

SUPREME COURT OF YUKON

Citation: *R v Charlie*,
2021 YKSC 46

Date: 20210907
S.C. No. 19-01520
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

DYLAN WILFRED CHARLIE

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

Before Justice K. Wenckebach

Counsel for the Public Prosecution Service of Canada

Sarah Bailey

Counsel for the accused

Nathan Forester

This decision was delivered in the form of Oral Reasons on September 7, 2021. The Reasons have since been edited for transcription without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The accused, Dylan Charlie, is charged with having committed a sexual assault on M.P., contrary to s. 271 of the *Criminal Code*, R.S.C., 1985, c. C-46 on March 30, 2019, in Whitehorse, Yukon. M.P. says that she was sexually assaulted by Mr. Charlie, through vaginal and anal penetration, and fellatio. Mr. Charlie agrees that they had vaginal intercourse. He says, however, that was all that they did, and that it was consensual. The question to be determined, therefore, is

whether the evidence demonstrates beyond a reasonable doubt that M.P. did not consent to the sexual activity between them. If it does not, I must acquit Mr. Charlie.

EVIDENCE

M.P.

[2] M.P. testified that on March 30, 2019, the day of the alleged sexual assault, she had been drinking at home in Whitehorse. She went downtown by car to find cigarettes. When she got there, she ended up chatting with a group in front of the Whitehorse Emergency Shelter, which included Mr. Charlie. She smoked and shared alcohol with the group. M.P. testified that she did not remember what she spoke about with Mr. Charlie. On cross-examination, she agreed that at some point it became clear that Mr. Charlie found her attractive. She also agreed that she enjoyed his company, and that they were behaving in a romantic way. Mr. Charlie said that he wanted to have sex with her.

[3] M.P. testified that she does not remember what occurred immediately after Mr. Charlie said he wanted to have sex with her. She recalled being in an outside stairwell with Mr. Charlie, but does not remember how she got there. At the time of the alleged offence, she could not recall where the stairwell was located. Through police investigation, it was determined that M.P. and Mr. Charlie went to the outside stairwell of a business, the Alpine Bakery, located close to the Whitehorse Emergency Shelter.

[4] M.P. remembered that Mr. Charlie pulled down her pants and underwear, and she kept telling him to stop. Mr. Charlie had vaginal and anal intercourse with her. In her words, he raped her “over and over again”. She says that she was on her hands and knees, and, at another point, that she was on her back.

[5] After Mr. Charlie was done, he helped her pull up her pants. They left the stairwell. M.P. testified that she could not remember what happened immediately afterward. She did testify that Mr. Charlie took her by the hand and pulled her to a new place. While he was doing that, he told her he loved her, and gave her his sunglasses. At the time of the offence, M.P. could not identify where Mr. Charlie took her after they left the stairwell. Later, it was determined that Mr. Charlie had taken M.P. to the Chilkoot Trail Inn. Mr. Charlie took her to a room, where M.P. saw another person. Mr. Charlie took M.P. into the bathroom. He forced her to perform oral sex on him. M.P. then described throwing up, and convincing Mr. Charlie to let her go.

[6] Once he let her go, M.P. ran out of the Chilkoot Trail Inn whereupon she met a man and spoke with him. He took her back to the Chilkoot Trail Inn, to his room, and she phoned 911. She also drank some alcohol while there.

[7] Police officers attended the Chilkoot Trail Inn and she gave a police statement. In her statement, she did not tell the police that some of the sexual activity had taken place in the Chilkoot Trail Inn. After she gave her statement, she went to the hospital for a sexual assault examination. The following day, she gave a second statement to the police officers. In both statements she could not identify where the alleged sexual assaults took place, nor did she know the name of the alleged assailant. She did give a description of him, stating that he was black, wearing blue jeans and a white hoodie.

[8] M.P. said that she was intoxicated throughout the evening. She also agreed that she had a criminal conviction for theft, from 2016.

