

Citation: *R. v. M.G.*, 2025 YKTC 63

Date: 20251022
Docket: 23-00564
23-00564A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

M.G.

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:
William McDiarmid
Kevin Drolet

Counsel for the Crown
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 refer to the complainant throughout by her initials, A.B., or, alternatively, as the Complainant. Given that the offence charged arose in a small Yukon community, the community will not be named, and I will refer to the accused and other witnesses by initials in order to remove potential identifiers to the extent possible.

[2] M.G. is charged with sexual assault contrary to s. 271 of the *Criminal Code* (the “Code”). Not guilty pleas were entered and the trial proceeded on September 4, 2025, in Whitehorse, Yukon.

[3] Three witnesses testified to the events of October 4, 2023 – the Complainant, a longtime friend of hers, and the accused. In addition to the *viva voce* evidence, Admissions of Fact were made. While the evidence of Complainant and M.G. overlapped in some areas, it diverged on the issue of consent. The Complainant’s evidence described non-consensual penile-vaginal penetration; M.G.’s testimony was of consensual oral sexual activity.

Summary of Evidence

[4] On October 4, 2023, A.B. and her friend, B.W., drove from their community to Whitehorse so that A.B. could do some shopping. A.B. said that she and M.G. were texting enroute, and she told him she would stop in and see him after she was done shopping. Upon visiting him, A.B. says M.G. asked if he could come back to her home community. In response, A.B. said she needed to ask B.W., given that he was driving her. B.W. agreed M.G. could join them, and M.G. returned with A.B. and B.W., staying overnight at the home of A.B.’s friend, C.U.

[5] At the time, A.B. was renting a room from M.W. and living about a block from C.U.’s home. Her evidence was that she was not allowed to have a guest at the place she was renting, so it was better to go to C.U.’s. A.B. said that M.G. was delivered to C.U.’s home by B.W., and B.W. then drove her home and helped her unload the groceries, after which she walked to C.U.’s. A.B. said she did not recall texting M.W.

that afternoon or night. The allegations of sexual assault arise from the night at C.U.'s home.

[6] A.B. says, after a night of partying with M.G. and C.U., she was tired and went upstairs to sleep in the bedroom of C.U.'s roommate, an individual who was not at home on October 4. She admitted smoking marijuana but denied drinking or smoking crack. A.B. says that M.G. followed her upstairs. A.B. described the roommate's room as having a mattress on the floor; she says she made the bed, crawled in wearing her clothes and lay down. She described the clothing she was wearing. She says that M.G. crawled into the bed and started to grope her and said, "it would only take a minute". In response, A.B. says she told him she was tired. A.B.'s description of the sexual contact is that M.G. pushed her bra up, proceeded to suck on her nipple, then pulled her pants and panties down to her ankles, spread her legs and penetrated her by inserting his penis into her vagina. A.B. says M.G. told her again that it would only take a minute and that she would like it. After the vaginal penetration ended, A.B. said M.G. said he was sorry but that he thought she had wanted it. M.G. then went back downstairs. A.B. said she remained lying in the room for a while and that it was hard to gain the strength to get up. She then put her pants on and ran into C.U.'s room, told him what happened, and stayed there for awhile. She said C.U. was awake when she went to his room and that both stayed awake. She said she saw M.G. again when she went downstairs as he was in the living room. A.B. described herself as gathering her things and storming out the door. She said that M.G. followed her to her home and asked her for a phone charger. A.B. said she was not thinking straight, grabbed the nearest charger, and gave it to him because she just wanted him to leave her alone.

[7] A.B. says that, in relation to the sexual contact, M.G. did not ask for her consent, she was frozen, felt powerless, and felt no control over her body. She said she did not give M.G. consent for any of the sexual contact. She says she told him multiple times over the course of the evening that she was only interested in friendship. When cross-examined, she said she was pretty sure she had told this to the police; however, upon reviewing her statement to police, she readily agreed she had not said this to them.

