

Citation: *R. v. D.R.*, 2024 YKTC 54

Date: 20241206
Docket: 22-00216
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

D.R.

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:
Leo Lane
Kevin Drolet

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] PHELPS T.C.J. (Oral): D.R. is before the Court on a four-count Information alleging two offences contrary to s. 271 of the *Criminal Code*, and two offences contrary to s. 161(1)(c) of the *Criminal Code*. All offences are alleged to have been committed against the same complainant, A.S.

[2] The allegations involve two separate encounters, each resulting in one charge each of s. 271 and s. 161(1)(c). Both encounters are alleged to have occurred in April 2022.

[3] The Crown produced two witnesses at trial, being the lead investigator from the RCMP, Cst. Moore, and the complainant, A.S. D.R. testified on his own behalf for the defence.

Evidence of Cst. Moore

[4] Karina Moore was a constable with the RCMP in July 2022, working in the capacity of general duty in Whitehorse. She was on shift when A.S. attended at the Whitehorse RCMP detachment the morning of July 6, 2022, accompanied by a Yukon Government victim services worker. Cst. Moore received the complaint from A.S. and took an audio and video recorded statement from her.

[5] Based on the statement of A.S., Cst. Moore formed the grounds to arrest D.R. and proceeded with his arrest on July 8, 2022. During the arrest, Cst. Moore seized D.R.'s cell phone. The cell phone was subject to forensic analysis which did not result in anything of evidentiary value.

[6] There was no evidence presented at trial on what the forensic analysis involved, or what conclusions can be drawn by the results.

Evidence of A.S.

[7] A.S. was 27 years old at the time of trial and shares a child with D.R., a daughter, born in 2019. She described what could be referred to as an on-again, off-again relationship with D.R. that began in 2018. They lived together during her pregnancy and up to the arrest of D.R. in July 2022. There was significant tension between A.S. and

D.R. in 2022, as they had ended their relationship but continued to reside in the home together with their daughter.

[8] A.S. described that there was an incident in February 2022 and D.R. resided elsewhere for one month due to contact restrictions with her. When he returned in March 2022 there was significant friction in the relationship.

[9] She described an incident that occurred about three weeks after D.R. returned to the home. During the day they had been arguing about childcare responsibilities. When they were home after work, they each began consuming alcohol. She was consuming wine and D.R. was consuming beer. According to A.S., she consumed three glasses of wine and D.R. consumed more than four beers. In addition to the wine, A.S. smoked some cannabis. D.R. did not consume cannabis.

[10] With their daughter in bed, the two were consuming the drinks and listening to music together. They eventually showered together followed by preparing to go to bed. A.S. was dressed in her pajamas consisting of boxer shorts and a tank top, and D.R. in full length Star Wars themed pajama bottoms with no shirt. They ended up in the living room joking with each other, tickling each other, and cuddling together. The activity continued and they ended up on the carpeted living room floor wrestling, tickling, kissing, and cuddling. They were both intoxicated by the alcohol and, in her case, the cannabis.

[11] A.S. recalls a discussion about being sleepy and that they were discussing going to bed. However, she fell asleep on the floor before this happened. The next thing A.S. remembers is the feeling of being moved around and she awoke to the realization that

D.R. was having sexual intercourse with her. Specifically, he had inserted his penis into her vagina and was engaging in vaginal intercourse.

[12] A.S. did not know what to do, so she kept her eyes closed and did not react to what was happening. After an estimated 10 minutes, she felt him pull his penis out of her and thought the incident was over until she felt him trying to open her mouth with his hand to insert his penis. This lasted for about two minutes before he stopped.

[13] A.S. estimates that about 35 minutes passed when he again penetrated her vagina with his penis. This lasted for about five minutes. Next, he attempted anal intercourse with her which caused her to scream and start crying. At this point he lay on top of her to cuddle her and repeatedly stated "I'm so sorry" over and over again. A.S. got up and proceeded to lock herself in the bathroom.

[14] When A.S. exited the bathroom, D.R. was in the living room playing a video game and she went to bed without speaking to him. He came to the bed, cuddled up next to her, and she proceeded to cry herself to sleep.

[15] A.S. described a very brief instance when D.R. was trying to open her mouth that she opened her eyes and saw that he was using one hand to try and open her mouth while using the other hand to hold his cell phone. There was only the brief moment of observation, and she did not know what he was doing with the phone but she does recall that the camera light for the phone was not on.

[16] A.S. described how throughout the assault she pretended to be asleep and did not react or participate in any way with what was happening to her. She did not give consent to sexual activity.

[17] When A.S. got up from the living room floor she was still dressed in her pajamas and recalls the sensation that they had been shifted and being stuck between her “butt cheeks”.

[18] The second incident occurred about two weeks later. On this occasion, A.S. was again drinking wine, consuming about two and one-half glasses over the evening, and D.R. was drinking beer. They were getting along, having fun together, and proceeded to shower together. After showering, she went to the bedroom and lay down on her front on the bed. She fell asleep in this position. D.R. had remained in the shower and she was waiting for him when she fell asleep.

