COURT OF APPEAL FOR YUKON

Citation: *R. v. Kinney*,
2013 YKCA 5

Date: 20130422
Docket: 11-YU697

Between:

Regina

Respondent

And

Donald Robin Kinney

Appellant

Restriction on Publication: Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Before: The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Neilson

On appeal from: Territorial Court of Yukon, December 8, 2012
(*R. v. Kinney*, 2012 YKTC 51, Watson Lake Registry No. 10-10132)

Counsel for the Appellant:	B.D. Vaze
Counsel for the Respondent:	T. Nguyen
Place and Date of Hearing:	Whitehorse, Yukon March 18, 2013
Place and Date of Judgment:	Vancouver, British Columbia April 22, 2013

Written Reasons by:
The Honourable Madam Justice Neilson

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] On December 8, 2011, following a trial before a judge of the Territorial Court of Yukon, Mr. Kinney was convicted of sexual assault: 2012 YKTC 51. He now appeals his conviction, arguing that it was unreasonable and unsupported by the evidence. Alternatively, he says the trial judge erred in his analysis and application of the decision of the Supreme Court of Canada in *R. v. J.A.,* 2011 SCC 28, [2011] 2 S.C.R. 440, which dealt with the element of consent in sexual assault.

Background

[2] On the evening of December 18, 2010, the complainant, C.G., became intoxicated to the point that she recalled very little from that evening. She found herself at the home of Twyla Merrick, where she said she went into a bedroom and passed out. She testified that she had no recollection of seeing Mr. Kinney at Ms. Merrick's residence, but when she awoke Mr. Kinney was on top of her, her pants were down, and he was having sexual intercourse with her. She pushed him off, got up, and left the house to go to a neighbour's and get a ride home. She later reported the event to the police, and gave a statement to them.

[3] Ms. Merrick did not testify, but the Crown conceded that if she had done so, she would have given this evidence: C.G. and Mr. Kinney were together in her living room and then walked hand-in-hand to the bedroom. About an hour later, C.G. came out of the room, said she had to go home, and left the residence.

[4] At trial, during her evidence-in-chief, C.G. testified that she had not consented to any sexual contact with Mr. Kinney, and that he was not even at Ms. Merrick's house that evening. On cross-examination, the defence put to her that when the police had asked her if it was possible she and Mr. Kinney engaged in something consensual, she had said, "Maybe, but I don't think so". She explained this was because she was drunk and didn't remember. She continued to deny any consensual sexual activity with Mr. Kinney, but did concede she might have walked down the hallway with him, saying she did not remember that and did not know.

[5] Mr. Kinney did not testify at trial.

The Reasons for Judgment of the Trial Judge

[6] The defence position at trial was that C.G. had consented to sexual intercourse with Mr. Kinney or, alternatively, her evidence as to consent was too vague and suspect to form the basis for conviction. Thus, the principal issue was C.G.'s credibility and reliability as a witness.

[7] The trial judge acknowledged this at the outset of his reasons:

> [3] The evidence of the complainant, though sketchy in many particulars due to her degree of intoxication, is a credible story; and indeed, there did not emerge during the course of the trial any reason to think that either she has concocted or imagined what occurred, or that she has misidentified her assailant. However, the reliability of her story is challenged by the defendant in some particulars.

[8] After setting out the evidence that suggested some consensual contact between Mr. Kinney and C.G., the trial judge assessed C.G.'s evidence in the context of the defence arguments:

> [6] In the circumstances, the accused argues that the complainant may have consented or, alternatively, that whatever occurred, the evidence of Ms. G. is simply too vague or suspect to form a safe basis on which to enter a conviction. In assessing the evidence of Ms. G., it is important to understand and remember that, while the complainant did admit the possibility that she and the accused went to the bedroom together and that something consensual occurred, she explained, in effect, that since she did not recall what had occurred, she logically could not deny the possibility that things had happened that she did not remember. When she did recall something, she was just as logically precise. It was put to her that she may have been driven to the Merrick residence by Roger Brace in company with the accused. She did not recall this, but allowed that it could have happened. It was then put to her that they had stopped on the way at Tag's store and bought 15 beer. She did not recall that either, but thought that did not happen since, on arrival at the Merrick residence, she was looking for her purse to get money to buy more alcohol. If they had just bought beer, she said, there would have been no need to get more. Seen in this light, the complainant's alleged admissions take on less force.
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> [7] However, it must also be recalled that the Crown admitted that Twyla Merrick, if called, would have said that the complainant and the accused did indeed go hand in hand to the bedroom. Although the admission is oddly framed, i.e., not that the event occurred but that Ms. Merrick would have

