him in the questions that were asked.

[75] I do not find that Mr. Charlie's version of events is at all persuasive with respect to his testimony that he did not sexually assault, S.S., or that it even raises a reasonable doubt in this regard. In saying this, I am careful not to put undue emphasis on what I found to be the somewhat confusing sequence of events in his testimony, in part because of the way questions were asked of Mr. Charlie. It would be an unfair treatment of his evidence to do so. Leaving this aside, I simply do not find that Mr. Charlie's evidence has any persuasive weight, particularly in light of the totality of the evidence.

[76] This leaves me to consider whether the evidence of S.S. is sufficiently credible and reliable such that it satisfies me beyond a reasonable doubt that she was sexually assaulted by Mr. Charlie.

[77] S.S.'s testimony must be considered, as was Mr. Charlie's, against the backdrop of her also being intoxicated. This said, her evidence was not confusing and her recollection of events was quite clear and consistent.

[78] I have no difficulty accepting as true S.S.'s testimony that she was sexually assaulted in the manner that she testified to. The issue for me, however, is whether I

am satisfied beyond a reasonable doubt that it was Mr. Charlie that sexually assaulted her.

[79] S.S. stated that when she was touched sexually she thought that it was S.F. When the voice stated: "This is not S.", she turned to see who it was. The individual had withdrawn his hand, and was sitting on the edge of the bed in a dimly lit bedroom. She said that it was Mr. Charlie.

[80] While she did not state that she recognized the voice as being Mr. Charlie's, or that she saw his face, she said that it was him. She also said that Mr. Charlie was wearing the same overalls that evening as he was on the day of trial, and he was wearing them while he was in the bedroom.

[81] S.S., in her testimony, placed Wilfred, Peter, and S.F. in one bedroom and Gordon at the kitchen table. Her evidence is that the only other person in the residence at that time was Mr. Charlie, that he is the one who was in the bedroom with her, and that he is the one who sexually assaulted her.

[82] S.S. does not say that she believed it was Mr. Charlie by reasoning it must be, simply through eliminating other possibilities. S.S. also did not testify that she "thought" that it was Mr. Charlie. To the extent that her testimony could be construed as stating that she "thought" it was him, it was, in fact, the Crown who used the word "thought" in his question to her. S.S. simply agreed with the question by stating "Correct".

[83] At no time in her testimony did S.S. indicate that she had any uncertainty or ambiguous feelings as to who touched her sexually. It would be unfair to S.S.'s

testimony to find it not reliable on the basis of the way that the Crown phrased the question to her, in the absence of any statement in her testimony that she was uncertain as to who her assailant was.

[84] I find the fact that S.S. did not tell the RCMP right away about the digital penetration does not detract from the reliability of her evidence.

[85] When assessing the evidence of the witnesses in this case, I must avoid any reliance on myths, stereotypes, and assumptions.

[86] There is no predictability as to how a victim of a sexual assault may or should behave, and it is improper to have an expectation as to how an alleged victim should have acted, in assessing the credibility and reliability of the witness' testimony. S.S.'s testimony that she was "confused, ashamed and uncomfortable about discussing this", is an understandable reaction. She was 17 years old, and this happened to her in her home community, and was done to her by an elder in the community. It would not be surprising that S.S. was processing events with a confused state of mind.

[87] In some situations, a failure to disclose certain aspects of a sexual assault until much later may be a factor that can impact upon the credibility of a witness and the reliability of that witness' testimony. Having heard the testimony of S.S., I find that this is not one of those situations.

[88] In order to find Mr. Charlie guilty of having committed this offence on the basis of the testimony of S.S., I would need to find that her testimony that it was Mr. Charlie who sexually assaulted her satisfies me of his guilt beyond a reasonable doubt.

[89] It is unfortunate that there is no testimony from any of the others who were in the residence, and who may have been able to provide probative and relevant evidence.

[90] It has certainly been my experience in hearing cases in the Yukon that sometimes there is a reluctance on the part of witnesses to testify when family members are involved as accused individuals, particularly when the offence occurs in a small community.

[91] This is simply an observation, the absence of any such potential evidence from witnesses does not bear on my decision and I have not drawn any inferences from the absence of these witnesses.

[92] On the totality of the evidence before me, and in particular my acceptance of the evidence of S.S. as being both credible and reliable, and separately finding Mr. Charlie's evidence neither credible or reliable, I am satisfied that Mr. Charlie committed the offence of sexual assault.

[93] In saying this, I have not simply preferred the evidence of S.S. over that of Mr. Charlie, and therefore decided that Mr. Charlie must be convicted. As stated earlier, I do not find the evidence of Mr. Charlie to be either credible or reliable. I find that it does not raise a reasonable doubt.

[94] I find the evidence of S.S. to be both credible and reliable.

[95] I therefore reject the exculpatory evidence of Mr. Charlie.

[96] I am satisfied that the evidence establishes that Mr. Charlie sexually assaulted S.S. as she described, and Mr. Charlie is therefore convicted of the offence of sexual assault.

COZENS T.C.J.