[8] C.U. testified next, saying that he and A.B. had been friends for many years but that he did not know M.G. well. Unfortunately, although C.U. was a Crown witness, he testified in less-than-ideal circumstances by holding a cellphone in his hand and testifying outside of a residence. The connection was poor, and he was interrupted from time to time. When asked if he was under the influence of drugs or alcohol while testifying, C.U. acknowledged that he had smoked a little marijuana.

[9] C.U.'s evidence was that, on October 4, 2023, there was a party involving him, A.B., and M.G. at his then-residence. He did not recall if A.B. and M.G. had arrived together at his home or arrived separately. The party involved drinking and smoking weed and crack. He revised his evidence later to say that only he had been smoking crack. He said that he went upstairs to bed when he was tired, leaving A.B. and M.G. in his living room. He was unable to sleep as he has bad anxiety, causing him to toss and turn. He said that when he was trying to sleep, A.B. came into his room appearing distraught and scared. When asked to describe her tone of voice when she spoke to him, C.U. said "too much vodka and marijuana and distraught". A.B. then stayed in his room.

[10] C.U. agreed that M.G. went to the store to get cigarettes in the morning. C.U. said he had coffee with M.G. in the morning but A.B. was gone. He did not recall if A.B. shared cigarettes with them that morning. When C.U. was asked if M.G. went up to bed to get some sleep after having coffee and cigarettes, C.U. said he had not. He said that M.G. tried to do so but that C.U. said it was better for him to leave, that he had to go.

[11] M.G.'s evidence was that he bumped into A.B. at Ashley's furniture store in Whitehorse, they started talking, and she asked him to help her find crack cocaine, giving him money for that purpose. He denied there had been earlier communication with A.B. by text, saying he had not had a cell phone for a long time. M.G. said he was able to hook her up with a supplier for crack cocaine, that she met him at a buddy's house later, and that he gave her crack cocaine.

[12] During cross-examination, M.G. described various interactions related to a drug transaction he says he was involved in. When asked about how he effected these transactions without a phone, M.G. said he texted A.B., then clarified he texted on his friend's or buddy's phone. He further explained these transactions by saying he caught a ride with a friend to the location to get the drugs. When asked how that person knew he was coming, he said he "got a hold of them". When asked how he got a hold of them, he said he phoned them but could not remember if he used a payphone or not.

[13] M.G. says that after the drug transaction, A.B. said she wished he could come back with her. He said that, at first, he did not want to go as he did not have a vehicle, and it would be hard to get home. Once some arrangements were made, he agreed to come. Upon arriving in her community, M.G. said they went to A.B.'s house, unloaded

the groceries, and together went to C.U.'s home. Once at C.U.'s, M.G. testified that he had brought vodka and all three smoked crack cocaine through the night. In the morning, M.G. said he walked to the store to get cigarettes. Upon his return, he said A.B. came down from upstairs and she, C.U. and he smoked cigarettes. Fatigued from the return walk to the store, M.G. says he told them he was tired and went to bed. M.G. said A.B. followed him to the bedroom, lay beside him, telling him to close the door. He said they smoked a bit more crack, she rolled on her side and put her hand on his chest, and they started to kiss and fool around. M.G. testified that they tried to have intercourse, but he was unable to get an erection, due in part, to his age. He says he then offered to perform oral intercourse on her and she verbally responded affirmatively, saying "yeah". M.G. said the oral intercourse did not last long as A.B. said she was not into it. M.G. said he stopped right away, and he went back downstairs afterwards to smoke more crack with C.U. In response to A.B.'s evidence that he had followed her home and asked for a phone charger, he simply said he did not have a phone.

[14] M.G. testified to consuming a significant amount of crack cocaine on October 4, 2023.

[15] In addition to the *viva voce* evidence summarized above, Admissions of Fact were made. The Admissions of Fact included:

- i. B.W. drove A.B. to her mother and stepfather's home in Whitehorse and dropped her off there.
- ii. Before driving back to the community, A.B. asked B.W. if she could visit another friend (M.G.) and this was accommodated.

