Citation: *R.* v. *Kinney*, 2012 YKTC 51

Date: 20111208
Docket: 10-10132
Registry: Watson Lake
Heard: Whitehorse

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

REGINA

v.

DONALD ROBIN KINNEY

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:
Terri Nguyen — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR JUDGMENT

[1] FAULKNER T.C.J. (Oral): Donald Robin Kinney is charged with sexual assault. The story told by the complainant in this case is simple and all too familiar. A woman drinks to excess, passes out and is sexually assaulted.

[2] On December 18, 2010, C.G. drank far too much. In consequence, she remembers little of the evening in question. By means she cannot recall at this time, she found herself at the Twyla Merrick residence. She was grossly intoxicated and looking for her purse, which she could not find. Eventually, she went to a bedroom and passed out. When she awoke the next morning she found the accused on top of her. Her pants were down and the accused was having sexual intercourse with her. She had no recollection of the accused even being in the house prior to this time. She

pushed him off of her and got up. She left the house and after going to a neighbour's, got a ride home.

[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.

[4] The Crown admitted that Twyla Merrick, if called, would have testified that Ms. G. and the accused were together in the living room and proceeded hand in hand to the bedroom. About an hour later, Ms. G. came out of the room and said she had to go home, and left the residence.

[5] The police were aware of Ms. Merrick's claim and when they were interviewing Ms. G. they confronted Ms. G. with this information. Ms. G. allowed that she did not remember such an incident, but conceded that it might have happened. When the police then suggested that something consensual might have occurred, Ms. G. said, "Maybe, but I don't think so."

[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.

[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.

[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.

[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.

[10] In the result, I find the accused guilty as charged.

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FAULKNER T.C.J.