

Citation: *R. v. S*, 2006 YKYC 2

Date: 20061128
Docket: 06-03502
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Barnett

R e g i n a

v.

T.D.S.

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486(3) of the *Criminal Code*.

Appearances:
Michael Cozens
Edward Horembala, Q.C.

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] T.D.S. is charged with having sexually assaulted J.B. at Teslin on January 28, 2006. It is alleged that he had intercourse with her although she did not consent.

[2] The trial of this charge was in Teslin on November 22 and 23, 2006. I reserved my decision until today. These reasons are deliberately brief: I took the time necessary to write in that manner. I do not attempt to mention all the testimony I heard during the trial.

[3] The essential issue in this case is the one fundamental to all cases in Canada when a person is charged with criminal wrongdoing: has the charge been proved beyond all reasonable doubt?

[4] In January 2006, T.D.S. and J.B. were both 15 years of age. And they were pretty good friends.

[5] T.D.S., his girlfriend, M.H., and J.B. were snowmobiling and partying together on a Saturday in January 2006. They were snowmobiling that afternoon and again after supper when they were joined by an acquaintance who had purchased a 26-ounce bottle of Wiser's whiskey.

[6] It was very cold in Teslin that night – the evidence suggests it was about -30°C.

[7] The group went to the home of T.D.S.'s mother. It was known that she would not be there. The bottle of whiskey was passed around and shared by the three young persons and their so-called "adult" "friend".

[8] J.B. says that she drank considerably more whiskey than any of the others and that she became very drunk. There is other evidence, which I accept, that J.B. "was not that intoxicated".

[9] J.B. had a curfew and when she realized it was time for her to return home, T.D.S. volunteered to take her there on his snowmobile.

[10] J.B. says that enroute to her home T.D.S. stopped his snowmobile at the Teslin airstrip claiming that the engine was overheating. She says that T.D.S. suggested that while they were waiting for the engine to cool, they engage in some sexual activity. She says she declined the invitation but that, being very drunk, she was not able to effectively resist T.D.S. when he undid the buttons and zipper of her ski pants and pulled them down along with her jeans and underwear. She says that she must have blacked out because her next memory is that she was laid out on the seat of the snowmobile, naked from the waist

down, and that T.D.S. had painfully penetrated her. She says that T.D.S. refused to stop but that she was able to kick him off and then pull her clothing together again.

[11] J.B. believes that the sexual encounter lasted for perhaps 30 minutes. She says that T.D.S. did then take her home: she was late and her parents were not pleased. Her mother followed J.B. to her room and questioned J.B. who was reluctant to admit that she had been drinking. J.B. told her mother that she was hurting and needed to sleep. She did not say anything about a sexual encounter with T.D.S.

[12] J.B. says that she tried to forget the assault by T.D.S. In part, she says, that was because T.D.S.'s girlfriend, M.H. was her dorm roommate and best friend. J.B. says that she did not tell anybody what T.D.S. had done to her.

[13] The evidence makes clear the fact that M.H. heard that something had happened and on March 21, she confronted J.B. and asked if it was true that J.B. had slept with T.D.S. J.B. responded by telling M.H. that T.D.S. had assaulted her, more or less in the manner I have described.

[14] The voices of both girls were raised and that caught the attention of the dorm supervisor who arrived on the scene and asked what was wrong. When J.B. told her story to the dorm supervisor, she was told to call her mother who happened to be in Whitehorse and when her mother arrived, J.B. recounted the story to her.

[15] The next day, J.B.'s mother reported the matter to Constable Wolfram of the Teslin RCMP detachment. He wanted to arrange an interview of J.B. by a female officer but J.B. did not concur: she preferred to tell her story to Constable Monkman who she knew as a hockey coach and family friend.

[16] Constable Monkman interviewed J.B. on March 23. J.B. consciously chose to be untruthful at times during that interview. The admitted falsehoods do not seem to go to the heart of J.B.'s story but it is disconcerting that J.B. cannot offer any sensible explanation to account for them.

[17] T.D.S. testified during the trial. He denies that he assaulted J.B. on January 28, 2006 or on any other occasion including January 7, 2006 which, he says, was the day when he and M.H. were snowmobiling and drinking with J.B.

[18] I did not find the testimony of T.D.S. or M.H. entirely convincing. I am inclined to think that something did happen that night.

[19] The fact that I am not convinced by T.D.S.'s testimony does not mean that he must be convicted. Judges in Canada must not decide criminal cases merely by saying who they do or do not believe: that is not good enough.

[20] Trial judges were emphatically reminded in 1991 by the Supreme Court of Canada that "(t)he requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law". One aspect of this principle is that even in a case where the court is not left in doubt by the evidence of the accused, it must still be asked if the accepted evidence is sufficient to establish guilt. See *R. v. W.(D)* (1991), 63 C.C.C. (3d) 397 at page 409 (b) to (f).

[21] In the present case the evidence falls short: when I consider the accused's testimony in the context of the evidence as a whole I cannot say that I am convinced of his guilt. I therefore must and do acquit. To do otherwise in this case would be – to borrow and adopt the phrasing of judges wiser than myself – dangerous.

[22] I want however to say a little more. I do not wish my decision to be misunderstood. I have not said that I do not believe the essential story told by J.B. That was not the issue in this case. I have only said that the evidence heard during the trial does not prove criminal misconduct by T.D.S. when the test is “proof beyond all reasonable doubt”. Upon the evidence I cannot know what really happened that night and, that being so, the decision today must be and is “not guilty”.

Barnett T.C.J.