Dr. Sally Macdonald

[9] Dr. Macdonald is a medical doctor that performed a sexual assault examination on M.P. She was not called as an expert witness. Dr. Macdonald testified that M.P. had two bruises on her knee, that M.P.'s mid-back was tender, and that there was a ring-like mark on her back. All these injuries were recent. She noted that M.P.'s vaginal area was irritated around the area where the urine comes out, with some blood, there was recent blood and irritation on the vaginal wall, the vulva was red, and the anus was tender, but had not bled.

Constable Jeff Reid

[10] Constable Jeff Reid attended the Chilkoot Trail Inn in response to M.P.'s 911 call. M.P. was very upset and emotional, and he described her as "quite heavily intoxicated". He explained that M.P. could not name her assailant, but described him as a black man, wearing a white hoodie and blue jeans. Constable Reid met with M.P. the next day, and took a second statement. M.P. described the assailant in the same way. At neither time was M.P. able to describe where the alleged assault occurred, beyond stating that it partially occurred in a stairwell.

[11] By reviewing CCTV footage taken outside the Whitehorse Emergency Shelter and around the Alpine Bakery, Constable Reid was able to identify the person M.P. was with on March 30, 2019. A worker at the Whitehorse Emergency Shelter was able to tell Constable Reid that the name of the person on the CCTV was Dylan Charlie.

Corporal Manweiller

[12] Corporal Manweiller was also involved in the investigation. She testified that she attended the Chilkoot Trail Inn in response to the 911 call and reviewed the CCTVs of

the Alpine Bakery and the Whitehorse Emergency Shelter. She described M.P.'s intoxication as being at a level of 5/10 on the night of the alleged sexual assault.

Dylan Charlie

[13] Mr. Charlie testified in his own defence. He stated that, in March 2019 he did not have his own house but was staying with friends, “couch surfing” in Whitehorse. One of the friends he stayed with lived at the Chilkoot Trail Inn.

[14] On the night of March 30, 2019, he was outside the emergency shelter where he met M.P. They talked for about 20 minutes. He began flirting and hitting on her and it was “going back and forth”. He told her she was beautiful. Eventually he told her he wanted to “hook up” with her and that they would need to find somewhere to do it, as he did not have his own place. He went first, and she followed him. He held his hand out, and she grabbed it.

[15] They walked to the outside stairwell of the Alpine Bakery, where they started kissing and “making out”. At that point they were holding onto each other. He then told M.P. to bend down. She turned, pulled her pants down. They then had vaginal sex. She at no time asked him to stop. They did not have anal sex.

[16] After he got tired, he stopped. They put their clothes back on. He left, and she came after him. M.P. asked if he had a cigarette. He did not, but said he might be able to get some from his friends at the Whitehorse Emergency Shelter if she went with him. She agreed, and followed him back. As they were walking there was some distance between them, and Mr. Charlie even told M.P. to hurry up. Then, while walking to the Chilkoot Trail Inn, M.P. took Mr. Charlie's sunglasses from him.

[17] They went to Mr. Charlie's friend's room at the Chilkoot Trail Inn. His friend was passed out, and two other people were there. Mr. Charlie got a couple of cigarettes and gave them to M.P., who had been standing outside the room, in the corridor, the entire time. M.P. then left.

[18] When put to him, Mr. Charlie agreed to the entries on his criminal record.

CCTV

[19] The Crown also filed several videos of the area around the Alpine Bakery, including the area at the front and side of the Alpine Bakery, and the area around the outside stairwell. There is no video of the outside stairwell itself.

[20] The videos show Dylan Charlie and M.P. going toward the Alpine Bakery, holding hands, and entering the stairwell. It then shows them leaving: Mr. Charlie goes first, and M.P. follows. As they walk away, there is distance between them for sometime.

ANALYSIS

[21] In criminal trials where, such as here, the accused testifies, the verdict does not rest on whether the trier of fact believes the Crown's witnesses or those of the defence (*R v W(D)*, [1991] 1 SCR 742 ("*W(D)*" at 757). Rather, the method for reaching an outcome, as outlined in *W(D)* at 758 is:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[22] In this case, the testimony of Mr. Charlie and M.P. are central to my decision, and their credibility is key. Credibility is an umbrella term, incorporating both the concepts of credibility and reliability. In *R v HC*, 2009 ONCA 56 at para. 41, Watt J.A. explained the two concepts. He 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 considerations 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.

