Citation: *R.* v. *Boparai*, 2012 YKTC 33

Date: 20120404
Docket: 11-00511
Registry: Whitehorse

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

REGINA

v.

SUKHDEEP SINGH BOPARAI

**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:
Joanna Phillips — Counsel for the Crown
André Roothman — Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] COZENS C.J.T.C. (Oral): Sukhdeep Singh Boparai has been charged with having committed the offence of sexual assault and having entered a dwelling house, contrary to sections 271 and 349(1) of the *Code*.

[2] The complainant in this case, V.P., was a resident at the Chilkoot Trail Inn and also a part-time employee there. She testified and, briefly put, stated that she and her partner had been out drinking that night. They had gotten into an argument. She came back to the Chilkoot Trail Inn, which was locked, as it usually is each evening. She did not have her keys because her partner had them. She knocked on the door. Mr.

Boparai let her in and, at her request, took her up to her room, opened the door, and let her into the room.

[3] Her evidence is that approximately 15 minutes later, there was a phone call from Mr. Boparai indicating that she had to stop crying and that he was going to come up, to which she said, “Don’t come up.” However, approximately 30 seconds later, he came to the room, opened the door, walked into the room, came towards her and was kissing her on the face and the neck over her protests. She yelled as loudly as she could and he left. She went down into the lobby area where he was and confronted him with respect to what had just taken place in the room.

[4] Now, initially, after what she indicated occurred, she was crying and upset, went looking for her partner in other rooms and located an individual named Mike on a different floor, and in his presence, and, as indicated in cross-examination, the presence of another individual, Mr. Shane Papineau; confronted Mr. Boparai.

[5] She placed her level of intoxication as about a seven out of ten, with ten being the most severely intoxicated, indicating that she drank a total of eight or nine beers over the course of the day, stopping about an hour before this occurred, at 10:00 p.m. or shortly thereafter.

[6] Mr. Boparai took the stand and denied having gone up to the room and entering the room. He indicates that she came, did not have her keys, he let her in, and went up to the room and let her into the room, but without him ever going back to the room. She came down and started accusing him of having raped her or kissing her and assaulting her.

[7] There were several other witnesses called. Perhaps the most useful from a probative point of view was Shane Papineau, who happened to be in the lobby at the time that Ms. P. first came back to the Chilkoot Trail Inn without her keys, and who also waited while Mr. Boparai let her into the room the first time. Mr. Papineau took the toilet paper he was waiting for, went back to his room, heard the noise out front and came back out into the lobby.

[8] It appears that the complaint was not made by Ms. P. herself, because other events took place, by her evidence, and it seems consistent with what took place, that she told her partner what had happened and he went to the front lobby and confronted Mr. Boparai, yelling. Mr. Papineau, in the morning, heard that yelling, went up into the area, and ended up calling the police. The police came and Mr. Papineau advised the police of what had taken place that morning, as well as what he had observed the night before, and the investigation subsequently led to the charges against Mr. Boparai.

[9] There was considerable evidence with respect to prior incidents where complaints had been made and the police had attended in respect of altercations between Ms. P. and her partner. I do not find them of any particular significance in assisting me in deciding this case. There is also evidence related to potential or actual eviction by the owner of the Chilkoot Trail Inn that potentially could have gone to motive. I do not find this evidence, as it unfolded, to be of any real assistance at all in helping me decide this matter. This is a case that really is a case of credibility, falling strictly within the analysis set forth in *R.* v. *W.(D).*, [1991] 1 S.C.R. 742, and the cases that subsequently follow.

[10] Dealing with the evidence of the complainant first, there is no particular magic in this evidence to deal with, as long as you give all of the evidence a fair consideration. Ms. P. was candid in her evidence. She was not given to embellishment in that she is not describing what would, along the lines of sexual assault, be of a more major nature. She was clear in her testimony. She was not challenged in her testimony, particularly in cross-examination, and there is nothing in her evidence that is inconsistent either internally or with the remainder of the evidence, aside from the directly contradictory evidence. So in as far as she delivered her evidence, it was her evidence, certainly, that put the case squarely before the defence, because her evidence was strong and it was persuasive evidence, standing on its own. That, of course, is only one factor in considering the entirety of the evidence.

