Citation: *R. v. A.G.,* 2025 YKTC 26

Date: 20250502
Docket: 23-00132
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

A.G.

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

Appearances:
Elmer Brillantes — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

This decision was delivered from the Bench in the form of Oral Reasons. The Reasons have since been edited without changing the substance.

REASONS FOR JUDGMENT

[1] CAIRNS T.C.J. (Oral): For the purposes of adhering to the publication ban, I will simply refer to the complainant throughout as the Complainant. Given that the offences charged arose in a small Yukon community, I will also refer to the accused by initials and have removed other potential identifiers to the extent possible.

[2] A.G. is charged with sexual assault and failing to comply with a condition on a release order. Not guilty pleas were entered and the trial proceeded on March 11, 2025, in a rural Yukon community.

[3] Two witnesses testified to the events of May 20, 2023 – the Complainant and the accused. While the evidence of Complainant and A.G. was consistent in several areas, it diverged on the issue of consent. The Complainant testified to waking up to find A.G. vaginally penetrating her without her consent. A.G.'s testimony described a consensual sexual encounter.

Section 145(5) of the *Criminal Code*

[4] A.G. does not dispute the charge of failing to comply with the conditions of a release order contrary to section 145(5)(a) of the *Criminal Code*. On the relevant date, A.G. was on a release order prohibiting him from being in a particular community except to attend court or in the direct company of his surety. The evidence at trial established that he was in that community on May 20, 2023, neither to attend court nor in the direct company of his surety. I find him guilty of that charge.

Section 271 of the *Criminal Code*

[5] A.G. is also charged with sexual assault contrary to s. 271 of the *Criminal Code*. The *actus reus* of sexual assault comprises three elements: (1) touching; (2) the sexual nature of the contact; and (3) the absence of consent. In this case, I have evidence from both witnesses establishing that sexual touching occurred. The issue is whether the sexual touching was consensual.

[6] As with any *Criminal Code* trial, A.G. is presumed to be innocent unless and until the Crown proves he is guilty beyond a reasonable doubt. It is essential 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 A.G. to establish his innocence.

[7] 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 and has been described by the Supreme Court of Canada in *R. v. Lifchu*s, [1997] 3 S.C.R. 320, at para. 39, as follows:

> …
>
> 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.

[8] The issue to be decided in this case is whether the evidence at trial proves beyond a reasonable doubt that A.G. committed the offence of sexual assault. I must

determine what evidence, if any, from each witness that I accept. In considering the evidence, I must consider both the credibility and reliability of each witness's evidence.

[9] In *R. v. Nyznik*, 2017 ONSC 4392, a decision that has been quoted with approval in a number of Yukon cases, the concepts of credibility and reliability were articulated at paras. 15 to 17 as follows:

> 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 ...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.

Direct Evidence of the Complainant

[10] The Complainant lives in a rural Yukon community and is a member of a Yukon First Nation. She is employed and a mother. Formally, she has Grade 10 education and is currently furthering her education through a certificate program, with an anticipated completion date in 2026.

[11] On Friday, May 19, 2023, there was a funeral in the rural community attended by about 150 to 200 people, including the Complainant. After that, the Complainant had drinks with some friends at N.'s house over six or seven hours. Thereafter, in the early morning hours of Saturday, May 20, 2023, she was at home alone with A.G.

[12] The Complainant explained that A.G. was at her home because she had an injured ankle and leg, was using crutches, and needed his assistance to help her look for something she had lost outside. She explained she had brought him to her house on her quad after leaving N.'s house. She has known A.G. her whole life and he had been a friend.

[13] The Complainant described the main floor of her home as open concept, saying that she and A.G. were in the living room and kitchen.

[14] When asked what plans she and A.G. had that morning, she said he was supposed to go outside to look for her smokes, but she fell asleep. She said she was supposed to drop him at home.

[15] The Complainant said the smokes were outside by her sitting area, a campfire spot. At her request, A.G. went outside to look for her smokes. The Complainant said she was sitting by the kitchen island and then, because it was quiet in her house, she went to put on a movie on the living room television around 6:00 or 7:00 a.m., sat on the couch with her injured leg up and passed out.

[16] The Complainant said she woke up around 12:00 p.m. to A.G. having sex with her. She clarified that his penis was in her vagina. She described what A.G. was doing to her when she woke up as "actively raping" her. She said she was positioned on her back and A.G. had both her legs in his arms. The Complainant said she did not know how long this had been going on while she was sleeping but that it did not go on very long when she woke up – about 30 seconds. The Complainant said she kicked him with her good leg, used her knees and screamed at him to "get the fuck out". In response, she says that A.G. said, "just let me finish". The Complainant did not think he had a condom on. After A.G. was off her, the Complainant said she rolled herself in her couch covers hoping that it was not true.