[19] The next thing A.S. remembers is the bed shifting and that she was confused. She could hear him walking on the wooden floor and could feel him around her mouth briefly before he exited the room. She got up and saw him in the bathroom, standing in front of the mirror, with his phone. At first he appeared to be taking pictures of himself, then he played a video depicting a sexual act. She grabbed the phone and saw what she believed to be a close-up video of him having vaginal intercourse with her from behind. She asked him why he would do that, and he began apologizing to her. The image was very close and did not depict the location, and A.S. was not certain when or where it was from. She watched it for five or six seconds, deleted it from the phone and then threw the phone at D.R. while saying “don’t ever touch me like that again”.

[20] A.S. put her pajamas on and slept in the living room without further discussion with D.R..

[21] The relationship between A.S. and D.R. deteriorated significantly after this incident, with A.S. sleeping on the couch. They argued over the impact of the sleeping arrangements on their daughter, and eventually A.S. started sleeping in her car.

[22] In early July they were working towards A.S. moving out, and she was sleeping in her car or elsewhere and was depressed with suicidal thoughts. She reached out for help to victim services and with their assistance attended at the RCMP station and spoke with Cst. Moore.

[23] During cross examination, counsel put two parts of A.S.'s RCMP statement to her. The first exchange in cross-examination being:

Q: After the alleged incident in April your attention was directed to what the officer referred to as the first incident, is that right?

A: Yes

Q: And you, being asked about the first incident, told the police officer "I don't exactly remember the first one, but, its kinda like the same thing" Do you recall being asked by the officer that, and saying that?

A: Yes

Q: And that's the truth?

A: Yes

[24] Counsel then moved on from this line of questioning and referred A.S. to another portion of the statement regarding an argument A.S. and D.R. had on July 3, 2022.

During the argument, D.R. said that A.S. was a neglectful mother, she was abandoning

her daughter, and he would seek full custody. A.S. responded that she would see him in court. A.S. agreed with the content of the argument and that it was after this argument that she went to the RCMP.

[25] In the RCMP statement, the police officer asked if A.S. had talked to D.R. about the incident and his drinking, and A.S. stated “we had a fight a few days ago which is why I kinda started all this”.

[26] A.S. agreed that her complaint was precipitated by the July 3, 2022 argument.

[27] Defence counsel put to her that she fabricated the allegations to gain advantage in the family law proceedings, which A.S. denied. In re-direct, A.S. confirmed that she had “dropped” her family law case about one year before this trial as she and D.R. were co-parenting on a 50/50 basis and getting along well.

Evidence of D.R.

[28] D.R. was 26 years old at the time of trial and gainfully employed as an electrician, having completed his education at Yukon University. He confirmed that he and A.S. were co-parenting and currently have an amicable and calm relationship.

[29] D.R. confirmed the living arrangements in the home in 2022 being that they lived in the house together but were separated. This arrangement included staying in separate bedrooms part of the time. He confirmed that he was removed from the home and did not return for about one month. The cohabitation with A.S. ended on the date of his arrest for the charges before the Court in July 2022.

[30] D.R. denied that the incidents in April described by A.S. happened. The extent of his testimony regarding the incidents described by A.S. was during the following exchange:

Q: You've heard A.S.'s evidence of two incidents during the period of April 2022. Did those incidents occur?

A: No, they did not.

[31] He did not testify further to the details of the allegations in direct examination.

[32] D.R. confirmed that the argument on July 3, 2022 occurred, during which time he told A.S. he was unhappy that she was neglecting their daughter and not participating as a parent.

[33] In cross-examination, D.R. agreed that he drank alcohol with A.S. from time to time during the time period of the allegations, that he drank regularly during that period, that it would not be unusual for him to consume more than four beer during one sitting, and that he would drink heavily on occasion.

[34] In relation to D.R.'s outright denial of the allegations made against him by A.S., there was the following exchange:

Q: You testified when your lawyer was asking you questions that these incidents simply did not happen. Are you denying that in March or April of 2022 there was an incident where you and A.S. had sex on the carpet. You say that did not happen?

A: I'm saying that we had consensual sex on the carpet in the living room during that time period, yes.

[35] When further probed about his heavy drinking during the time period of the allegations, D.R. denied that his drinking had any impact on his memory.

Standard of Proof

[36] In any *Criminal Code* trial, the Crown is required to prove the offences against an accused person beyond a reasonable doubt. The principle of innocent until proven guilty and the standard of proof beyond a reasonable doubt is set out in *R. v. Nyznik*, 2017 ONSC 4392, at paras. 5 through 7:

5 The presumption of innocence, and along with it the standard of proof beyond a reasonable doubt, are important safeguards to ensure that no innocent person is convicted of an offence and deprived of his liberty. Without these protections, there would be a serious risk of wrongful convictions -- an outcome that cannot be accepted in a free and democratic society.

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*, 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.

