Citation: *R. v. Rosenthal*, 2014 YKTC 35

Date: 20140527
Docket: 13-00471
Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Schmidt

REGINA

v.

ASHTON REED ROSENTHAL

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:
David A. McWhinnie — Counsel for the Crown
Melissa D. Atkinson — Counsel for the Defence

REASONS FOR JUDGMENT

[1] SCHMIDT T.C.J. (Oral): I will commence by briefly summarizing the circumstances of the evening that led up to this complaint.

[2] J.P. found himself alone in a house that he shared with his mother and, one evening, he decided to have some friends over. He was 22 years old. J.P. phoned three people he knew to come and spend the evening with him, and they would find something to do. One was Mr. Ashton Rosenthal, who had previously lived at the house before he got a dormitory room at the college, a person named A. who no longer lives here and did not give evidence but another young man who was a friend, and the three of them did try to recruit other people to come, but without success, except for the complainant, J.H., who was called, either by text or phone, and agreed to come over.

[3] She was told it was going to be a hot tub and dance party. The dance party part was because the two young men, Ashton and J.P., were DJs, had equipment, and did rent themselves out to other parties, and they apparently spent a fair amount of time DJing together. The complainant knew that this was going to be that kind of party because she, in fact, had J.P. and Ashton DJ her own parties at her house.

[4] J.H. also knew it was going to be a hot tub party, where they would all go in the hot tub together.

[5] J.H. agreed to come, and went over on her bike; she only lives a short distance away.

[6] There are real conflicts in the evidence as to when J.H. actually came to the party. It could have been 9 p.m., it could have been after midnight. But, in any event, when she did arrive, the boys had been drinking somewhat and she said they seemed fine; they were not slurring their words or anything like that. They had been drinking mojitos and possibly beer at that point. It did not take J.H. long to catch up. She was sober when she arrived but, after a short period of time, they were all in about the same condition, and that was not falling-down drunk.

[7] J.H. thought they were going in the hot tub earlier, and she stripped down to her underwear in anticipation of going into the hot tub, but the boys were interested in playing with their DJ equipment longer, and so they continue to do that and, ultimately, I guess, given the fact that J.H. was in her underwear, they stripped down to their underwear and they continued to dance, separately, and for the two boys to continue to play music on the DJ equipment.

[8] That lasted for an hour and a half or so, so there was just some general activity in the basement room. J.H. says the people just danced on their own, so it was not -- it might appear, as the prosecutor said, to older generations like myself, that there was some sexual innuendo, but he says that it does not indicate sexual innuendo necessarily, and he backs up with some evidence that he elicited from J.P. that -- J.P. said there was no indication of any sexual interest between the parties.

[9] At some point, after all the dancing, they decided to go to the hot tub and have the hot tub that they had all been expected to have that night, and they -- none of them appeared to have come equipped with swimming suits, and they took off their underwear and went in the hot tub naked. Again, there appears to have been no sexual overtones to that and, again, that evidence was elicited. The only thing that one of the parties could think of was that J.H., at one point, stretched out on the hot tub, but he was digging for something of a sexual nature after the Crown asked him several times, but that was pretty much an afterthought and not particularly relevant.

[10] After the hot tub party and during the time in the hot tub, the accused was apparently speaking with his girlfriend for some -- up to two hours, trying to persuade her to come over, but she was not interested because she had just finished a shift at work. So she did not go over. But she did not think that he was too intoxicated during that conversation.

[11] A. went upstairs to bed after they came out of the hot tub. At least that is the evidence of J.P.; J.H. thought he was downstairs dancing but it appears that A. probably

went to bed, and the three of them went back downstairs, and they were fully clothed at this point.

[12] J.H. had asked earlier if she could share a bed with Ashton that night, rather than going home. Ashton slept in a bed downstairs when he was over there and when he used to live there, and she knew it to be his bed because she had been there before. Apparently he consented to that. She thought it was a single bed, but it was, in fact, a double bed according to J.P., who lives in the house, with a single bed attached above as bunk beds. That is a common configuration for bunk beds so I take it, given J.P.'s familiarity, that that is probably correct. So it was a large enough bed.

[13] There is some evidence that I really do not know where to put it in the continuum here, but, at some point, the complainant said, perhaps on questioning, that she had some marijuana at home and would go get it and did. But before she did, apparently the accused gave her a kiss and then she went home and got the marijuana and came back. J.H. said she did not think anything of the kiss because he has kissed her before and she just shrugs it off, "Whatever", she says, and that was all that she put into that. By "before", I meant on other occasions when he had seen her, once in a while, he comes up with a kiss and she was okay with that, she just did not want it to go any further, and appears to have made that fairly clear to him by her actions of not kissing back.

