Citation: *R. v. D.R.,* 2025 YKTC 28

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Docket: 22-00216
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IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief 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:
Sabrina Cruz-Mendez and
David King — Counsel for the Crown
Kevin Drolet — Counsel for the Defence

RULING ON APPLICATION

[1] D.R. was convicted of one count contrary to s. 271 of the *Criminal Code*, on December 6, 2024. The reasons for judgment are reported as *R. v. D.R.*, 2024 YKTC 54. The matter was adjourned for sentencing and on March 3, 2025, D.R. filed an application seeking to re-open his trial to further cross-examine the complainant, A.S., in relation to her motive to fabricate the complaint.

[2] D.R. argued at trial that A.S. had a motive to fabricate the allegations against him in order to assist her in family law proceedings involving the child she shares with D.R.

(the “Child”). The application before this Court relates to a Notice of Application filed by A.S. in the Supreme Court of Yukon on December 10, 2024 (the “Family Application”), regarding custody of the Child, and her denial of access by D.R. to the Child on December 9, 2024.

[3] A s. 278.92 *Criminal Code* application was filed by D.R. to rely on the materials filed by A.S. in support of the Supreme Court of Yukon proceeding. The application was abandoned at the hearing of this matter and counsel urged this Court to instead rely on the Reasons for Decision of the Supreme Court of Yukon Justice indexed as *D.D.R. v. A.L.M.S.*, 2025 YKSC 24.

[4] Both parties agree that the test for the Court of Appeal to admit fresh evidence set out by the Supreme Court of Canada in *R. v. Palmer,* [1980] 1 S.C.R. 759, applies to this application. There are four factors to be considered as set out in *Palmer* at pg. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartine v. The Queen [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[5] The Ontario Superior Court of Justice addressed the test, adopting the application of the *Palmer* test, on an application to re-open a trial after a finding of guilt in *R. v. Birtch*, 2024 ONSC 7125, at paras. 42 and 43:

> 42 In *R v Arabia*, Justice Watt of the Ontario Court of Appeal reviewed the governing principles for re-opening the case and/or considering a mistrial even after the trial judge has "recorded findings of guilt". In such circumstances, a "more rigorous test" is required to protect the integrity of the process, which includes finality. First, when considering re-opening or a mistrial based upon fresh evidence, the test cited in *Palmer and Palmer v The Queen* respecting the introduction of 'fresh evidence' on appeal was favoured...
>
> 43 In addition to the *Palmer* criteria, a trial judge facing an application to re-open or declare a mistrial after a finding of guilt must consider whether the application is merely an attempt to reverse a competent trial tactical decision. As I have noted, an accused must ordinarily live with the consequences of those decisions.

[6] As the Family Application by A.S. was made on December 10, 2024, counsel agree that there was not a lack of due diligence on the part of defence counsel at trial regarding the subject matter. That is, the evidence did not exist at the time of trial and was not discoverable. There is also no dispute as to the credibility of the evidence given that this application relies on the Reasons for Decision in *D.D.R. v. A.L.M.S*.

[7] If the application is successful on re-opening the evidence in this trial, counsel agree that the result should be a mistrial considering my adverse credibility findings regarding the evidence of D.R (see *Birtch* at para 50; *R. v. Drysdale*, 2011 ONSC 5451).

[8] The focus of this application is on whether the evidence in question is relevant regarding the findings of credibility of A.S., specifically as it relates to A.S. having a motive to fabricate the complaint to weaponize her position in the family law proceeding. If relevant, then is it such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[9] According to D.R., the Family Application provides evidence of A.S.'s motive to fabricate, which she denied at trial, and goes directly to her credibility. The denial of having a motive to fabricate was expressed in the cross-examination of A.S. as follows:

> Q: And – but it's true Mr.- [D.R.] told you that he felt you were being a neglectful mother?
>
> A: Correct.
>
> Q: And during the argument, he told you that he felt you were abandoning [A.R.]?
>
> A: Correct.
>
> Q: And during the argument of July 3rd, 2022, [D.R.] also told you that he was going to seek full custody of his daughter.
>
> A: Correct.
>
> Q: And that was when you told him that you would see him in court.
>
> A: I told him I would see him in court after. That was the end. Yes.
>
> Q: So, as you told the police officer, your complaint was initiated by that argument with [D.R.].
>
> A: Correct
>
> Q: And – and in fact, the allegation of sexual assault that you made and the allegations of the video recording that you made didn't happen at all, did they?
>
> A: Incorrect.
>
> Q: In fact, what you were doing was fabricating a complaint to weaponize the criminal process for your advantage in the family proceedings.
>
> A: Incorrect.

[10] This cross-examination took place on December 4, 2024, and the subject matter was with respect to the initial complaint to the RCMP in July 2022. The cross-examination does not go to the future intentions of A.S. depending on the outcome of

the trial. That is, A.S. did not testify as to her future intentions regarding the family law proceedings should there be a conviction at trial. The focus was on an argument and the subsequent decision, days later, to report this incident to the RCMP in July 2022.

[11] The Crown re-directed A.S. on this issue following the above-noted exchange as follows:

> Q: [A.S.], Mr. Drolet just suggested to you that you made a false complaint to gain tactical advantage in the family proceedings. Can you say what are the current – what is the current state of the family proceedings between you and [D.R.]?
>
> A: It's null. I've dropped my family proceedings about a year ago now, so there's no family proceedings at this time.
>
> Q: And what is the – what is the custody and access arrangement right now?
>
> A: We are doing partial, so half and half, week on, week off, Monday switch-offs. [Our child] will go to school the week and then we do the switch-off on the Monday so the other parent will drop off.
>
> Q: And financially, is there any kind of – are there any kind of payments from one to the other between the two of you?
>
> A: We help each other out. [D.R.] helps me pay for her snowsuit and photos.
>
> Q: Any formalized like spousal support or child support or anything –
>
> A: no.
>
> Q: – like that?
>
> A: No.

