

Citation: *R. v. Roberts*, 2015 YKTC 44

Date: 20150804
Docket: 13-00811
13-00811A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Orr

REGINA

v.

JAMES NATHAN ROBERTS

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

Appearances:
Keith D. Parkkari
James Roberts
J. Robert Dick

Counsel for the Crown
Appearing on his own behalf
Appearing as *Amicus Curiae*

REASONS FOR JUDGMENT

[1] ORR T.C.J. (Oral): James Nathan Roberts has been charged that on or about February 15, 2014, in the Village of Teslin, in the Yukon Territory, did commit a sexual assault on S.B., contrary to s. 271 of the *Criminal Code*. The Crown has proceeded by way of indictment. The accused has elected to be tried in the Territorial Court and the case has proceeded.

[2] As in any criminal case, the accused has nothing to prove. The onus is on the Crown to establish beyond a reasonable doubt that Mr. Roberts committed the offence

as alleged. Mr. Roberts has nothing to prove. Should he choose to testify, as he did in this matter, his evidence is subject to the same review as to credibility and reliability as that of any other witness.

[3] In looking at the assessment of credibility and reliability, the Court considers:

- Does the witness have any difficulty in recalling the details of the event? Is there any reason for that difficulty, either through the passage of time, consumption of alcohol or drugs, poor memory, or for any other reason that may explain that?
- How does the witness testify? Is their answer straightforward or is it difficult to follow, complicated, convoluted? Does it make any sense?
- How does the witness answer questions? Do they answer in a straightforward manner or are they hesitant, evasive? Do they answer the questions with questions themselves?
- Does the evidence make any sense? Are they in a position to see what they say they saw or is there some sort of an obstruction or difficulty, such that would prevent them from seeing what they claim to have seen or experience what they claim to have experienced?
- Do they have any motive to give the evidence that they are providing in respect of the matter? Is there a difficulty or problem, such that would affect their ability or their interests in respect of the matter as to testifying in one manner or another?

[4] The case of *Browne v. Dunn* indicates that you have to put to a witness your version of the events so that that witness has an opportunity to agree, disagree, or clarify the situation, but you are not to raise that version for the first time in your defence, without giving a witness that opportunity.

[5] In this case, Mr. Roberts is representing himself. However, counsel was appointed, in order to conduct the cross-examination of S.B. in this matter, as set out in the *Criminal Code*. Certainly there was experienced counsel who would have been in a

position to put those matters to S.B. with respect to a lot of the evidence that came from Mr. Roberts in his evidence when he choose to give it. Those were matters that should have been put to her, but she did not have an opportunity to address those, agree or disagree with him. As a result, it is a question of how much weight, if any, should be given to that evidence.

[6] We also have the decision of the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which indicates that, in a case of this nature, if I believe the accused then I must acquit. That, of course, is based on the idea that his evidence must constitute a defence. If I do not believe the accused but believe his evidence could reasonably be true, I must acquit. Again, that is on the basis that his evidence would constitute a defence. Finally, if I do not believe the accused or believe his evidence could reasonably be true, I have to be satisfied, on the evidence, that I do accept that the Crown has proven all of the elements of the offence beyond a reasonable doubt, otherwise I must acquit.

[7] Mr. Roberts' evidence is that he was invited to the residence of S.B. on the date in question to smoke drugs and to drink. He went there. He passed out on the couch and awoke to her screaming at him to leave, which he did. He testified, "I was not so drunk that I did not know what was going on."

[8] The issue, of course, is not what someone remembers. It is not a defence to say, "I don't remember doing that." It does not mean you did not do it or that it did not happen. It only means that you do not recall it.

[9] Mr. Roberts also indicated that he remembers that he passed out. The next thing that he remembered was her screaming at him and that he remembered sleeping. It was certainly indicated that it is -- difficult to indicate -- sir -- a person remembers sleeping, the state of sleeping being one in which you are not awake therefore alert to what is going on, but he indicated he remembered going to sleep is what his comment was in summation.

[10] Mr. Roberts stated that S.B. was screaming at him, that that woke him up. Obviously, if someone is screaming at you there would be some issue. Obviously, she was unhappy. In fact, that confirms her evidence in this matter that she was very unhappy and that she did scream at Mr. Roberts to leave after the alleged incident with him. Mr. Roberts, in his evidence, does not admit or deny the incident. In fact, he does not refer to it. He simply indicates that he passed out on the couch and woke to her screaming at him to leave, which he did.

[11] It was obvious that S.B. was very emotional during her testimony. According to her evidence, this incident has had a significant impact on her, her children, and how she has dealt with this allegation. She knew Mr. Roberts. Whether she invited him or he just dropped by, she certainly confirmed in her evidence that he was at the residence. They drank and smoked dope. A third person came to the residence, a Mr. George Sydney.

[12] She indicated she had asked Mr. Roberts to leave, but due to the fact that it was extremely cold -- minus 30, in the middle of February -- that Mr. Sydney persuaded her to let Mr. Roberts stay. She also indicated to Mr. Sydney that he may as well stay, too

and that he had passed out on the main floor. She went to her bedroom, which was in the basement at the time, with her children. There is no suggestion that S.B. in any way invited anyone to her bedroom, other than the two children who were quite young at the time.

[13] She awoke early the next morning to find her boys awake. She indicated that the light was on in the bedroom and that Mr. Roberts had his finger in her vagina, inside both her sweatpants and the underwear that she had on, which she described as a thong. She screamed at him to leave. She went upstairs. Mr. Sydney was still there. S.B. reported it to her instructor of the course that she was taking that day, as to why she could not be at the course that day. Several days later, she reported the incident to the RCMP.

[14] While she was quite emotional and had a great deal of difficulty in relating the incident, she was subject to cross-examination by counsel appointed for that purpose. She did not change her evidence on cross-examination. There was no suggestion of any problems, nor was that canvassed that she had any issues with Mr. Roberts prior to that time. There was no suggestion of any history of problems between the two, such that she would have reason to harm him by making such an accusation against him. There was no suggestion that this was provided as an excuse to Child and Family Services. In fact, she indicated, quite to the contrary, that her behaviour following this incident, in order to try and forget it, was such that that caused her the problems with Child and Family Services, which resulted in her losing her children. She did not attribute that directly to Mr. Roberts, but certainly to the manner in which she dealt with the matter. She was quite forthcoming in that regard and in fact, she indicated during

her testimony that her concern was what harm might have befallen her children and her inability to protect them from such harm or possible harm.

[15] I accept the evidence of S.B. in respect of this matter. There was no suggestion, either on direct or cross-examination, that in any way she invited or consented to this activity. While she had consumed drugs and alcohol on the night in question, there is no evidence that she was highly intoxicated or unable to recall the incident or the details of it. In fact, during her testimony, at no time did she ever indicate any difficulty in recalling the details of this particular incident. I found her to be a credible witness whose evidence is capable of being relied upon.

[16] Certainly the evidence of Mr. Roberts does not amount to a defence in respect of this matter, that he passed out and the next thing that he recalls is her screaming at him. As far as whether it could reasonably be true, it certainly, again, does not amount to a defence in respect to this matter.

[17] I am satisfied in this matter that the Crown has established beyond a reasonable doubt that on February 15, 2014, at Teslin, that James Nathan Roberts did sexually assault S.B. by placing his finger inside her vagina while she slept, which woke her up, and that that was done without her consent. I enter a conviction on the charge under s. 271 of the *Criminal Code* as a result of those findings.

ORR T.C.J.