Citation: *R.* v. *Abdullahi,* 2010 YKTC 44

Date: 20100115
Docket: 09-00237
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

MOHAMED MOHAMED ABDULLAHI

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.*

Appearances:
Bonnie Macdonald — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): Mohamed Abdullahi has been charged with having committed a sexual assault, contrary to s. 271 of the *Criminal Code,* against K.L. At the trial of this matter, K.L. testified, as did two friends, H.A. and N.H. Also called by the Crown were Manager of City Bylaw John Taylor and two police officers, Corporal Gale and Constable Horbachewsky. Mr. Abdullahi testified on his own behalf.

[2] This is a case in which the only witnesses to the actual allegations of sexual assault are Mr. Abdullahi and K.L. It is clearly a case that turns on credibility and a case in which the principles set out in *R.* v. *W.(D.),* [1991] 1 S.C.R. 742, as

subsequently developed, apply to the evidence of the witnesses.

[3] The basic allegation as set out by K.L. is that she was walking home from her father's place in Whitehorse, having been unable to gain entrance to his place in the early morning hours. She was on Two Mile Hill, having turned down from the intersection of Two Mile Hill and Industrial Road. According to her, a cab driven by Mr. Abdullahi passed by heading up Two Mile Hill, pulled a u-turn, stopped, and asked her if she wanted a ride, at which point in time she said she had no money and she was going down to Ogilvie Street, which was not very far away.

[4] Shortly after getting into the vehicle - and, admittedly, her state of mind was upset at a number of factors; that she was leaving town the next day; she had not been able to get into her father's house; she was just generally upset - Mr. Abdullahi, instead of taking her to her place, turned onto Quartz Road and proceeded up towards Porter Creek. During the course of the drive towards Porter Creek, at one point in time, he exposed his penis and put her hand on his exposed penis, after which he took her, at her request, to her friend's house, Ms. H.'s, where Ms. A was also. That, in a nutshell, is her version of events. It sets out the basic allegation of sexual assault.

[5] This version of events is denied by Mr. Abdullahi who, basically, again briefly, states that she flagged him down. He [sic] got in the vehicle, asked her where she wanted to go, she initially said to an address on Ogilvie Street but then asked him to take her up to her friend's place in Porter Creek, which he proceeded to do, making one stop at the Baranov Trailer Park, where she left the vehicle, knocked on a door, came back into the vehicle, asked him if he knew where she could get any weed, and

then went directly to Ms. H.'s place on Centennial Road in Porter Creek, at which point in time she said she had no money and refused to give him anything in exchange, or as collateral, I guess, in order to ensure that she would subsequently pay him the approximately $20 fare, after which she left his vehicle. He decided that it is just one of those things that happens and drove away.

[6] Obviously, these two versions of events are completely different on the critical points. When an accused person testifies, the rule as set out in *R.* v. *W.(D.)* at page 758 applies:

> 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 a 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.

[7] The case of *R.* v. *Ay*, [1995] 93 C.C.C. (3d) (B.C.C.A.) 456 at page 460 stated as follows in elaborating somewhat upon particularly the second branch of the *R.* v. *W.(D.)* test: If you do not know whether you believe the accused or the complainant you must acquit, and if you do not reject the evidence of the accused you must acquit.

[8] It is clear in law that cases of this type are not to be viewed as credibility contests between a complainant and an accused. Finding one witness credible does not mean that there is a coincidental finding that the other witness is not credible. A number of factors are involved in assessing the credibility of a witness including but not limited to: independent evidence of other witnesses, prior statements, the physical, mental or emotional state of the witness at the time of the occurrence of events being

testified to, and the witness's demeanour on the stand. With respect to demeanour, much care must be taken in the consideration of a witness's demeanour when assessing their credibility because you may have self-conscious and nervous witnesses who appear hesitant and uncertain who yet may be telling the truth all the while, and you may have witnesses that appear confident, engaging, persuasive, and all the while are not necessarily telling the truth. There are a number of different ways in which people will testify on the stand that make demeanour, while still a factor for consideration, a factor that has to be handled very carefully when a Court is using it in a determination of credibility.

[9] Since the *R.* v. *W.(D.)* case, a number of other cases have considered the scope to which it should be applied in cases and, in particular, often dealing with cases where you are dealing with what is referred to quite often as the "he said/she said" case that takes place in a context in which there is going to be little other independent evidence that is of particular probative value on a case or on a determination of credibility, but not limited to those kinds of cases.

[10] In *R.* v. *Hall*, [2006] O.J. No. 3177 (C.A.), an accused was acquitted of aggravated assault and assault with a weapon. The trial judge reviewed the evidence and found it was inappropriate to compare the evidence of the accused with that of the complainant. The Court of Appeal clarified that not only was it allowable for the trial judge to compare the evidence of the accused to that of the complainant, the trial judge had a positive duty to assess the evidence of the accused in light of the whole evidence, and that includes the testimony of the complainant.