[17] The Complainant testified that A.G. left out her back door around "12:00 or 12:30ish" p.m. She then fell asleep on the couch for one to two hours. She went downstairs, got changed, and left the house, taking off on her quad.

[18] Before falling asleep on the couch, the Complainant said that she had been wearing jeans and a sweater. She had a tensor bandage on her right ankle. When she woke up, she said she was wearing her shirt and bra, and her pants were on the floor.

[19] She denied giving A.G permission to have sexual contact with her and said she was not okay with it.

[20] When asked how intoxicated she was at the time of the assault, she stated that she was about a five out of ten. She said she had no injuries from the assault but attended the Health Centre in the rural community and met with one of the nurses. The Complainant said she could not complete the sexual assault kit because they did not have a qualified nurse at the Health Centre. She also gave a statement to the RCMP the same day as the incident.

[21] The Complainant has a criminal record with a conviction for an impaired driving offence from last year and a break and enter offence. She said the break and enter was committed a couple of months after this incident and she is still awaiting sentence.

Cross-examination – the Complainant

[22] The Complainant agreed that she was not especially intoxicated – five out of ten – when she was with A.G. at her house. She said she had been highly intoxicated – eight out of ten – earlier in the evening. She confirmed that her memory was intact, and she could remember everything from that night.

[23] The Complainant agreed she had been smoking crack cocaine that night but had not mentioned that to police or when questioned by the Crown during her direct

evidence. She said she did not mention the crack cocaine because, while she had been smoking crack cocaine, she had not done so at her house. She confirmed that the crack cocaine did not impact her memory and that she had no psychosis or hallucinations.

[24] She said that she asked A.G. to make the trip from N.'s house to her house on her quad so that he could find her cigarettes by the firepit, later agreeing that he was not actually looking for cigarettes but for her crack pipe. She acknowledged that she had lied under oath about this during her testimony and had not mentioned the crack pipe in her statement to police.

[25] She confirmed that it was her evidence that A.G. left out of her back door at around 12:30 p.m. She said she phoned her sister shortly after she got up, just before 1:00 p.m.

[26] When it was suggested to her that A.G. had left around 7:00 or 8:00 a.m., she disagreed, saying she was sure it was 12:00 or 12:30 p.m. when he left. She agreed that she went to A.G.'s house that day with her sister and punched A.G. She denied that this had occurred around 10:30 a.m. She agreed that she had asked police if she could assault him again.

[27] The Complainant confirmed that she had spoken to the police more than once in relation to this incident. Shortly after the incident, she provided an unrecorded statement at the Water Treatment Plant ("WTP") to Cpl. Drapeau with two other officers present. She agreed that, at that time, she told police that she fell asleep with A.G. on the couch. She confirmed that what she told the police at the WTP was different than

what she testified to in court and, also, that what she told police at the WTP was not truthful. By way of explanation, she described herself as “standoffish” with police. She said when she gave her formal recorded statement to police, that was the truth.

[28] The Complainant could not recall if she was wearing knee high boots with zippers that night. She agreed the jeans she wore that night were tightly fitted. She said when she woke up her jeans and the tensor bandage on her ankle had been removed. She said she could not recall if she had told police at the WTP that her pants were not off, just below the knees, but that it was possible she told them that.

[29] She confirmed that she did not think A.G. ejaculated. In relation to this issue, when she was cross-examined in relation to what was on her medical records, she clarified that she had been menstruating at the time and the reference to a “gush” in the records was not a gush of ejaculate, but rather a gush of menstrual blood.

[30] Counsel for A.G. questioned the Complainant in relation to her criminal record, which had been put to her by Crown counsel. In her direct examination, the Complainant twice agreed that she had “committed” a break and enter. A.G.’s counsel then put to her that she had raised an alibi defence in relation to the break and enter yet was now admitting she had committed that offence. In response, the Complainant said she was only admitting that she was being sentenced for the offence.

Direct evidence – A.G.

[31] A.G. is a 28-year-old member of a Yukon First Nation. He resides in the same rural Yukon community as the Complainant and has known her all his life.

[32] A.G. did not attend the funeral on May 19, saying he spent the day of the funeral drinking. After the funeral, A.G. said he was over at Cousin T.'s for eight to nine hours. He agreed Cousin T. was the same person the Complainant referred to as N. Four people were at Cousin T.'s house, including the Complainant. A.G. said they were drinking whisky and everyone was smoking crack. He said he drank about one-half to three-quarters of a 26 oz bottle. He said his memory of the night was clear.

[33] A.G. denied the Complainant asked him to get her crack pipe at her house. He said she had asked him to get something earlier, from her quad, either a pack of smokes or a bottle.