- iii. Upon returning to their home community, at approximately 8:00 p.m., B.W. dropped both A.B. and M.G. at the home of M.W. where A.B. rented a room.
- iv. In the afternoon of October 4, 2023, A.B. texted M.W. to ask if she and M.G. could “hang out” there when they returned. M.W. waited up for them until, at 1:30 a.m., she texted A.B. to ask if they were coming to hang out. In reply, A.B. texted “soon”. M.W. fell asleep and did not see A.B. until morning.
- v. When M.G. was arrested on October 11, 2023, in A.B.’s community, he had two rocks of crack cocaine and a crack pipe in his trouser pockets.

Analysis

[16] M.G. is charged with sexual assault contrary to s. 271 of the *Code*. As with any criminal trial, M.G. is presumed 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 M.G. to establish his innocence.

[17] 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 the Complainant and the accused establishing that sexual contact occurred, although the type of sexual contact described differs. The issue to be decided

in this case is whether the evidence at trial proves beyond a reasonable doubt that M.G. committed the offence of sexual assault by having sexual contact with the Complainant without her consent. 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.

Application of the *W(D)* Test

[18] In this case, I must grapple with the conflicting evidence of the various witnesses. As in many sexual assault cases, the assessment of credibility and reliability is very difficult, as the allegations arise from an encounter occurring in private, leaving the trier of fact with the contradictory testimony of the two main witnesses. Here, this difficulty is heightened given the passage of time and the drugs and alcohol consumed by some of the witnesses. In addition to the evidence of the Complainant and the accused, the evidence of C.U. and the Admissions of Fact must also be considered.

[19] Given that M.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.

[20] The *W.(D.)* framework is designed to ensure that a trier of fact understands the following:

- (a) the burden of proof remains on the Crown throughout the trial;
- (b) the Crown must prove the accused's guilt beyond a reasonable doubt;
and
- (c) the question of whether the Crown has met its burden must be based on a consideration of the evidence as a whole and is not to be treated as a "choice between the accused's evidence and the Crown's evidence".

[21] Proper application of the *W.(D.)* framework requires that a trier of fact understand that, in a case where the accused person's exculpatory evidence is disbelieved, it does not mean that inculpatory evidence must necessarily be believed – nor that rejection of the accused's evidence automatically means the Crown has proven its case beyond a reasonable doubt (*R. v. Berg*, 2025 SKCA 85, at paras. 40 and 42).

[22] A criminal trial involves the assessment of all the evidence presented. The evidence of a complainant or an accused is not to be assessed in isolation and conflicting evidence is not to be approached as a credibility contest. While M.G. has denied that he sexually assaulted A.B., describing instead a consensual sexual encounter, M.G.'s evidence cannot be considered in isolation. His testimony must be assessed against the backdrop of the entire evidentiary record. If, based on the whole of the evidence, I am left with a reasonable doubt as to the guilt of M.G., I must acquit.

[23] I will start by reviewing the Complainant's testimony. While A.B. testified in a manner that appeared credible, there are some concerns about the reliability of her memory as it relates to several peripheral matters. Credibility and reliability are different. Credibility has to do with a witness's truthfulness, reliability with the accuracy of the witness's testimony.

[24] The following evidence raises some concerns about the reliability of A.B.'s recall. In her testimony, A.B. denied that B.W. dropped her off to visit her mother and stepfather in Whitehorse on October 4, 2023; however, it was an admission of fact that she was dropped off by B.W. to visit them that day. A.B. also testified that she was not really allowed to have guests at the house she was renting from M.W. to explain why the party with M.G. occurred at C.U.'s house. However, it was an admission of fact that she texted M.W. to ask if she and M.G. could "hang out" there that night. A.B. testified that, upon returning to her home community, B.W. dropped M.G. off at C.U.'s house rather than bringing him to her home. Again, it was an admission of fact that B.W. dropped both M.G. and A.B. off at her home to unload groceries. Finally, it was an admission of fact that M.W. texted A.B. about 1:30 a.m. on October 5, 2023, to ask when she and M.G. were coming to hang out, and A.B. texted back "soon". While A.B. did not deny texting M.W., she testified that she did not recall texting M.W. that afternoon or night. While these evidentiary inconsistencies relate to matters peripheral to the sexual assault allegation, they cause some concern about the reliability of her recall, and I remain mindful of this when considering her evidence.