[11] Mr. Boparai only fairly recently came to Canada and his English, although understandable, is not as clear. Certainly, when I assess his evidence, I have to consider, as I need to do with all witnesses, the person and how they deliver their evidence and the cultural and linguistic differences that they bring. There are many other factors when one looks at the demeanour of a witness in their evidence, which one takes into account and the Court must always be very careful in trying not to put undue weight on how a witness delivers evidence or how a witness seems to understand questions. At the end of the day, it is how the witness actually answers the questions and deals with them that is of most significance to the Court.

[12] His evidence is not complex. It is consistent with the other evidence up to the point that there is the indication that there was the second visit to the room. Now, Mr. Papineau's evidence, when looking at the evidence of Mr. Boparai, certainly recognizes

that Mr. Boparai came down, but then Mr. Papineau left and there is clearly opportunity for Mr. Boparai to have gone up to Ms. P.'s room. The fact that he would have left his desk unattended for a period of time to do this, really, it is a locked door, and that is not outside of the realm of possibility. There is nothing that would say that he could not have done this, but he says he could not have done this, and I must assess his evidence in light of all the remainder of the evidence. He was working at the time, indicates that he does not drink, and that is one factor to take into account. We are not dealing with a case where we have two individuals who were intoxicated and whose recollections might be affected as a result of the intoxication.

[13] The only real evidence that contradicts his evidence is the evidence of the complainant. Now, the *R.* v. *W.(D.)* case, *supra*, simply stated, is that first, if I believe the evidence of the accused, obviously I must acquit. That, of course, presupposes that the evidence of the accused is exculpatory, which, in this case, it was. Second, if I do not believe the testimony of the accused but am left in a reasonable doubt by it, I must acquit. Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence I do accept, whether I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[14] In this case, standing alone, on the evidence of the complainant, I would not be left in any doubt, because her evidence, standing alone, would have been sufficient to have upheld a conviction.

[15] Now, the case of *R.* v. *Ay* (1994), 93 C.C.C. (3d) 456, B.C.C.A., in considering *W.(D.)*, stated that: 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.

[16] Cases have also at times struggled with how to deal with assessing the credibility of an accused when looking at the credibility of the complainant. In *R.* v. *Jaura*, 2006 ONCJ 385, out of Ontario, Duncan J. stated that:

> ...a trial judge can reject the evidence of an 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.

[17] In *R.* v. *J.J.R.D.,* [2006] O.J. No. 4749, Doherty J. stated that a trial judge who is carefully assessing the evidence of the complainant cannot move directly from a finding of credibility to the guilt of the accused person but has to conclude that there is nothing in the testimony of the accused that will cause him to disbelieve the complainant's evidence.

[18] He went on to state 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.

[19] In *R.* v. *C.L.Y.*, [2008] 1 S.C.R. 5, out of the Supreme Court of Canada, the issue is not the basing of a verdict on a choice between an accused and the Crown's evidence but whether, considering the entirety of the evidence, which includes the evidence of the complainant, the trier of fact is left with a reasonable doubt.

[20] Then in *R.* v. *Dinardo*, 2008 SCC 24, the Court stated that:

> What matters is that the substance of the D.W. instruction be respected. 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.

[21] Courts are not required to find corroboration for a complainant's evidence. It is evidence on its own. When assessed against the evidence of an accused, it can, in some circumstances, lead to a finding of guilt and a rejection of the evidence of the accused. The question for me: Is this that kind of a case?

[22] When I look at the entirety of the evidence, when I consider the parts of the evidence that are consistent with each other from all of the witnesses, and the parts that are different, I find that this is not such a case. While the complainant's evidence may well be true, and it is certainly capable of being true, it is not evidence that, standing with all the evidence, is so persuasive that I find that I can reject the evidence of the accused such that it does not raise a reasonable doubt. This is not a finding of innocence. It is a finding that I cannot be persuaded beyond a reasonable doubt that Mr. Boparai committed the offences he is alleged to have committed.

[23] Given that I have this reasonable doubt, it would be unsafe to enter a conviction and Mr. Boparai is acquitted of the charges.

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COZENS C.J.T.C.