Citation: *R. v. Ladue,* 2023 YKTC 25

Date: 20230516
Docket: 20-00488
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Gill

REX

v.

DANIEL LADUE

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

Appearances:
Noel Sinclair — Counsel for the Crown
Nathan Forester — Counsel for the Defence

REASONS FOR JUDGMENT

[1] GILL T.C.J. (Oral): Daniel Ladue is charged with sexually assaulting S., and as she is a person under the age of 16 years, with touching her for a sexual purpose contrary to ss. 271 and 151 of the *Criminal Code*, respectively.

[2] Admissions of fact filed in these proceedings include the admission that Mr. Ladue's semen was found on the interior middle front crotch area of the

complainant's underwear that was seized by police two days after the allegation. Those admissions also stipulate that there is no way to determine exactly when that ejaculate was placed there.

[3] The complainant alleges the accused had non-consensual sex with her during the early morning hours of August 25, 2020. The accused denies any sexual contact with her on that date, but says they had consensual sex a few days prior on August 22. The complainant denies this.

[4] At the time of these allegations, the complaint was about 15 and one-half years old and Mr. Ladue was 18 years old. Regardless of what happened, it is agreed by counsel that the defence of consent, pursuant to s. 150.1(2.1), would be available to Mr. Ladue as of the alleged offence date.

[5] The complainant testified that on the evening, August 24, 2020, she was out partying with her boyfriend and others. Mr. Ladue ended up being one of those others. Together, all of them consumed a considerable amount of alcohol. The alcohol consumed was so much that the complainant remembers very little of that evening. Her boyfriend, A.A., was very close to her level of intoxication. This caused significant blackouts for periods of time during their evening activities together. Mr. Ladue, who was also drinking, was not as intoxicated; there is little question that he was not as intoxicated as the complainant and her boyfriend.

[6] A.A. testified that the gathering started at a place known as "the shack", which was a small one-room structure built by the family of the accused on or near their property in Ross River. He said that on their arrival around 7 or 8 p.m., there was

already a party in progress. They were all, including the accused, drinking and smoking marijuana. He said that after a few hours, they went for more alcohol and spent some time at, or outside, the home of a person known as T. He said by the end of the night he was very intoxicated, around a seven or eight out of a maximum of ten, but was still in control of his motor movements. He estimated the intoxication of the complainant as being ten out of ten, stumbling and unable to communicate. He estimated the intoxication of another individual who was with them throughout the evening, named S., as being around nine out of ten, and he felt the accused was the least intoxicated of all of them at around four out of ten.

[7] Unable to manage the complainant unassisted, A.A. testified that he asked the accused for help, and he agreed and asked if they needed a place to stay. With one of them on each side of the complainant, to hold her up, they walked her back to the shack. S. accompanied them. By now, it was after midnight and by the time they arrived at the shack, the complainant was falling asleep. The room contained a larger bed and a floor mattress. He said they placed her on the bed and she fell asleep right away. He said the rest of them stayed awake a while longer drinking some more before falling asleep.

[8] He testified that both he and the accused slept with the complainant on the large bed, with her in the middle, while S. slept on the floor mattress. He next recalled being awakened briefly by the accused, placing the complainant into his arms, as he described it. He did not think she was awake and he himself went right back to sleep.

[9] The next morning when they awoke, he said the complainant seemed sad and wanted to leave. Mr. Ladue was also awake and they bid him goodbye. A.A. and the complainant departed. He said the complainant just did not seem to be herself, not talking much, and just looking at the ground as he walked her back home.

[10] It was the next morning, on August 26, 2020, that he said she knocked at his door and was crying so hard she could barely speak. She made a disclosure to him about the previous night at the shack. They then went to the home of a friend named M., told him, and they together proceeded to the shack to confront the accused, taking some other people with them along the way. He said the complainant, in her distraught state, was not eager to confront the accused but joined everyone anyways.

[11] Reaching at or near the property of Mr. Ladue's family, they encountered Mr. Ladue's brother. They told him what happened and he demanded they leave the property, which they did, without ever seeing Mr. Ladue. A.A. took the complainant back to his home where he said she spent the rest of the day crying and not wanting to return to the shack.

[12] A.A. testified he did not engage in any sexual activity with the complainant in the shack that night. He was not cross-examined or challenged on that assertion.