[25] When cross-examined, A.B. did not agree that she and M.G. had just bumped into each other in Whitehorse. She remained steadfast that he knew she was coming to

Whitehorse as they had been texting back and forth and had arranged to meet. When it was put to her that M.G. did not have a cell phone at that time, she reiterated that they had been texting back and forth. She denied asking M.G. to get her crack cocaine or that she smoked it that night.

[26] In relation to the sexual assault allegation, A.B. provided a cogent and detailed account of M.G. penetrating her vaginally with his penis without her consent. A.B.'s account was not undermined during cross-examination – she denied M.G.'s version of events when it was put to her and denied initiating sexual contact with M.G. Perhaps most compellingly, when it was put to her that M.G. had been unable to get an erection and so had offered to perform oral intercourse on her, she expressed her clear recollection that he had been able to get an erection saying, “I remember at the time he was able to get an erection”.

[27] Among other inconsistencies, the evidence of A.B. and M.G. differed in respect of the timing of the sexual contact, A.B. saying it was during the night, M.G. saying it was in the morning after he returned from the store. Here, C.U.'s evidence that A.B. came to his room is important. C.U. says he went up to bed, leaving A.B. and M.G. in the living room. A.B. says she was tired and went up to bed. She says that M.G. followed her upstairs and that is when the sexual contact occurred. A.B.'s evidence that she went to C.U.'s room after the sexual contact is consistent with C.U.'s evidence that she came into his room during the night. While C.U. described A.B. as his “best friend”, he did not appear to be colouring his evidence to favour her; he was a somewhat reluctant witness. For example, while A.B. denied drinking that night, C.U. explained

her as distraught and scared when she came to his room in the night, describing her state, in part, as “too much vodka”.

[28] M.G.’s evidence that A.B. followed him when he went upstairs to the bedroom in the morning after his trip to the store is contradicted by C.U.’s evidence. I accept that A.B. stormed out of the house in the morning and, as such, was no longer at C.U.’s home to drink coffee, have cigarettes, and follow M.G. upstairs that morning. While C.U. agrees that M.G. went to the store in the morning, his evidence is that A.B. was gone by then. Further, C.U. says that when M.G. wanted to go upstairs to get some sleep in the morning after he returned from the store, C.U.’s evidence is that he told him he better go. I accept CU’s evidence on these points.

[29] Additionally, M.G.’s evidence about the drug transactions and related communications in Whitehorse was, in my view, evasive and strained, appearing implausible without a cell phone. I find that evidence bears on his credibility.

[30] Returning to the *W(D)* test, after considering all the evidence, including the evidence of C.U. and A.B., I do not believe M.G.’s evidence and am not left in doubt by that evidence. I find his evidence of how he and A.B. met up in Whitehorse and the subsequent transactions not credible. I do not accept his evidence of either the timing or nature of the sexual contact.

[31] This takes me to the third part of the *W(D)* test, which requires that I ask myself whether, based on the evidence I do accept, I am convinced beyond a reasonable doubt of M.G.’s guilt? Despite some reliability concerns regarding peripheral matters – visiting her parents, texting M.W. and being dropped off by B.W. in her community – the

evidence of A.B. that I do accept does not leave me with a reasonable doubt on the third part of the *W(D)* test.

[32] I accept A.B.'s evidence that she did not consent to the sexual contact she described with M.G. Her answers on cross-examination regarding the type of sexual contact – penile vaginal penetration – were compelling and believable. Her evidence withstood cross-examination, and she did not falter on crucial points. C.U.'s evidence in relation to timing and A.B.'s attendance at his room is consistent with A.B.'s evidence. The concerns about A.B.'s reliability in relation to peripheral matters noted above does not impact her evidence on the core allegations and does not give rise to a reasonable doubt about the honesty and reliability of A.B. regarding the sexual contact and lack of consent. I accept A.B.'s evidence that M.G. penetrated her vaginally with his penis and that she did not consent. I find that the offence contrary to s. 271 of the *Code* has been proven beyond a reasonable doubt and I find M.G. guilty of the offence charged.

CAIRNS T.C.J.