

Citation: *R. v. Bland*, 2021 YKTC 43

Date: 20210916
Docket: 20-00359A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

MICHAEL STEVEN ROSS BLAND

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

Appearances:

Jane Park

Nathan Forester (by telephone)

Counsel for the Crown

Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Michael Bland has entered not guilty pleas to three counts relating to an incident alleged to have occurred in the fall of 2018: sexual assault, contrary to s. 271; uttering a threat to cause death, contrary to s. 264.1(1)(a); and choking, contrary to s. 267(c) of the *Criminal Code*. At the conclusion of the trial, Crown conceded that the evidence was insufficient to support a conviction on the s. 267(c) offence, and count 3 was dismissed.

[2] With respect to the remaining counts, the Crown's case relies almost exclusively on the testimony of K.W., the named complainant. The evidence of Cst. Clements, the

Crown's second witness, offered limited assistance solely in relation to how Mr. Bland was identified as the primary suspect on the basis of a first name and a nickname. Mr. Bland, as is his right, opted to call no evidence.

[3] At issue is whether the Crown has met its burden of proving that Mr. Bland committed the remaining two offences to the requisite standard of proof beyond a reasonable doubt. This turns on an assessment of the credibility of the evidence presented by the Crown.

The Evidence

[4] As noted, the sole evidence regarding the alleged offences comes from K.W. She testified that she was familiar with Mr. Bland, as she had seen him before in the neighbourhood, as he lived one street over, off and on, though she says she did not know him personally. Additionally, she had seen him a couple of times when her boyfriend or teenage son purchased drugs from him.

[5] In September or October of 2018, K.W. says that Mr. Bland texted her asking for a ride to Twin Fields, a secluded clearing out past the Whitehorse Fishladder. K.W. understood that Mr. Bland was meeting someone there in relation to collecting a drug debt.

[6] Once there, she says that Mr. Bland got out and into the back seat of the vehicle. He began commenting on how sexy she was and referred to being sent intimate photos of her the week before. K.W. says that Mr. Bland then grabbed her by the throat with one hand and pulled her either over or between the two front seats into the back of the

vehicle. She says she tried to pull his fingers off her neck and that she grabbed the steering wheel to keep from being pulled into the back, but was unable to hold on. At that point, K.W. says she gave up as she knew she would not win.

[7] Once in the back seat, K.W. says that Mr. Bland rolled her over onto her face, pulled her pants off, and stuck his penis inside her. She is not sure how much time passed but felt it was very quick.

[8] When Mr. Bland finished, K.W. says that he noted it did not appear that his friend was going to show and asked her to take him back to the hotel. K.W. says she got into the front seat and drove back towards the hotel. Near the Fishladder, Mr. Bland asked her to stop as he spotted the individual he was supposed to meet. K.W. stopped the vehicle and, when Mr. Bland got out, she drove away.

[9] With respect to count 2, the uttering threats, K.W. says that Mr. Bland told her that if she said anything, he would kill her boyfriend. She further testified that Mr. Bland was aware that R.K.T. was her boyfriend at that time, as R.K.T. frequently purchased drugs from Mr. Bland. K.W. indicated she was unable to recall whether the threat was made before or after the sexual assault.

The Issue

[10] As noted, the issue to be decided is whether the evidence is sufficient to prove the offences beyond a reasonable doubt. This requires an assessment of the credibility of the evidence, particularly that of K.W. It is important to note that credibility imports concepts not just of truthfulness but also of reliability. This is well articulated in the

decision of Molloy J. of the Ontario Superior Court in *R. v. Nyznik*, 2017 ONSC 4392, a decision that echoes similar comments made by Gower J. of the Supreme Court of Yukon in *R. v. Sweet*, 2013 YKSC 42.

[11] The following passage in *Nyznik* has also been quoted with approval in a number of Yukon cases, both in the Territorial and the Supreme Courts.