> testified that it did, I cannot ignore what Ms. Merrick would have said. It must be given some weight, enough at least to raise a reasonable doubt on that point. Therefore, the possibility that the complainant went with the accused willingly and at least, to some degree, affectionately to the bedroom, cannot be excluded. Nor can I exclude the possibility that some consensual sexual activity then ensued.
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> [8] However, that is not the end of the matter. As I have said, the complainant is a credible witness. She was very candid about what she could and could not recall. She was forthright in acknowledging that she might have gone with the accused willingly and that something consensual could have occurred. When she could not recall what happened, she refused to be adamant. However, when she could recall, she was unmoved. At the end of the day, she maintained that she awoke to find the accused having sex with her and that this was unwanted and without her consent.
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> [9] After *Her Majesty the Queen v. J.A.*, [2010] S.C.C.A. 147, it is quite clear that even if consent has been obtained, it does not extend to a time when the complainant is unconscious and thus incapable of consenting. In this case, I find that even in the somewhat unlikely, but certainly possible, event that the complainant initially consented, or indeed was capable of consenting it is, in my view, beyond doubt that she eventually passed out, and that while she lay comatose the accused began to have sex with her. She could not consent while unconscious, and did not consent once awake.

Analysis

1. Was Mr. Kinney's conviction unreasonable and unsupported by the evidence?

[9] Mr. Kinney contends that his conviction should be set aside because it was not supported by the evidence before the trial judge.

[10] The approach to be taken in considering this contention was discussed by the Supreme Court in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, and summarized as follows by Madam Justice Arbour in the companion case of *R. v. A.G.*, 2000 SCC 17 at para. 6, [2000] 1 S.C.R. 439:

> [6] ... embarking on the exercise mandated by s. 686(1)(*a*)(i) of the *Criminal Code*, the reviewing court must engage in a thorough re-examination of the evidence and bring to bear the weight of its judicial experience to decide whether, on all the evidence, the verdict was a reasonable one. Inevitably the verdict will be one that was open to the jury, in the sense that it was not an error of law for the trial judge to leave it to the jury for consideration. Moreover, it is not sufficient for the reviewing judge to simply take a different view of the evidence than the jury did. The appeal court, if it is to overturn the verdict, must articulate the basis upon which it concludes

> that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence. This is what must now be done in this case.

[11] Mr. Kinney argues, first, that there was no evidence that C.G. withdrew her consent during what the judge accepted may have begun as consensual intimacy.

[12] I see no basis on which this argument can succeed. C.G.'s testimony that she did not consent to intercourse with Mr. Kinney clearly provided some evidence that, if believed, could support a conviction. The central issue is whether the trial judge erred in accepting that evidence.

[13] Mr. Kinney argues the trial judge's finding that C.G. was a credible witness is not borne out on a proper examination of her evidence. He says, first, that although C.G. testified emphatically in-chief that she did not consent to any sexual intimacy with Mr. Kinney, on cross-examination she was shown to be inconsistent on this point, and had to concede the possibility of consensual intimacy. Mr. Kinney says that, as a result, the trial judge found her testimony about consent at the early stage of events was unreliable, and it was unreasonable for him to then accept her evidence that at a later point she withdrew her consent and had not consented to intercourse. He says C.G. was clearly suffering from alcohol-induced memory loss during the events, and so could not reliably testify that she had withdrawn consent. Mr. Kinney contends that C.G.'s high level of intoxication, and the trial judge's initial finding of unreliability, should have tainted all of her testimony, and the judge erred in failing to give sufficient weight to these significant flaws in her testimony. Had he done so, he would have found there was no reliable evidence as to what went on in the bedroom after C.G. entered it affectionately with Mr. Kinney. In short, he maintains the trial judge's conclusion that C.G. did not consent to intercourse was pure speculation.