[23] A credible witness may be mistaken but believes what they are saying is correct.

[24] The testimony of the police officers and Dr. Macdonald provides very limited assistance. Both police officers testified that M.P. was intoxicated. Based on all the evidence, including M.P.'s testimony about her drinking, I conclude that she was somewhat intoxicated, but not grossly so.

[25] As Dr. Macdonald gave evidence only of her findings and was not called as an expert, I can draw no conclusions from the evidence of any injury, or lack of injury, to M.P.'s vaginal and anal areas.

Dylan Charlie

[26] Mr. Charlie provided his evidence in a forthright manner. In her submissions, Crown counsel took issue with Mr. Charlie's credibility, arguing that Mr. Charlie's

evidence was no more than a “bare denial”. I disagree. Although his testimony was brief, he did provide some detail with regard to what occurred between him and M.P.

[27] Despite this, I see two potential issues in Mr. Charlie’s testimony. The first is that his description of the sexual encounter with M.P. seemed to depict a brief encounter. He explained that, once in the outside stairwell, the two kissed. M.P. then pulled down her pants and underwear, turned, and the two had sex while M.P. was on her hands and knees. Once he got tired he stopped, they put their clothes back in place, and left. The video evidence shows, however, that, the two were in the outside stairwell for approximately 40 minutes. Mr. Charlie’s description does not seem to account for all the time they were there.

[28] Second, M.P. testified that, at one point, Mr. Charlie put her on her back and she got a bruise on her back from being in this position. She also testified that she did not have the bruise before meeting Mr. Charlie. Dr. Macdonald also testified that she noted tenderness and a mark on M.P.’s back, which were new. This suggests that, whatever occurred in the outside stairwell, it was more than what Mr. Charlie testified to.

[29] As such, although for the most part Mr. Charlie’s testimony seems credible, I do have some concerns about parts of his testimony.

M.P.

[30] On the whole, I found M.P. to be credible, although there were problems with her reliability.

[31] M.P. was candid about what she did remember and what she did not. In addition, she provided some detail about what she did remember. Mr. Charlie says, however, that M.P. is not credible.

[32] Mr. Charlie says that it is not credible that she would identify him as black to the police (Mr. Charlie is First Nations). He also says it is not credible that, when she went back into the Chilkoot Trail Inn to call 911, M.P. would not recognize it, although she had been allegedly sexually assaulted there not long before. During argument counsel to Mr. Charlie suggested that M.P. regretted her sexual contact with Mr. Charlie and, because of this, when she spoke to the police, she lied.

[33] At trial, M.P. testified that she has been living in Whitehorse for three years. At the time of the alleged offence, March 30, 2019, she had been living in Whitehorse for approximately one year. I do not find it surprising that a person, not living in Whitehorse for long, somewhat intoxicated and who may be processing an unexpected sexual encounter, would not recognize the Chilkoot Trail Inn when she returned.

[34] Similarly, I do not find it unusual that, given her intoxication, M.P. was mistaken about Mr. Charlie's race. I therefore do not find that M.P. wilfully lied to the police.

[35] Mr. Charlie also says that M.P.'s testimony changed between direct examination and cross-examination. There are two areas of inconsistency that I have identified. The first was about what she and Mr. Charlie talked about while standing in front of the emergency shelter with the group of people. On direct examination, M.P. said that she could not remember what she and Mr. Charlie talked about. During cross-examination defence counsel suggested to M.P. that Mr. Charlie had told her he liked her and that she was beautiful. At that point, she agreed that was what had occurred.

[36] I do not find that this inconsistency affects her credibility. The incident occurred almost two-and-a-half years before the trial. It is reasonable that M.P. would need a reminder about what Mr. Charlie and she said to each other.

[37] The second area in which M.P. was inconsistent was with respect to whether Mr. Charlie took her hand and pulled her along to the outside stairwell, or whether she took Mr. Charlie's hand. On direct examination, she stated that Mr. Charlie "pulled me by the hand and said he wanted to have sex with me". On cross-examination, Mr. Charlie's counsel asked her whether she said in her police statement that Mr. Charlie grabbed her by the hand and pulled. M.P. agreed. Further along during cross-examination Mr. Charlie's counsel suggested that Mr. Charlie put out his hand to her and she took it. Again, she agreed.