15 Typically, the outcome of a sexual assault trial will depend on the reliability and credibility of the evidence given by the complainant. Reliability has to do with the accuracy of a witness' evidence – whether she has a good memory; whether she is able to recount the details of the event; and whether she is an accurate historian. Credibility has to do with whether the witness is telling the truth. A witness who is not telling the truth is by definition not providing reliable evidence. However, the reverse is not the case. Sometimes an honest witness will be trying her best to tell the truth and will fervently believe the truth of what she is relating, but nevertheless be mistaken in her recollection. Such witnesses will appear to be telling the truth and will be convinced they are right, but may still be proven wrong by incontrovertible extrinsic evidence. Although honest, their evidence is not reliable. Only evidence that is both reliable and credible can support a finding of guilt beyond a reasonable doubt.

16 It is sometimes said that the application of these principles is unfair to complainants in sexual assault cases, that judges are improperly dubious of the testimony of complainants, and that the system is tilted in favour of the accused. In my opinion, those critics fail to understand the purpose of a sexual assault trial, which is to determine whether or not a criminal offence has been committed. It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt. In many cases, the only evidence implicating a person accused of sexual assault will be the testimony of the complainant. There will usually be no other eye-witnesses. There will often be no physical or other corroborative evidence. For that reason, a judge is frequently required to scrutinize the testimony of a complainant to determine whether, based on that evidence alone, the guilt of an accused has been proven beyond a reasonable doubt. That is a heavy burden, and one that is hard to discharge on the word of one person. However, the presumption of innocence, placing the burden of proof on the Crown, and the reasonable doubt standard are

necessary protections to avoid wrongful convictions. While this may mean that sometimes a guilty person will be acquitted, that is the unavoidable consequence of ensuring that innocent people are never convicted.

17 Although the slogan "Believe the victim" has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence. That is antithetical to the fundamental principles of justice enshrined in our constitution and the values underlying our free and democratic society.

Analysis

[12] In the case at bar, defence counsel argues that K.W.'s evidence was neither credible nor reliable given the number of inconsistencies between her evidence at trial and her prior statements to police.

[13] Crown argues that K.W. was both credible and reliable, and that any inconsistencies go to peripheral matters, which ought not to undermine her credibility regarding the actual act of non-consensual penile penetration, about which her evidence was unchallenged.

[14] Crown further argues that it is not surprising that K.W.'s recollection would be blurry on peripheral details given the passage of time, the fact she was doing her best to forget the incident, and the fact that she was going through a difficult time around the date of the alleged offence.

[15] In considering the credibility of K.W.'s evidence, I would agree with the Crown that K.W. certainly presented as being forthright and candid in her evidence. There were no clear indicators that she was deliberately being untruthful, and she certainly

appeared to fervently believe the events that she recounted. However, as noted in *Nyznik*, an honest witness can nonetheless be mistaken. Courts must consider the reliability of a witness' recollection in determining whether the evidence is sufficient to support a conviction.

[16] Defence counsel highlighted a number of frailties in K.W.'s memory and a number of differences in the versions she provided to the police and to the Court.

[17] The question to be determined is the extent to which these inconsistencies are material and whether or not they undermine the reliability of K.W.'s evidence to the extent that it would be unsafe to convict.

[18] In my view, some of the differences are not particularly concerning.

[19] For example, defence noted that K.W. told the police she picked Mr. Bland up at the 98 Hotel, but she could not recall the name of the hotel at trial. Furthermore, Cst. Clements testified that she contacted the 98 Hotel and could find no record that Mr. Bland had been staying there during September of 2018, although she only checked in relation to September based on K.W.'s statement to the police regarding the timing of the alleged offence.

[20] These differences cause me little concern. It is not troubling that K.W. would forget the name of the hotel, having moved away from the City of Whitehorse three years ago. With respect to the lack of a record regarding Mr. Bland staying at the 98 Hotel, I would note that Mr. Bland would not necessarily need to be registered at the 98 to be asked to be picked up at that location.

[21] Defence further noted that there were distinct differences in K.W.'s degree of admitted acquaintance with Mr. Bland between her evidence-in-chief and her evidence on cross-examination, moving from meeting him a couple of times, to more frequent associations. Similarly, her evidence regarding the nature of the drug usage of her son and boyfriend moved from marijuana use in direct examination, to cocaine use in cross-examination. As with the hotel name, these differences are not particularly concerning to me in terms of their impact on K.W.'s overall reliability. They are not particularly material, nor is it surprising to see such differences when a witness is pressed for more specificity on cross-examination, and K.W. was not evasive when questioned further on either topic.

