SUPREME COURT OF YUKON

Citation: *R.* v. *Abdullahi,* 2011 YKSC 64

Date: 20110817
Docket S.C. No.: 09-AP014
Registry: Whitehorse

BETWEEN:

REGINA

Respondent

AND:

MOHAMED MOHAMED ABDULLAHI

Appellant

Before: Madam Justice B.L. Keyser

Appearances:

David McWhinnie — Appearing for the Crown
Jennie Cunningham — Appearing for the Defence

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] KEYSER J. (Oral): Defence counsel has appealed this case on the basis that the learned trial judge improperly admitted statements made to the complainant's two friends when dropped off by the accused at the friend's house, and by using those statements to bolster the credibility of the complainant's testimony.

[2] I start by saying that the trial judge provided a lengthy, reasoned 15-page judgment before convicting Mr. Abdullahi. In it he makes it clear that he is alive to the test in *R.* v. *W.(D.),* [1991] 1 S.C.R. 742; that it is not a credibility contest between the accused and the complainant, and how the evidence is to be contextualized. He then

goes on to indicate that demeanour is of no particular significance in this case, as there was nothing in either the testimonies of the accused or the complainant that would say that one was truthful or untruthful vis-à-vis the other.

[3] At page 8 of the judgment, he discusses the state in which the complainant was in when she arrived at the friend's house; that is to say, crying and distraught and in a state that they had never seen her before. This is, of course, completely admissible evidence.

[4] The impugned parts of the decision are, basically, in paragraphs 20, where the learned trial judge talks of admissible, excited utterances, and paragraphs 23 and 24, which has the learned trial judge saying that he finds it difficult to find that she would have fabricated this story in these circumstances as quickly as she did, and presented it as consistently as she has throughout. Defence counsel maintains that these statements should not have been admitted, nor relied on for their truth.

[5] Prior consistent statements are generally inadmissible except in a narrow set of circumstances, and there are many valid reasons for this which are well-known and which I will not enumerate. One exception is to rebut the allegation of recent fabrication. This case, in my view, is not a case of recent fabrication. Just because an accused takes the stand to testify in his own defence and disputes the complainant's allegations and puts forward a possible motive to lie does not mean he is suggesting recent fabrication. But the matter does not end there.

[6] The courts have generally moved to a principled approach to hearsay, but they have also not abandoned the old pigeon-hole exceptions. These remain admissible

exceptions to hearsay except in rare cases. Such is the situation for excited utterances. In this case, the learned trial judge found the comments to her friends to be such excited utterances, which are presumptively admissible. Indeed, defence counsel did not dispute the admissibility of comments, just their truthfulness. Therefore, I find that the trial judge was not in error to have admitted the statements to the friends as excited utterances which could be used for their truthfulness. Despite that, the learned trial judge did not place much weight on these comments. There were several passing references to them in the midst of a lengthy, well-reasoned decision. I find that, therefore, he did not err in admitting the comments, or in his use of them. The appeal is therefore dismissed.

[7] I do note in passing that defence counsel is not the same as defence counsel at trial, and if this point had been raised and fully argued at trial it might be the case that the learned trial judge would have come to a different conclusion.

KEYSER J.