[14] Mr. Kinney faces a high onus in challenging the trial judge's assessment of credibility. Appellate courts recognize that because trial judges have the advantage of watching and hearing witnesses testify, they are in the best position to judge testimonial reliability and credibility. As well, they appreciate that "assessing

credibility is not a science", and so it is often difficult for trial judges to precisely explain why they have accepted or rejected a witness' evidence. As a result, appellate courts approach findings of credibility with deference, and will only interfere if the trial judge has made a palpable and overriding error: *R. v. R.E.M.*, 2008 SCC 51 at para. 49, [2008] 3 S.C.R. 3; *R. v. Gagnon*, 2006 SCC 17 at para. 20, [2006] 1 S.C.R. 621. These principles were recently affirmed and summarized by the British Columbia Court of Appeal in *R. v. Ceal*, 2012 BCCA 19 at para. 25, 315 B.C.A.C. 138:

> In determining whether a verdict is unreasonable or cannot be supported by the evidence, the focus of the inquiry is on whether there is any evidence to support the trial judge's findings based on the totality of the evidence before him or her, and whether the verdict logically flows from those findings. An appellate court will not interfere with a trial judge's assessment of credibility absent palpable and overriding error in the findings that support his or her assessment.
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> [Emphasis in original.]

[15] Despite these difficulties, it is incumbent on trial judges to sufficiently explain their findings on credibility to an accused. In *R. v. Dinardo*, 2008 SCC 24 at para. 26, [2008] 1 S.C.R. 788, the Supreme Court explained this as follows:

> At the trial level, reasons "justify and explain the result" (*Sheppard*, at para. 24). Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error (see *R. v. Braich,* [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 23). As this Court noted in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, the accused is entitled to know "why the trial judge is left with no reasonable doubt" …

[16] Turning to the application of these principles here, I am not persuaded the trial judge's approach reveals any palpable and overriding error. He appreciated there were gaps in C.G.'s recollection due to her intoxication but found nothing to suggest her account was concocted or imagined. Instead, he described her as "logically precise" in that she related what she could recall, but conceded that she could not deny what she could not recall.

[17] The trial judge found Ms. Merrick's observations raised a reasonable doubt as to the credibility of C.G.'s testimony that there had been no consensual sexual intimacy when she initially went to the bedroom with Mr. Kinney. He went on, however, to find her a credible witness, and described her as "forthright" in conceding that some consensual intimacy may have occurred, given her limited recollection. He nevertheless found her "unmoved" in her account of awakening to find Mr. Kinney engaged in unwanted intercourse with her. He accepted that aspect of her testimony, concluding she could not have consented to intercourse while unconscious, and did not consent once she awoke.

[18] In my view, the trial judge's reasons adequately explained the basis for his findings on credibility, and the reason why he accepted that aspect of her evidence.

[19] The appellant's argument that the trial judge's rejection of C.G.'s evidence about initial consensual intimacy must taint all of her evidence ignores the principle that a fact finder is entitled to accept all, some, or none of the evidence of a witness: *R. v. Francois*, [1994] 2 S.C.R. 827 at 836, 116 D.L.R. (4th) 69. It was thus open to the trial judge to find some of C.G.'s evidence unreliable, but accept her testimony about a later event. It is instructive that C.G. was cross-examined at length about the possibility that she initially consented to intimacy with Mr. Kinney, but her testimony that she passed out and awoke to find him engaged in non-consensual intercourse was not challenged.

[20] I conclude Mr. Kinney has demonstrated no palpable and overriding error in the trial judge's findings of credibility, nor in his acceptance of C.G.'s evidence that Mr. Kinney had non-consensual intercourse with her. There was thus evidence that reasonably supported Mr. Kinney's conviction.

[21] I would not accede to this ground of appeal.

2. Did the trial judge err in his analysis and application of R. v. J.A.?

[22] In *R. v. J.A.*, the Supreme Court affirmed that a complainant must provide "actual active consent throughout every phase of the sexual activity" (para. 66), and

a complainant who is unconscious thus has no capacity to give meaningful consent (para. 36).

[23] Mr. Kinney says the trial judge wrongly engaged these principles to repair C.G.'s inability to remember what transpired, instead of considering what effect her alcohol-induced memory loss had on her account of events. He argues that *R. v. J.A.* only applies where there is clear evidence that initial consent to sexual activity was withdrawn, and the trial judge erred in invoking it to support Mr. Kinney's conviction when C.G. may have initially consented and there was no evidence to show her consent did not continue.

[24] This second ground of appeal, like the first, is dependent on setting aside the trial judge's findings of credibility. It fails for the same reasons. The trial judge accepted C.G.'s evidence that she passed out, and at that point it became impossible for her to consent to any continuing sexual activity, regardless of whether it had been consensual at the outset.

[25] I find no merit in this ground of appeal.

[26] I would accordingly dismiss the appeal.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Madam Justice D. Smith"