[22] Next, defence counsel highlights details to which K.W. testified that were not included in her statements to police.

[23] Firstly, while she apparently told the police about the intimate photos, she did not tell them that Mr. Bland had said the photos had been sent to him. This inconsistency is not an insignificant one, particularly when one considers that K.W. testified that it was Mr. Bland's possession of the intimate photos that, in her view, led to his suggestive comments and, ultimately, to the sexual assault.

[24] K.W. also did not tell the police that she tried to hold on to the steering wheel when being pulled by Mr. Bland, and, more significantly, she did not mention suffering any injuries, namely, the red marks she told the Court were on her neck as a result of Mr. Bland grabbing her by the throat.

[25] As with the intimate photos, these differences are much more material to her description of the alleged incident. The fact that they are details that appear to have been remembered or recounted for the first time at trial is indicative, in my view, of potential concerns with respect to the overall reliability of K.W.'s recollection.

[26] Two additional inconsistencies highlighted by defence counsel are even more concerning in assessing whether K.W. is a sufficiently reliable and accurate historian.

[27] The first involved the evidence as to what happened with K.W.'s pants during the alleged assault. In direct examination, she testified that her pants were pulled off. On cross-examination, she testified she could not recall for certain if her pants were pulled off or simply pulled down, though to the best of her recollection at the time of trial, she believed that they had been simply pulled down. The inconsistency between her evidence in direct examination and on cross-examination, and her inability to recall for sure whether the pants were pulled off or down is relatively minor and not particularly troubling to me. What is troubling is the fact that K.W. told the police that Mr. Bland had pulled her pants off and thrown them out the window, and that she had to get out of the vehicle to retrieve them after the assault.

[28] This is an unusual and memorable detail, hence the inconsistency between her statement to the police and her evidence at trial is significant in assessing the reliability of her recollection of the events.

[29] Finally, K.W. testified that Mr. Bland pulled her, with one hand on her neck, either over or through the two front seats into the back of the vehicle. I had some questions about whether this description was physically plausible, but, more importantly, K.W.

apparently provided a different version of the events to the police telling them, in her statement, that Mr. Bland opened the driver's door, grabbed her by the shirt, pulled her out of the car, opened the rear door, pushed her into the back and she fell into the car. This is a markedly different sequence of events. The inconsistency is neither minor nor peripheral. Rather, it is an integral part of K.W.'s recollection of how the alleged assault unfolded.

[30] The dramatically different versions of events cause me grave concern about the reliability of K.W.'s memory, particularly when considering K.W.'s response when asked about the major inconsistency. She said, "I remember that he pulled me through, but I guess he didn't." This statement clearly indicates that however strongly K.W. believed in the version of events she recounted to the Court, there is a very real possibility that her memory of events is not entirely accurate. Both versions simply cannot be true.

[31] I am left in the position of not knowing whether one, the other, or neither of the versions is accurate. I am also left with a concern about whether K.W. may be similarly mistaken about other details she provided in her evidence at trial, notwithstanding her apparent belief as to their truthfulness.

[32] Crown's argument that any inconsistencies or frailties in K.W.'s memory are understandable, given her circumstances at the time of the offence and her desire to forget the incident, simply does not address the impact the concerns about reliability have on the question of whether the evidence is sufficient to support a conviction. Absent expert testimony, understanding why K.W.'s recollection might be impaired does not change the fact that her recollection is impaired.

[33] In the result, I find that the cumulative impact of the inconsistencies and, most particularly, the dramatic differences in the sequence of events described to the police and to the Court are such that I am left with serious questions about the overall reliability of K.W.'s memory of the events that simply cannot be reconciled. I conclude that the concerns with respect to the reliability of her evidence, in turn, leave me with a reasonable doubt, and an acquittal must be entered with respect to both of the remaining counts.

RUDDY T.C.J.