[34] A.G. said he asked the Complainant for a ride home, helped her on the quad, jumped on, and she drove off in the opposite direction from his house, drove around a little bit, then went to her house. No one else was home. He described her level of intoxication as about the same as his, being a seven or eight out of ten. He said, to him, this means the point beyond buzzed, where you might start to stagger a little bit.

[35] A.G. described the Complainant's house as an open concept and referred to a couch and television. He said they were standing by the kitchen island, and she pulled out a bottle less than one-quarter full, they drank that and conversed about drugs and other stuff. The Complainant asked him to unzip her boots, which he described as tight brown leather boots that went to her knees. He unzipped them and took them off. The Complainant then asked him to put on a movie, and he did. He said the Complainant was standing in the kitchen while A.G. put on the movie. Then sitting on the couch, she came and lay on the couch, with her head in A.G.'s lap.

[36] A.G. testified that the Complainant started rubbing his leg and trying to unbutton his pants. He said he did not let her, telling her he would rather perform oral intercourse on her. In response, A.G. says she rolled on her back and started to unbutton her pants. He said he helped her pull off her pants, which were tight. He recalled changing his position on the couch so he could help her. The Complainant told him to watch out for her injured leg, and he slowly worked her leg out of the tight pants, being careful of the tensor bandage. Her pants came off.

[37] A.G. said he then told her she had a tampon in, and she pulled it out herself, throwing it on the ground. He said he grabbed a tissue box, wiped her a bit, and then performed oral intercourse on her for a short period. He described her grabbing his head and moaning while he was doing that. He then pulled down his pants and started having sex, meaning he put his penis in her vagina for 30 to 40 seconds to one minute. The Complainant then said, “I thought you were my boyfriend”. Upon hearing that, A.G. says he got off the Complainant and said she pushed him off using her legs. He then grabbed a glass of water, took a sip and gave her the glass with the rest of the water.

[38] A.G. said that the Complainant had seemed normal during the time at her house. He said she was not slurring her words, was not falling and seemed a little bit drunk. He said her eyes were open during the sexual contact.

[39] A.G. says he left the Complainant’s home around 8:00 a.m. He started walking home, noticed a small bike, grabbed it and rode it home. There, he says he fell asleep for maybe two hours. He woke up to the Complainant knocking at the door and then punching him in the face. He thought this was between 9:30 a.m. and 10:00 a.m.

[40] A.G. denied that the Complainant was sleeping, losing consciousness, or confused while he was with her.

Cross-examination – A.G.

[41] The Crown's cross-examination primarily focussed on the terms of A.G.'s release order, what court orders meant to him, and the risk associated with non-compliance. A.G. denied that he ignored the Complainant's request that he stop engaging in intercourse with her.

Analysis

[42] The Crown submits that it has met its burden of proving beyond a reasonable doubt that A.G. sexually assaulted the Complainant . The Crown asks me to accept the Complainant's evidence that she was unconscious or asleep when the sexual assault began and, as such, incapable of providing consent. Several arguments were advanced by the Crown during submissions.

[43] Starting with the Complainant's credibility, the Crown fairly acknowledged that the Complainant lied under oath in her testimony on several occasions. In fact, the Crown describing her as "flip flopping" under oath. It was also established that the Complainant was not truthful when she first spoke to the police after the incident. When she was asked to explain the changes in her story, she appeared to have a difficult time formulating her response. Ultimately, she explained these different versions by saying she was "standoffish" with police. She said that, when she gave her recorded statement

to police, that was the truth. Despite these acknowledged credibility concerns, the Crown urges me to find the Complainant credible in the key aspects of her evidence.

[44] The Crown also argued that the Complainant had no motive to fabricate, submitting there was no reason for her to attend the Health Centre or provide articles of clothing to the police following the incident. In support of the argument that the Complainant had no motive to fabricate, the Crown pointed out that there is no evidence that the Complainant and A.G. have a family or children together, they do not share property, there is no evidence of a dispute over assets.

[45] In considering the argument that the Complainant had no motive to fabricate, I note that the issue of motive to fabricate is an area where a court must tread cautiously. Where there is no apparent motive to fabricate, as appears to be the case here, the evidence can still fall short of actually proving the absence of motive. It has been found to be an error to transform "the absence of evidence of a motive to fabricate into a proven lack of motive" (*R. v. Bartholomew*, 2019 ONCA 377, at para. 21).