[38] I am not convinced that M.P. was lying in her testimony on this point. Rather, I believe it far more likely that she was trying to reconstruct her memories, was relying on what she said in her statement to the police, or was simply deferring to some of defence counsel's suggestions.

[39] Moreover, underlying the question of whether M.P. gave her hand to Mr. Charlie or whether he took it is the question of whether M.P. went with Mr. Charlie towards the outside stairwell of her own free will. Immediately after Mr. Charlie's counsel suggested to M.P. that Mr. Charlie put his hand out and she took it, he suggested that she went with Mr. Charlie willingly. M.P. responded that she did not remember wanting to be intimate with Mr. Charlie. She did not say that she went with Mr. Charlie willingly.

[40] Mr. Charlie also argued that M.P.'s actions were inconsistent with her testimony about her emotional state. According to Mr. Charlie, initially M.P. said that Mr. Charlie grabbed her by the hand and took her unwillingly to a place she did not want to go, and she could not get away from him. The CCTV evidence showed, though, that she was walking at a leisurely pace, and that the two gestured to each other.

[41] Counsel for Mr. Charlie then argued that, as shown in the video, Mr. Charlie left the outside stairwell first, leaving M.P. behind. At one point they were even about half a block away from each other. Yet, she did not run away. If she was afraid, as she claimed, and if she wanted to get away from Mr. Charlie, as she also claimed, then the natural question is: “why did she not do so given the first opportunity?”

[42] In response, Crown submitted that, in questioning how M.P. behaved, Mr. Charlie is relying on stereotypes about how complainants are supposed to act after a sexual assault. M.P.’s conduct after the alleged sexual assault should not be determinative.

[43] In his oral submissions, defence counsel distinguished the case at bar from the case law. He said that, in general, a complainant should not be impugned for how they react after an alleged sexual assault. Here, however, M.P. is saying she feels one way, but her actions are not consistent with those purported feelings.

[44] Moreover, M.P.’s testimony about the time before she and Mr. Charlie had sexual intercourse changed. I should therefore infer that her testimony about what occurred during and after sexual intercourse is also not credible.

[45] Courts have wrestled with the ways myths and stereotypes affect sexual assault proceedings, and how evidence should and should not be assessed. In *R v Chen*, 2020 BCCA 329, Dickson J.A., stated, at paras. 23-24:

As Justice Benotto recently reminded in *R. v. Cepic*, 2019 ONCA 541, the use of a common-sense approach to assessing credibility in sexual assault cases is fraught with danger. This is because so-called “common sense” can mask reliance on stereotypical assumptions and pre-conceived views about how victims of sexual assault can be expected to behave: *Cepic* at paras. 13-14. Although the law has sought for decades to eradicate such myths and stereotypes, they are remarkably persistent, pervasive, and invidious. ...

I will not review the many myths and stereotypes about victims of sexual assault and their expected behaviour that are subtly woven into the fabric of "common sense" in our society. For present purposes, it is sufficient to note they include the notion that sexual assault victims can reasonably be expected to resist or cry out during an attack, avoid their attacker thereafter and manifest signs of the trauma they endured for all to see and understand. However, it has long been recognized that, in reality, there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" and stereotypical assumptions to the contrary have been soundly rejected as a proper basis upon which to draw inferences. [citations omitted]

[46] In my opinion, these legal principles are directly applicable here. Mr. Charlie is asking the Court to conclude that because M.P. did not ask anyone for help, try to run away or seek help immediately after the sexual contact in the stairwell, she should not be believed. This is exactly the kind of reasoning courts should not embark on.

[47] Additionally, if defence counsel wanted to argue only that the changes to M.P.'s evidence suggests that, contrary to what she said, she wanted to go with Mr. Charlie; and that this further leads to the conclusion that M.P.'s testimony about the events that followed and her feelings about them should not be trusted, counsel could simply have said so. The kinds of questions posed to M.P. about whether she had the ability to run away or seek help, why she did not, and the arguments made in light of those questions, do not assist this submission. They serve only to confuse the issues.