[11] In *R.* v. *Jaura*, [2006] O.J. No. 4157 (C.J.), Duncan J. stated what he considered to be the application of the rule of *W.(D.),* as being that a trial judge can reject the evidence of the accused and convict solely on the basis of his acceptance of the evidence of the complainant, provided that he also gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding this acceptance of the complainant's evidence.

[12] In *R.* v. *J.J.R.D.*, [2006] O.J. No. 4749 (C.A.) (leave to appeal dismissed 2007 S.C.C.A., No. 69), Doherty J. was writing for a unanimous court. This case involved an allegation of a father sexually assaulting his nine-year-old daughter. The evidence was the testimony of the victim, her diary, and the denial of the accused, and neither witness was significantly shaken on cross-examination. The appeal was grounded upon the judge accepting the evidence of the complainant and then rejecting the evidence of the accused without adequate reasons. The Court of Appeal found the trial judge's reasons had acknowledged the reasonable doubt standard of the principles in *W.(D.)* and that the trial judge had carefully assessed the evidence of the complainant and did not move directly from this finding to the guilt of the accused, but rather had concluded there was nothing in the testimony of the accused that would cause him to disbelieve the complainant's evidence. Doherty J. cautioned, in paragraph 36:

> [I] do not diminish the significance of the absence of any discernible explanation for the rejection of an accused's seemingly plausible denial.

But Doherty J. went on to state, at paragraph 53, that:

> The trial judge rejected totally the accused's denial because stacked beside (the complainant's) evidence and the

> evidence of the diary, the appellant's evidence, despite the absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt. An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of the accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

[13] The approach by Doherty J. certainly discards some of the rigid application of *R.* v. *W.(D.)* and takes a more expansive approach towards considering the evidence and determining credibility in cases where you are dealing with little or no outside direct evidence.

[14] *R.* v. *Dinardo*, [2008] S.C.J. No. 24, was a case involving a cab driver alleged to have sexually assaulted and exploited a passenger who was mildly mentally challenged. The complainant testified. There were inconsistencies and contradictions in her evidence. The accused testified and denied the allegations. The majority of the Quebec Court of Appeal upheld the conviction, finding that, even though the trial judge did not explicitly set out the test in *R.* v. *W.(D.),* he had considered that the substance of the *W.(D.)* instruction was respected. At paragraph 9 (sic) the Supreme Court stated that:

> In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.

[15] In *R.* v. *R.E.M.*, [2008] S.C.J. No. 52, again, a case involving an allegation of sexual assault, the trial judge, despite some difficulties with the complainant's evidence, determined her to be credible and, despite finding that some points of the accused's evidence were uncontradicted, disbelieved the evidence of the accused. The Court of Appeal overturned the conviction and ordered a new trial. At the Supreme Court of Canada, the court found that the reasons for judgment were sufficient, and with respect to the trial judge's failure to explain the accused's plausible denial. The Chief Justice found in paragraph 66 that:

> The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial.

[16] A summary of the principles that have developed in these cases is that there is now, right up to the Supreme Court of Canada, authority for the proposition that accepting the complainant's evidence on its own can lead to a rejection of an accused's testimony as long as the trier of fact does not fall into the error of moving from disbelieving the accused directly to a finding of guilt. Those are the principles that apply to this case.

[17] When I consider the evidence before me, and looking firstly at the demeanour of both witnesses, I can say that nothing in the demeanour of either witness would lead me to find that they were being untruthful or, either, would lead me to believe, on the basis of demeanour alone, that they are being completely truthful. Demeanour is not really a probative factor in this case, in and of its own, or of any particular significance.

[18] The complainant's testimony as to what occurred was consistent internally, both in direct examination and in cross-examination. Her testimony was consistent with the testimony of her friends, Ms. A. and Ms. H., with respect to what took place leading up to the cab ride, or leading up to, at least, the point at which they departed into Ms. H.'s residence and left K.L. and her other friend, Leanne (phonetic), to continue on in a different cab to where K.L. was dropped off at her father's house.

[19] The evidence of Ms. A., police officer Constable Horbachewsky, and K.L. makes it pretty clear that although K.L. had been drinking as much as, in her evidence, seven or eight drinks over the course of the evening, that in the morning, when this was reported to the police, which was at approximately 3:52 a.m. that Constable Horbachewsky arrived at Goody's Gas, the complainant was not showing any signs of particular intoxication. The evidence of Ms. A. and Ms. H. as to K.L. showing up at their door upset, crying, quite clearly distraught and, in Ms. A.'s words, who had known her two years, more upset than she had ever seen her in her life, is consistent with K.L.'s version of events. We were dealing with a fairly limited time frame here and not a lot of time had passed from the time that Ms. A. and Ms. H. had parted company with K.L. and K.L.'s return, and in all of the evidence of all of the witnesses, it is clear that things happened in a relatively short period of time, when you take into account the cab ride back to her father's, the walking from there to Two Mile Hill, and then the cab ride back.