[13] Cross-examination of A.A. revealed a number of issues relating to his evidence. Most, but not all of them, relate to his heavy intoxication that night and his resulting inability to recall everything. He agreed this was a problem.

[14] There are also inconsistencies between his testimony at trial compared to what he told the police only days after the event. In particular, he did not tell the police about Mr. Ladue placing the complainant into his arms as they slept. He explained he only recalled that aspect a couple of days after giving the statement and he did not know how, or to whom, he should provide that updated information until trial.

[15] He also, inconsistently, told the police that the accused was on the floor, not on the bed, and he failed to mention to the police that the accused was ever on the bed that night. He also agreed that he had not mentioned to the police that he woke up that night at all.

[16] Some of these and other omissions, regarding his statement to the police, he explained by saying he was not specifically asked. On redirect, he seemed surprised to learn that the entire statement to the police that he thought must have lasted about an hour was in fact only about seven minutes, in duration, and had therefore represented a much more limited opportunity to account what happened as opposed to his testimony at trial.

[17] The other witness for the Crown was the complainant herself. She testified to having lived in Ross River her entire life. She knew A.A. for some years before but began dating him in August of 2020, only a couple of weeks before the event in question. She said she had known the accused for about three years, since age 11 or 12, mostly seeing him around the youth centre on gym nights.

[18] She recalled very little of the evening prior, really just bits and pieces. Much of what she did recall was at odds with the testimony of others. This is due to her admitted

intoxication to the point of having periods where she blacked out. In my view, she could not be relied on to determine the details of much of anything that happened while they were together and drinking. However, it is clear, that she recalls being in the company of people that included A.A., who was her boyfriend, and the accused, as well as S.

[19] Through this haze of recollection, she did recall eventually being carried to the shack. She recalled waking up in the night and seeing her boyfriend asleep next to her on the bed and the accused and S. asleep on the floor. Her next recollection is that of waking up a second time to find her pants having been taken down, feeling something, and looking around behind her to see the face of the accused. She could see it was him with the aid of light that was by then coming in through a window. She said he had his penis in her vagina. She tried pushing him away but she said he reinserted it. She pushed him away a second time and pulled her pants up and moved closer to her boyfriend who was asleep on the other side of her.

[20] She testified there was no pain or any resulting physical injury. She said that before, during, and after this neither of them spoke and clearly that she did not consent to this activity in any way. The complainant said the entire event, from being awoken by the feeling of penetration, to him stopping, was what she described as a couple of seconds or about two seconds.

[21] I am not entirely sure what to make of this description. It is not uncommon for people to use this type of description for something happening quickly, in the general rather than in the literal sense. It may, for example, have been helpful for her to have

been asked to raise her hand and then lower it to illustrate the entire time elapsed, but she was not.

[22] In cross-examination, she agreed that in her statement to the police she had said the accused had not ejaculated. She also agreed in cross-examination that she never saw his penis but did not think it could be anything other than his penis, asking, in essence, how else could the DNA be there? She agreed that she did not know if he ejaculated. She also agreed, on redirect, that she could not recall where the hands of the accused might have been during that time. In other words, they could have been anywhere.

[23] She said that on that date she was wearing black leggings, an Adidas sweater, and yellow underwear. She testified that this was the underwear seized by the police and that it was likely the first time that she had worn it. The next morning, she said they woke up to the three of them on the bed and S. on the floor, and that she just wanted to leave, telling her boyfriend, "Let's go." She recalls he waved goodbye to the accused, who was by then also awake. A.A. helped her find her phone, which she had lost the night before, and they eventually parted ways.

[24] She testified to feeling emotionally confused, wondering if she should tell anyone. She then made a disclosure to a number of people, including her friend, her cousin, and to her boyfriend, A.A. This disclosure was clearly regarding the previous night in the shack with her boyfriend, the accused, and S. She recalled accompanying the others to go and confront the accused. She testified that she was eventually taken to the hospital by her father's girlfriend for an examination.

[25] In cross-examination, the complainant readily admitted to her heavy intoxication and poor memory of that evening's activities. Her recollection of the layout and furnishings of the shack was incomplete. She also agreed that in her statement to the police officer, she omitted mentioning that A.A. was her boyfriend. She instead described him as her brother-in-law, which in a sense was true given that their respective siblings were then dating.

[26] She was asked, in direct, if she did not mention she was dating A.A. because she may have felt awkward about it. She did not rely on any such excuse for the omission but simply said she did not want anyone to know they were dating.