[14] The evening got really late -- or early -- in the morning, and we are now into almost daylight -- it could have been daylight; it is August in Whitehorse, so it was probably getting light -- when they finally shut down the music. Before they shut down

the music, the complainant went to bed in the bed that she knew Ashton would be coming to eventually and took off her outer clothes, left her underwear on, and crawled under the covers. Shortly after, J.P. came in to see if she was all right; she was, and he did not want to rejoin the party, so he left.

[15] Then there is evidence that -- again, it is hard to discern what really happened here, and perhaps it does not matter -- but at some point the complainant came back out of the room and wanted to talk to the accused, and talked to him in the hall. J.P., who gave that evidence, did not hear or see what was being said or done. It was a very short thing and then she went back into the bedroom, and the accused went back to playing the music.

[16] It is likely that that happened -- the complainant does not remember it -- but could have. J.H. said, if she came out, she probably came out to tell them to turn down the music, which would seem odd given the fact that she knew what she was into there, and participated in for so many hours. It is fair to say that J.P. did not remember that right off but then, when it was shown that, in his statement he gave to police shortly after, he did say that J.H. had come out of the room and talked to Ashton. He did not remember it in his evidence, so I do not think that it was evidence that was contrived for the purpose of the trial, it is probably just something that he forgot but, probably, because he told it to the police earlier, shortly after the event, that is probably what happened. But it is really not important because we do not know what was said because the accused did not give evidence.

[17] The accused and J.P. at some point in the early morning went upstairs to make hot dogs; the accused actually made hot dogs and put them on two plates, for himself and J.P. By the time the hot dogs were ready J.P. just wanted to go to bed, and so he did. J.P. saw the accused go downstairs with the two plates of hot dogs.

[18] In giving her evidence, the complainant said that she was aware that J.P. came in but she did not really remember anything else. She just went to sleep. When she woke up, the accused was lying beside her and had a finger in her vagina. But later on, she remembered some other things, and she remembered that he did come down with the hot dogs, but she did not want them; she just wanted to sleep.

[19] At that point, J.H. said she was really drunk. She had had, by her estimation, three or four mojitos and three quarters of a bottle of wine and some shots of vodka. I accept that she was pretty drunk and probably sleeping and/or passed out. So her memory of these things is not to be faulted. It can be accepted that J.H. has a sporadic memory of the parts of the evening after she went to bed, and perhaps some things happened that she does not remember or is groggy, and so groggy that she did not properly interpret.

[20] The question -- it is uncontroverted that, when she woke up, the accused had, she said, his fingers -- I do not know what that means -- in her vagina. Again, there is no evidence otherwise. The evidence of the medical practitioner who gave the rape kit is pretty vague on this point and I do not think can be taken to mean anything. The medical examination happened a day or two later and only revealed that there was some swelling and tenderness in the posterior part of the vagina. The doctor could not

make any speculation as to how that might have happened. She said there were no other indications, and this was quite a time after, and there had been a lot of activity, the complainant had put in shifts at work, and she rides a bike. The doctor did not wish to speculate, and nor do I, that that had anything to do with what might have occurred on this evening.

[21] This is not, as in so many cases, a *W.(D.)* analysis. This is a case where the defence is, essentially, asking the Court to impute a form of consent because of the activities of the evening. There are a number of problems with that. The activities of the evening were not sexual. The agreement to share the bed for that night was not a sexual invitation, it was an invitation of necessity. It was at some time in the morning, around 4 o'clock or later. Parties were exhausted, and J.H. was exhausted, and she just wanted to stay the night -- had a thought that she might stay the night because she had done it before, and she had slept in the same bed.

[22] Knowing that Ashton would, at some point, crawl into the same bed, does not imply any impropriety or consent, it was simply a matter of sleeping arrangements, and people would be at quite a risk if the sharing of the bed was thought to be consent to sexual activity. No two-man tent would ever be safe again.

[23] The Crown has helpfully provided the case of *R. v. J.A.,* 2011 SCC 28, and it is an important case because it confirms that consent has to be contemporaneous with the sexual activity. It cannot be something that is implied or guessed at or hoped for by a person because of what might have happened during the course of an evening or at some other time. This is an important case because there was a time, as the Crown

has pointed out, that men took advantage of the mating ritual to take sexual advantage when it was not being offered. And since this case, and certainly in cases leading up to it, before it got to the Supreme Court of Canada, the courts were using this test that it has to be contemporaneous; it cannot be implied or hoped for because of other activity. There are going to be some variations on that theme but, especially where any activity which may have implied consent is so far removed in time, it is simply improper to assume that that consent that is implied is going to continue.

[24] And, as I say, there are going to be variations of that that courts will have to scratch their heads over. One of them is, of course, this idea of mistaken belief in consent, but I really do not think we have that here. For instance, we do not have evidence that there was a mistaken belief; we would have to speculate on that, and this Court cannot speculate.

[25] The Court has come to the conclusion that the Crown has proved their case beyond a reasonable doubt, and the accused will be found guilty as charged.

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SCHMIDT T.C.J.