[20] There were excited utterances, admissible as excited utterances, by K.L. to her friends, when she had calmed down enough from being upset, as to the allegation of

the sexual assault. There was action to attempt to call a cab immediately, that did not work, and to walk to Goody's Gas, and then Ms. A. called the police.

[21] Defence counsel has raised the issue of motive to fabricate, and the theory that defence puts forward and, in examining K.L. and in submissions, is that K.L. had no money for this cab ride, knew that she had no money for this cab ride, was not going to pay, and when she was being held accountable for that by Mr. Abdullahi, by grabbing her by the hand and him commenting that he was going to tell the police, she needed to come up with a story and she needed to do it very quickly, and she came up with the story that he had sexually assaulted her, and that she had never agreed to pay for the cab ride in order to protect herself from any of the negative repercussions of, effectively, stealing the $20 cab ride.

[22] The motive is not impossible or incapable of belief as being a reason for K.L. to have fabricated a story, but this needs to be looked at in the context of all of the circumstances. Firstly, given that it was clear that K.L. had no money, her friends had been buying her drinks because her bank card was not working and she had no other money, and that is uncontradicted, she would have had to effectively been planning, from the time the meter was turned on in the cab upon her getting into it, that she was going to somehow have to get out of this without paying. There is no question her initial intent, when she got into the cab, was to go to her residence at Ogilvie, which would have been a lot less money to get away with, but that she ended up at her friend's in Porter Creek. Now, these friends had been buying her drinks in the evening and it would seem that it would have been a lot easier to attempt to have borrowed money from them to pay for the cab ride than to come up with this whole story as to

having been sexually assaulted that would drag her into a rather convoluted process with the RCMP and the court system.

[23] Mr. Roothman, for the defence, points out that she did not initially intend to call the police, and in fact, it was a friend who did that and that circumstances may have spiralled beyond what she intended by originally telling her friends this story and that she got caught up in them. But I find it difficult, on all of the evidence, to find that K.L. would have fabricated this story in these circumstances as quickly as she did, and presented it as consistently as she has throughout. Certainly she would have been able to, perhaps, make greater efforts to persuade her friends, who also initially only thought about calling the cab company, from continuing through with the RCMP, but there is no evidence that she attempted to do that at all.

[24] Her actions the next day, I believe it was, when she was out with her friend again, in seeing the vehicle parked in front of the laundromat in the Tags parking lot, changing the direction, driving in, getting the licence plate number, seeing that it was Mr. Abdullahi in the vehicle and then going to the police with this, while not completely inconsistent with, or perhaps even consistent with, continuing an elaborate story, are also quite consistent with the version of events that she tells, and certainly shows some intention to continuing the path that she had started on.

[25] There was an issue raised with respect to how she could not have possibly seen the penis of Mr. Abdullahi being taken out of his pants before he grabbed her hand and put her hand on it. In the context of this being in a vehicle, certainly peripheral vision could have made it possible to have been seen, the fact that she had indicated that his

right hand was pulling on her and his left hand was driving. I have considered the evidence in the transcript, including the evidence that she gave with respect to Mr. Abdullahi having first put her hand on his thigh, and she had indicated she did not look over when he did that, and doing it again and putting it on his penis, and find that there was clearly, given her emotional state, given what was going on in the vehicle at the time, we are not dealing with an unobstructed view in testimony, that: I was looking at his hands at all times and his hands at all times were doing these two things, and no, I do not have any idea as to how his penis came out. There was opportunity for this to have occurred that she would not have seen and would not have observed. Certainly the distance between the seats and her evidence as to him reaching over with his right hand onto her shoulder and pulling her, undoing the seat belts, is not something that would have been so difficult to do as to border on impossible and have any particular impact on her credibility.

[26] Her reactions in the vehicle, I find, based on the story she says, is consistent with the story and the version of events she gave, because she noted quite clearly that Mr. Abdullahi was not aggressive and that she was angry, and she made it pretty clear that this was not behaviour that she wanted to have any part of, and he continued to drive. The fact that he did not pull off in order to perhaps attempt to make greater sexual advances I do not find at all impacting on her version of events, because it is consistent with his fairly non-aggressive approach in the vehicle, and opportunistic approach, based on her testimony, in the sexual assault, much rather than a predatory approach. Any aggressive behaviour on her part, such as striking him or grabbing the steering wheel, could certainly have perhaps escalated the situation.