[27] As would be required by the defence when alleging prior sexual activity, the defence made a pre-trial application obtaining permission to question the complainant about the accused's assertion of sexual activity with her a few days prior to the date in question. The complainant denied any such thing as having occurred. I will return to this area of questioning later in these reasons.

[28] The accused testified in his own defence. As already mentioned, he denied any non-consensual sexual activity with the complainant. He maintains they had had consensual sex a few days earlier when he said the two of them were alone in that very same shack. He testified that on that earlier occasion, a few days prior, he had just arrived in Ross River that day for a visit with his family there. He had had an argument with his then girlfriend, so he abandoned plans to visit Faro with her, and instead came without her to Ross River.

[29] Later, on the day of his arrival, he said he got together with a number of his friends, including S., at the gym and later on at the rec centre, where they played videogames until it closed. Somewhere along the way — and it seems his testimony was somewhat vague on this — he came to be with not only S., but also the complainant. He testified that he knew the complainant but does not appear to have had a prior history of socializing with her in such a limited setting.

[30] That aside, there appears to be some question as to whether the gym and rec centre were even open to the public, given the COVID restrictions that were in place at that time. Mr. Ladue was adamant the facilities were open as long as everyone wore a mask.

[31] In any event, he testified that next they went to an outdoor basketball court where they smoked a joint or two. S. then had to depart, due to a curfew requirement. It was after S. left that he said the complainant asked if they could go to the shack and smoke weed from his bong there. He said they went to the shack, smoked the marijuana, and began talking about things that included his fight with his girlfriend, and other things. He testified they eventually began flirting. He said this flirting led to mutual kissing and then fondling and eventually to consensual sex, which he then described in great detail to a level of professed recollection, essentially move by move. This recollection can only be regarded as remarkable, particularly when compared to his recollection about other details from that evening.

[32] Afterwards, he said they smoked some more marijuana and then she departed. He said he told his close friend S., the next day, about having sex with the complainant and that S. complimented him about it.

[33] As to the evening of the allegations specifically before the Court, Mr. Ladue agreed they were all out drinking together but denied there was ever a party that evening at the shack. He testified that they came to get him from the shack and then proceeded out into the community where they partied and drank together.

[34] He is probably right about that. He agreed the group included S., A.A., the complainant, and some others. He agreed with some of the details of their activities that evening but differed with others. Without going into specific details that I do not consider necessary to recount, I would mostly note that, given he was among those who were less intoxicated, his recollections of the group's evening activities may well be more reliable than that of the others.

[35] Mr. Ladue testified, by the end of the night, the complainant was too intoxicated to walk unassisted and that he helped A.A. walk her back to the shack. He said they placed her on the bed, where she was joined by A.A., and that he and S. were on the floor mattress. He said they had a smoke and then turned off the lights and went to sleep. The next morning, he said, they awoke, A.A. and the complainant departed, and he went back to sleep.

[36] Mr. Ladue specifically denied ever being on the bed, ever laying down next to the complainant, removing her clothing, or engaging in any touching or other sexual activity with her. He said he remained away from her and was on the floor for the entire time.

Mr. Ladue said he first learned of the allegation of sexual touching later that same morning when he received a phone call from his friend M., who was crying on the phone and asking if he did anything to the complaint. Even though he was not given any details, he understood it to mean, did he do anything sexual with the complainant, which he answered with a blanket denial.

[37] He also learned later that day, from his brother, about the encounter his brother had had with the group. He left town shortly after that same day because he said he needed to return home to look after his grandmother with whom he resided.

[38] He testified that on his arrival back in Carmacks, he decided he must go to the local police detachment for the purpose of clearing his name of any involvement with the allegation. He agreed the officer never advised him of what the specific allegation against him even was. He told the officer he just wanted to tell the whole truth and to clear his name.

[39] In the course of doing that, he told the officer things that included the following:

- first, that he was indeed out drinking with the group on the evening of August 24, and this group included his friend S., the complainant, and her boyfriend;

- that by the end of the night, the complainant was too drunk to walk unassisted, he helped walk her back to the shack, where she and her boyfriend went to sleep on the bed while he and S. slept on the floor mattress;

- that after they awoke the next morning, the complainant and her boyfriend departed without incident;

- that he later received a call from M., who was crying and asking what happened;

- that people were looking for him to fight;

- that he — in other words, the accused — felt outraged that he would be accused of anything like this because it would be impossible for it to have occurred with others in the room and with her boyfriend on the bed next to her; and finally,

- that he was shocked by this serious allegation that he would never do, describing the complainant as a little kid.