Weighing the Evidence

[37] In order to apply these legal principles, an assessment of the evidence before the Court is required. That is, I must determine what evidence, if any, from each witness presented by both the Crown and defence, I accept. This requires an assessment of the credibility and reliability of the witnesses.

[38] The assessment of credibility and reliability was addressed in detail in the context of a sexual assault allegation in *Nyznik* at para. 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.

Evidence of A.S.

[39] A.S. testified to two separate incidents from 2022 and presented her testimony in a candid and straightforward manner. She provided significant detail regarding both incidents in relation to how each evening unfolded. Despite the consumption of alcohol and cannabis, she provided a very detailed account of the events, including the clothing that she and D.R. were wearing.

[40] D.R. is not required to present a motive to fabricate on the part of the complainant, but in this case he asserts that the allegations were fabricated in order to benefit A.S. in the pending family law dispute over their daughter. I find that there is not evidence of fabrication on her part, noting the following:

1. When A.S. testified that she saw a cell phone in D.R.'s hand during the first incident, she was clear that she did not see the camera light on, meaning he was not recording her.
2. When she viewed D.R.'s phone after the second incident, she denied seeing any other images on the phone, and testified she only viewed a very brief portion of the alleged video.
3. When asked about what occurred to her on the bed during the second incident, she was candid that she did not know if anything occurred.

[41] A.S.'s evidence was not exaggerated, and I reject the assertion of motive to fabricate.

[42] Defence counsel urges me to find credibility concerns with her evidence based on the statement, set out above, to the RCMP where she states that she “doesn’t exactly remember the first one, but, its kinda like the same thing”. However, the questioning ended with her admitting the utterance in the statement. There was no further questioning of A.S. on her memory or whether the single sentence represents a clear contradiction of evidence at trial. I find little value in the evidence as put before me to assist in assessing credibility without follow-up questioning.

[43] I am also urged to find the utterance that “we had a fight a few days ago which is why I kinda started all this” somehow contradicts her evidence of why she contacted victim services and ultimately went to the RCMP. It is understandable that an argument as described in court could impact her state of mind and result in her seeking help through victim services. That is, it is consistent with what she told the Court, not a contradiction, considering as well the timing of the argument and the timing of the attendance with the RCMP.

[44] I find that neither of these examples impact the credibility of A.S.'s testimony.

[45] The Crown requested that the Court enter acquittals on the s. 161(1)(c) offence from the first incident, and on both charges from the second incident. I agreed with the submission based on the evidence as provided by A.S., and not due to issues with her credibility and reliability. The evidence as presented did not support conviction. That is, by accepting her evidence as credible, the facts do not support convictions.

Evidence of D.R.

[46] D.R. made a blanket denial of the incidents as testified to by A.S. He did not address any of the activities described by A.S. on the two occasions, and addressed it with a simple one sentence denial. It is very difficult to assess credibility of an accused on a blanket denial.

[47] While his evidence was brief, I did have concerns with the credibility of D.R. His testimony was self serving and, in some ways, lacked an air of reality. There was also an unexplained internal contradiction.

[48] D.R. testified to his alcohol consumption during the time period of the complaints, including excessive drinking on occasion, but adamantly denied his drinking ever impacted his memory.

[49] There was an apparent contradiction between his blanket denial of the allegations in direct examination, and the answer to questioning in cross-examination that he engaged in consensual sex with A.S. on the living room floor. There were no applications before me or clarifying questions to otherwise explain the statements, as to whether they were in relation to the incident in question or not.

Application of *R. v. W(D)*

[50] I am mindful that this case is not a credibility contest between D.R. and A.S. D.R. testified on his own behalf before the Court and that requires me to apply the three-step procedure as set out by the Supreme Court of Canada in *R. v. W.(D.)* [1991] 1 S.C.R. 742, at para. 28, which states:

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.

[51] In applying *W(D)* in what can be considered a he-said, she-said case, I must also consider the conclusions drawn by Cozens, J. in *R. v. Abdullahi*, 2010 YKTC 44, at para. 16:

A summary of the principles that have developed in these cases is that there is now, right up to the Supreme Court of Canada, authority for the proposition that accepting the complainant's evidence on its own can lead to a rejection of an accused's testimony as long as the trier of fact does not fall into the error of moving from disbelieving the accused directly to a finding of guilt. Those are the principles that apply to this case.

See also: *R. v. J.L.*, 2024 ONCJ 72.

[52] The testimony of D.R. does not leave me with a reasonable doubt when applying the first two prongs of the *W(D)* analysis. On the third prong of the analysis, I must look at the entirety of the case, which includes the evidence of A.S. I found A.S. to be credible and reliable. The extensive detail of her testimony and the credible manner in which she testified, balanced on a whole with the evidence of the accused, does not leave me with a reasonable doubt on the third prong of the *W(D)* test.

[53] I find that the offence contrary to s. 271 of the *Criminal Code* has been proven beyond a reasonable doubt and I find D.R. guilty on Count 1.

PHELPS T.C.J.