[46] Courts have held that "it is dangerous and impermissible to move from an apparent lack of motive to the conclusion that the complainant must be telling the truth. People may accuse others of committing a crime for reasons that may never be known, or for no reason at all" (*Bartholomew,* para. 22). There is a "significant difference" between "absence of proved motive" and "proved absence of motive". In short, "it does not logically follow that because there is no apparent reason for a motive to lie, the witness must be telling the truth" (*Bartholomew*, paras. 22 and 23). As such, I give little

weight to the Crown's submissions about absence of motive to fabricate in assessing the Complainant's credibility.

[47] The Crown also pointed to the Complainant's demeanour at trial, arguing that she testified credibly. However, while demeanour is an important component in the assessment of credibility, there are limitations to drawing accurate inferences from it. While I acknowledge that, at times, the Complainant testified with significant emotion that was consistent with the subject matter, it is difficult to rely on the Complainant's demeanour alone to determine if she was telling the truth. Indeed, as the trial proceeded, it was established that the Complainant had told different versions of this allegation to the police and she had also lied to present herself in a better light during the trial, in particular, in relation to her use of crack cocaine. It also appears that the Complainant's explanation for not mentioning her use of crack cocaine on the night in question – which was that she had not smoked it at her home – was a deliberate attempt to mislead.

[48] I note that A.G. denied that the Complainant had asked him to look for her crack pipe at her house; his evidence that she had asked him to look for something earlier. However, regardless of which version is true, it is clear the Complainant was not forthright with the Court in relation to her crack cocaine use that night.

[49] It is also important to say that it did not become apparent that the Complainant not telling the truth from her demeanour; rather, it was cross-examination that led her to admit that she had lied. As a result, I find I can place little weight on the Complainant's demeanour alone to assess her credibility.

[50] Finally, the Crown advanced the argument that A.G.'s non-compliance with the conditions of his release order is relevant to the sexual assault charge. Put another way, the Crown argued that A.G.'s disdain for court orders can be relied on to support a finding that A.G. is the kind of person who "puts his needs first". This, it was argued, can be used to support a finding that he is guilty of sexual assault. The Crown points to the Complainant's evidence that A.G. said "just let me finish" when she was telling him to get off her. I must reject this argument. While the evidence that A.G. failed to comply with a condition of his release order is admissible to prove that charge, I cannot rely on it to find that he is guilty of sexual assault based on character or propensity to commit the crime charged. The reasoning pathway the Crown is asking me to follow is akin to impermissible propensity reasoning or character evidence (*R. v. Handy*, 2002 SCC 56, at para. 31). In short, I do not rely on A.G.'s breach of a release order as support for a finding that he is the kind of person to have committed the sexual assault on the Complainant

[51] Counsel for A.G. argued that the Complainant should not be believed and that it had been established that she had lied on several occasions, apparently to advance her narrative. Additionally, A.G.'s counsel also argued that having advanced an alibi defence at her previous trial, the Complainant is now admitted to "committing" the offence. The admission of having "committed" the offence, it is argued, is inconsistent with having raised an alibi defence during her previous trial.

[52] I can give this submission little credence as it was not evident that the Complainant clearly recognized the difference between agreeing in response to a question that she "committed" the offence and her acknowledgement that she had been

convicted and would be sentenced. Without more detail on this point, I cannot give it much weight in assessing the Complainant's credibility.

[53] Given that A.G. testified at trial, I must apply the test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at para. 28:

> 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.

[54] In this case, I have conflicting and inconsistent evidence from two witnesses. The assessment of credibility and reliability is often very difficult in sexual assault cases which often occur in private and involve the contradictory testimony of only two witnesses.

[55] As noted, I have concerns with both the credibility and reliability of the Complainant's testimony. During the trial, she admitted to lying under oath and, further, admitted that she was not truthful with the police about this incident. Her evidence also appeared to change over time in relation to whether she was sitting with A.G. watching a movie or put the movie on herself. Although she denied that her consumption of alcohol and illicit substances affected her recall, I note some gaps in her memory, such as whether she was wearing boots that night. Given these concerns, I approach her evidence with caution.

[56] I find that A.G.'s testimony was internally consistent and generally coherent. Despite his consumption of alcohol and illicit substances, he recounted the incident in significant detail, describing a consensual sexual encounter initiated by the complainant. I note that his evidence included a specific reference to the fact that the Complainant was menstruating, a detail only raised by the Complainant during cross-examination. His evidence was that the sexual interaction ended when the Complainant wanted him to stop, which he did.

Conclusion

[57] A.G.'s evidence describes a consensual sexual encounter with the Complainant. The evidence provided by A.G. coupled with my concerns about the credibility of the Complainant's testimony raises a reasonable doubt as to whether the sexual contact was non-consensual. As I have a reasonable doubt that A.G. committed the sexual assault alleged, I find him not guilty of the offence contrary to s. 271 of the *Criminal Code*.

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CAIRNS T.C.J.