[40] At the end of the statement, the officer asked him if there was anything else he wanted to say and the accused replied that there was nothing more, nothing less.

[41] On cross-examination, it was put to Mr. Ladue why, if he wanted to clear his name about the whole thing, he did not explain that he had in fact had consensual sex with this very complainant only three days before, to which he replied that it was because the officer never specifically asked him that. Yet, he did agree that in his mind he could not preclude the allegation as possibly being about, or also being about the 23rd of August.

[42] As well, when it was suggested to him that his statement implied that he would never have sex with the complainant, describing her as just a kid. He dismissed that by saying he meant not that he would never have sex with her at all, only that he would never sexually assault her, and that he was also a kid.

[43] This now brings the Court back to the testimony of the complainant, specifically as regards whether she and the accused were together and had consensual sex, three days earlier on August 22, 2020. She denied any such thing occurring. She denied being out at the gym and rec centre at all, much less in the company of the accused and his friend S. She maintained there were COVID-related prohibitions in place that would not have allowed access to those facilities in any event.

[44] The complainant also denied later accompanying the accused to the shack. She denied any sexual activity with him because she was not with him to begin with. She admitted she knew the accused as a friend. She said they had never been romantically involved and she had never in her life been alone with him, only in group settings. She maintained she was, at the time of these events, in a dating relationship that had commenced just two weeks earlier with her boyfriend, A.A., that it was going well, and that she would never have been interested in sexual relations with the accused.

[45] This is the evidence.

[46] The case is essentially one resting on the word of the complainant and that of the accused. I must be mindful that the accused is presumed innocent unless the Crown is able to prove his guilt beyond a reasonable doubt, as to every essential element of each of the counts. I must recognize that there is no burden on the accused to prove

anything, and I must apply the principles of assessing credibility in a criminal case according to the well-established principles in the case of *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[47] Pursuant to that case, credibility must be assessed in the following fashion:

- if the accused is believed, he is entitled to an acquittal;
- if the Court is unable to determine who to believe, the accused is also entitled to an acquittal;
- even if the accused is not believed, he must be acquitted if his evidence raises a reasonable doubt; overall, and regardless,
- an accused can only be convicted in a criminal case if the Crown has met its burden to tender evidence establishing guilt beyond a reasonable doubt.

[48] Much of the evidence in this case aligns between all the witnesses. Where it differs, there is often very little that turns on those differences.

[49] For example, I do not believe the complainant's boyfriend, A.A., has any reliable recollection of just who slept where in the shack, other than that he was on the same bed as the complaint. I also doubt any reliability of his recollection of the accused placing the complainant into his arms. This is something he failed to mention to the police, having recalled it only later. Given his level of intoxication, it is not reliable. It is not that he was in any way attempting to exaggerate or fabricate but rather that, despite

his honest efforts, he was, because of his heavy intoxication, simply unable to reliably remember. In any event, his evidence sheds little light on the events at issue other than his denial of any sexual activity with S. that evening, which I accept as credible and trustworthy.

[50] I find, the testimony of the complainant was given in a highly credible fashion. I detected no attempt on her part to evade, avoid, or hide anything, and she admitted many gaps in her memory that evening. She recalled being briefly in a car that evening when she may well not have been, at least as compared to others' testimony. Her description of the sexual activity engaged by Mr. Ladue in the shack, on the date in question, was given honestly. To the best that she was able to recall that, in her mind, the event lasted only a couple of seconds. This is her best recollection, given her state of intoxication at the time. This is an answer that enhances her credibility, in my view, as she is clearly trying her best to give an honest recounting and to her it appears as having happened very quickly.

[51] It is important here to address one aspect of her testimony. Although testifying that she felt the accused penetrated her vagina with his penis, she admitted on cross-examination to not having actually seen his penis. She then, in turn, asked her own question, in essence, about how else the DNA could be on her underwear.

[52] I do not take her query in this regard as constituting doubt about whether the accused sexually assaulted her that evening, but rather some doubt as to whether the vaginal penetration she felt was actually his penis or whether it could have been something else, such as a finger.

[53] It must be recognized that a sexual assault resulting in Mr. Ladue's ejaculate being placed on the interior of the complainant's underwear could occur without his penis having been necessarily inserted into her vagina.