[12] This line of questioning addresses the state of the parenting arrangement between the two, and the status of the family law proceedings, on the date of questioning. The questioning by the Crown does not address the future intentions of

A.S. What can be drawn from the questions and answers is that for approximately two years to the date of the trial in 2024, the charging of D.R. had not resulted in the weaponizing of this fact in the family law proceedings. Alternatively, had that been the case, there was no evidence produced at trial or on this application that it had been.

[13] The question before me is whether the conduct of A.S. after the finding of guilt is relevant to the finding of credibility. I must consider whether the post conviction conduct, more than two years after the report to the RCMP of the incident, is evidence of "fabricating a complaint to weaponize the criminal process". The absence of evidence that the criminal charges following the complaint by A.S. to the RCMP had been weaponized in the family law proceedings to the date of trial factors into the analysis. Further, if it is relevant then would it have affected the result of the findings on credibility.

[14] The Court in *Palmer* addressed this two-part analysis at pg. 776:

> Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. Firstly, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced.

[15] In the *D.R.* trial decision the questioning of A.S. with respect to motive to fabricate is addressed at paras. 24 to 27:

> 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.

[16] The credibility assessment of A.S. and the assertion of her motive to fabricate were further addressed at paras. 39 to 41:

> 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.

[17] The decision of A.S. to reach out for help and make the complaint against D.R. is addressed at para. 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.

[18] The *D.D.R. v. A.L.M.S.* decision relied on for this application was filed on May 5, 2025. I note the following summary in the decision at para. 7:

> In sum, the issue arises here because, according to the mother, serious incidents occurred during the parents' relationship, some of which led to arrests and detention of the father and criminal charges against him. These incidents occurred when the father had consumed an excessive amount of alcohol, and some occurred in the presence of A.S. The father's alcohol consumption and resulting behaviours during the relationship have caused the mother to fear for her daughter's safety while she is with her father. **The relatively recent conviction in December in Territorial Court of the father for sexual assault stemming from a 2022 incident appears to have triggered this fear in the mother**, as it was immediately after the conviction that the mother brought her initial application to this Court.
>
> [emphasis added]

[19] Of note is the finding that the sexual assault conviction was a trigger for the Family Application, which was primarily based on fear in relation to D.R.'s alcohol consumption and resulting behaviors. That is, the focus in the proceedings was on the safety of the Child while D.R. was consuming alcohol. In her analysis the Justice in *D.D.R. v. A.L.M.S.* notes at paras. 29 and 30:

> 29 I can conclude that the father did drink to excess during the relationship because he has admitted this, and this drinking led to situations, incidents, and behaviours that were unhealthy. I accept that these behaviours can have a negative impact on A.S. if she is exposed to them.
>
> 30 However, I note that these incidents that the mother describes as most troubling occurred almost three or more years ago. The mother says that since the separation, she has no first-hand knowledge of the father's actions or behaviours because of the no contact order and because she is not there during his parenting time. She has relied on third-party information, particularly the affidavit evidence of one friend who provided two affidavits, saying that she was informed by an unnamed person that the father had been partying while A.S. was in his care and had left A.S. with his own mother; and on another occasion, this friend was informed by yet another unnamed person that the father had brought A.S. to a party. No dates were provided for these incidents.

[20] She continues at para. 36:

> Indeed, **the mother said more than once at the hearing that she does not want to prevent A.S. from seeing her father**. She did not question the father's parenting abilities or his love for A.S. As already stated, **her concern is his drinking**, the behaviours associated with his drinking, from past experience, giving rise to a fierce desire to protect her daughter from harm.
>
> [emphasis added]

[21] D.R. urges me to conclude from the *D.D.R. v. A.L.M.S.* decision that there is evidence of motive to fabricate the allegations of sexual assault against D.R. by A.S. The difficulty with this argument is that it appears on the findings of the Supreme Court

Justice that the conviction against D.R. was a trigger, as opposed to the central focus, of the Family Application. The concern of A.S. appears to have been about the alcohol consumption of D.R. while their daughter was in his care.

[22] I am unable to conclude on the evidence before me that the Family Application and subsequent proceedings provide evidence that would necessarily be relevant to the finding of credibility in this matter. It is true that A.S. denied D.R. access to their child three days after the finding of guilt, followed by the filing of the Family Application one day later. However, there is no evidence from her at trial regarding her future intentions, which was a tactical decision made by D.R. at trial. The fact of the Family Application does not contradict or undermine the answers given to the questioning at trial.

[23] I am being asked to conclude that the actions of a victim after the finding of guilt in a sex assault trial should be predictable. This matter proceeded through the courts for an extended period of time and the impact of the verdict on a victim could be profound. Whether or not A.S. intended to pursue family law proceedings when testifying at trial in this matter, the impact of the verdict could very well have, as concluded by the Supreme Court Justice in *D.D.R. v. A.L.M.S.*, triggered her to take the action that she did.

[24] While the evidence may be potentially relevant, I find that it could not reasonably be expected to have affected the result of the trial. Attributing the post conviction actions of A.S. to a motive to fabricate in 2022 is speculative at best. Her actions can be

explained by the findings in *D.D.R. v. A.L.M.S.*, which counsel requested this Court to rely on. The Family Application does not directly contradict A.S.'s evidence at trial and does not support the re-opening of evidence.

[25] The application of D.R. to re-open the trial in this matter is denied.

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PHELPS C.J.T.C.