[27] Overall, I find nothing in the evidence that discredits her evidence or gives me any concerns as to her evidence being believable and a version of events that took place. That is not the end of the matter, because the evidence of Mr. Abdullahi is evidence that must be given fair consideration, and certainly I can believe the evidence of a complainant and still find that, based on the evidence of the accused, that, notwithstanding that I have no reason to disbelieve the complainant I can still find a reasonable doubt raised by the evidence of the accused individual. So I need to consider carefully Mr. Abdullahi's evidence in light of the evidence of not only the complainant, but the evidence of the other witnesses.

[28] Mr. Abdullahi denies all of the basic allegations. He indicates that, yes, she was upset. His evidence and hers coincides that he turned the meter on as soon as she got into the vehicle, that she originally told him she wanted to go to Ogilvie Street, and that they ended up turning left and ended up on Quartz Road and ended up driving her to her friend's place in Porter Creek. The evidence is consistent on all those points other than at exactly which corner they turned, whether it was through the Chilkoot, through the parking lot area by Walmart, or whether it was at Second Avenue. I do not find anything of particular significance turns on which one of those two places the left-hand turn was made.

[29] His evidence is that she was quite upset and that he did touch her on the head, as a father would touch a daughter or an older brother to a sister, in a way to attempt to calm her. Her evidence was that originally when he touched her, although she said it was on her neck and shoulders, which he denies, that it was in a calming and soothing

manner. He was off-shift and had turned around, according to him, when he had been flagged down.

[30] There are some issues that arise with respect to his evidence in that he does not have trip sheets available. His indication or evidence was that he had run out of trip sheets just before the shift had begun, and that he did not keep track of all of the trips he had taken on separate sheets of paper because they would get lost, possibly, and it just was not the way that he did it. He also gave evidence that he could have obtained a meter readout at the end of the day that would have provided information with respect to his trips but that he did not do that.

[31] We have the evidence that he provided about the stop at the Baranov Trailer Park, which was denied by K.L., who would not, in her evidence, have any idea why the Baranov Trailer Park would have been brought forward. We do not know. We have a photograph of the residence provided by Mr. Abdullahi but we do not know who lived in that residence and there is no information before me with respect to any efforts made to determine who was in that residence.

[32] There is also the lack of evidence that Mr. Abdullahi ever informed the RCMP of this theft by K.L. despite having had opportunity to do so, this opportunity arising ostensibly when Constable Horbachewsky attended at his residence shortly after 7:00 a.m. on June 20th and spoke to him, and on the 24th, when Constable Horbachewsky spoke to him by telephone and asked him to come down to the detachment. Now I say this keeping in mind that the evidence appears to be that when Constable Horbachewsky spoke to Mr. Abdullahi he did not, on either of those two occasions,

advise him of why he was speaking to him or make any reference to K.L. So there would not have been an automatic trigger provided that would have caused Mr. Abdullahi to necessarily inform the RCMP of the theft.

[33] Then there is the evidence that arose from the *voir dire* on reply evidence or rebuttal evidence with respect to character. Mr. Abdullahi had raised his character during his cross-examination and I decided, in separate reasons, that the evidence that he had been in a sexual relationship with a Ms. Nadeau was admissible in order to rebut the evidence of good character that he was, as I found, not the kind of person that would have committed the offence with which it is alleged because of his faith and his marital and family status, in that people of his faith do not commit adultery. In all the context in which that was stated I found that the rebuttal evidence was admissible, and it is admissible not only for the purpose of rebutting the evidence of good character but for consideration in the context of assessing the credibility of Mr. Abdullahi.

[34] One other factor I had not mentioned with respect to assessing the evidence of K.L. is that, even acknowledging the relatively short time with which she would have had to come up with this story and tell it to her friends and carry it through right up to testimony on the stand, that she certainly understated, to some extent, what she saw or what occurred and did not take opportunities to try to make it clear that she saw the penis come out or say that his initial touchings of her were aggressive, and, if anything, she seemed to present what took place in a very calm and simple manner. As Crown counsel has pointed out, she certainly was quite upset to her friends, the one that had known her for quite a period of time, and would certainly have had to have done a

pretty good job with her story to convince this friend, that describes her as being a very calm person, that she was so upset to the point that she had never seen her that upset.

[35] None of those factors I identified with respect to the evidence of Mr. Abdullahi on their own are of any great significance, including the extent, to any, that his credibility may have been affected by the good character evidence he adduced and my subsequent finding that it was rebuttable. But when I consider all of the evidence, and when I consider the evidence of K.L. in comparison to that of Mr. Abdullahi, and when I consider what I perceive to be, or what I find to be, a lack of holes in the testimony of K.L. and some problems with the testimony of Mr. Abdullahi, I find I am satisfied beyond a reasonable doubt that the Crown has proven the offence charged and find him guilty of the offence.

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COZENS T.C.J.