[54] The main point is that while some of the complaint's testimony is incomplete or uncertain in terms of detail, she was unequivocal and unshaken that it was Mr. Ladue and, no one else, who sexually assaulted her on the bed in the shack that night. She felt his penetration by something, if not his penis, and she saw his face. I accept that testimony without reservation.

[55] The complainant was equally credible regarding her denial of even being with the accused a few nights earlier.

[56] Overall and for the reasons given, I accept her testimony denying sex, as asserted by him, a few nights earlier.

[57] The complaint's disclosure within a day of the event revealed her as distraught and unable to compose herself. While this disclosure cannot be used for the truth of its contents, her emotional state during the disclosure, as well as her tearful condition during her testimony, is consistent with such a thing having occurred.

[58] I will now address the testimony of the accused. Without question, he testified in a confident and assertive fashion. He was subjected to strong cross-examination, which he responded to equally strongly. There were many times, however, when it was clear that he felt he was being boxed in or cornered. During those times he became especially combative and, in my view, at times non-responsive to the logic of the

specific questions being posed to him. This was particularly evident when it was put to him that his failure to mention to the police officer the earlier consensual sex being a lie by omission, and that he is fabricating that event only after learning his DNA had been located on the underwear she wore that night of the allegations.

[59] It is, at this point, important to make two observations regarding the state of mind of Mr. Ladue at the time that he was speaking with the police officer:

- firstly, that he would presumably have remembered having had sex with the complainant three days prior to August 25, 2020, and if indeed that had occurred as he has asserted a trial; and

- secondly, that he did not at the time of speaking with the officer, know that his DNA would be later found on her underwear.

[60] Even assuming, without knowing the specifics of the allegation, that he did suspect the allegation may well relate to the night all of them spent in the shack, it is difficult to understand why he would not have volunteered that the two of them in fact had had consensual sex, at that very location, only three days earlier. He explained this omission by saying he was not asked. However, he was not actually asked anything; he went in to give an entirely voluntary statement. Even given that he was there without the benefit of legal advice, which he had waived, and that he was new to this process, it is hard to understand why, given his admission in testimony that he really had no idea what the complainant was alleging against him, he would not mention that prior event, if it occurred.

[61] Of course, the answer is that he did not mention it, the earlier consensual sex, to the police officer because it did not occur. I find that his explanation of how his DNA came to be located on the underwear worn by the complainant on the night of the allegations, is neither true nor reasonably capable of being true. It is a fabrication attempted to extricate himself from an otherwise unanswerable case against him.

[62] There is one additional aspect to the case that deserves mention, and that relates to the accused's friend S., by virtue of his connection to virtually every important aspect of these proceedings and the activities of that evening. Had he been called as a witness, his testimony would have provided important corroboration of the version of events testified to by Mr. Ladue, if those events indeed occurred as he testified.

[63] I am given to understand that S. attended the trial under subpoena potentially for that purpose. Not having been called as a witness by the accused deserves mention, not in any way intended to constitute additional proof of the offence having occurred, but to recognize the possibility that the reason he was not called as a witness is because his testimony may not have been helpful to the accused. I need say nothing further on that aspect. His absence is in no way being used to constitute proof or to otherwise advance the case against him.

[64] On the whole and for the reasons given, I find the Crown has proven beyond a reasonable doubt that the accused, on the early morning hours of August 25, 2020, at Ross River, Yukon Territory, did commit a sexual assault on S., contrary to s. 271 of the *Criminal Code*.

[65] Where the testimony of the accused conflicts with the testimony of the complainant as regards to that event, I reject his testimony as untrue and I accept the testimony of the complainant as true. I find that he penetrated her vagina. While unable to conclude the penetration was necessary with his penis, I find his sexual activity with her that evening resulted in his ejaculate being deposited on the interior crotch region of her underwear and her vagina. I find he committed these acts intentionally for sexual gratification and knowing that she had not consented to such sexual activity. He is guilty of Count 1.

[66] Count 2, for the reasons I have given, has not been proven with respect to the essential ingredients, in particular the allegation of the insertion by penis, and is dismissed.

[67] Those are my reasons.

[DISCUSSIONS]

[68] I will order a pre-sentence report and allow for a date to be identified that would also facilitate the preparation of a *Gladue* report, if it does take somewhat longer.

[DISCUSSIONS]

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GILL T.C.J.