[48] With regard to what I can conclude from the evidence, the videos are of little assistance. They confirm only what both Mr. Charlie and M.P. stated in their evidence: Mr. Charlie held M.P.'s hand while they walked toward the Alpine Bakery. I cannot determine from the video whether Mr. Charlie was putting any physical pressure on M.P. to go with him.

[49] While M.P. was inconsistent in her testimony, changing as defence counsel prompted her through his questions, the inconsistencies are somewhat different than Mr. Charlie's lawyer stated in his submissions. M.P.'s evidence initially was not that Mr. Charlie grabbed her by the hand, pulled her and she wanted to get away from him. Her evidence was simply that he pulled her by the hand. The change in her evidence, moreover, was not that she gave him her hand and went willingly; it was that she gave him her hand. Throughout her testimony, M.P. was consistent that she was afraid of Mr. Charlie. While M.P.'s evidence did change, the change is not as radical as presented by counsel for the accused.

[50] Therefore, even if the argument is legally valid, I find that the evidence does not support Mr. Charlie's position. That M.P. gave her hand willingly to Mr. Charlie, and that her testimony on this point changed during the course of cross-examination, sheds little, if any, light on what her feelings and motivation were at the time.

[51] Counsel for Mr. Charlie also urged me to find that M.P. is less trustworthy because of her conviction of theft. M.P. has one conviction of theft from 2016. I do not believe that M.P. is less trustworthy on the basis of one conviction from five years ago.

[52] I therefore find that M.P. was telling the truth as she believed it to be.

[53] The determination of credibility does not rest on whether M.P. was telling the truth as she believed it to be, however. It also requires that M.P. be reliable. It is here that I have concerns about her evidence.

[54] M.P.'s ability to recall the events of March 30, 2019, is an issue. She herself said she had large gaps in her memory. These gaps include not remembering much, if anything, of what occurred immediately before the sexual intercourse in the outside

stairwell, not remembering some of what occurred in the stairwell, including whether she and Mr. Charlie kissed, and some of what occurred as she walked away from the outside stairwell.

[55] The changes in M.P.'s testimony are also concerning to me. It is not entirely clear to me whether M.P. changed her testimony because she remembered some things during cross-examination, or whether she was relying on what she said in her police statement or on defence counsel's suggestions rather than her memory. Ultimately, however, it indicates not only that M.P. has gaps in her memory, but that what she does remember is changeable.

[56] There are, furthermore, issues with M.P.'s powers of observation. M.P. did not recognize the Chilkoot Trail Inn although she had been there not long before. I have found that it does not affect her credibility, but her inability to identify to the police that she was in the place in which some of the sexual contact took place affects her reliability.

[57] In addition, M.P. seems to have gotten confused during the course of her testimony. On direct examination, she testified that Mr. Charlie told her that he wanted to have sex with her. When Mr. Charlie's counsel brought her back to this statement during cross-examination, however, M.P. denied saying this.

[58] During submissions, Crown counsel argued that M.P.'s evidence is consistent with having "flashbulb" memories, in which the central events are clear, while peripheral events fade out. The core of M.P.'s evidence, however, was consistent and clear, and should be believed.

[59] There are two issues with this submission. Firstly, M.P. had memory gaps in describing these central events as well. She could not, for instance, remember whether Mr. Charlie kissed her while they were in the stairwell.

[60] Moreover, consistency does not necessarily prove reliability: a person who is mistaken may be consistently mistaken. In this case, I find that the consistency in some of M.P.'s testimony does not overcome the frailties in her testimony. Cumulatively, the gaps, errors and confusion make M.P.'s evidence unreliable.

[61] I cannot determine, based on all the evidence, including that of Mr. Charlie and M.P., whether sexual contact other than vaginal intercourse occurred. I also have reasonable doubt about whether M.P. consented to the sexual activity they did have. I therefore find Mr. Charlie not guilty of sexual assault.

WENCKEBACH J.