Citation: *R.* v. *Scurvey*, 2006 YKTC 40 Date: 20060420
Docket: T.C. 05-00174
Registry: Whitehorse

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

REGINA

v.

JOHN BENJAMIN SCURVEY

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

Appearances:
Peter Chisholm Counsel for Crown
Elaine Cairns Counsel for Defence

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): John Benjamin Scurvey is charged with sexually assaulting S.P. on the 7th day of May, 2005. The charge arose after police discovered Ms. P. naked and grossly intoxicated in a bed in the basement of a house in the McIntyre Subdivision of Whitehorse. It is admitted by Mr. Scurvey that he had sexual intercourse with Ms. P. He claims that the encounter was consensual. However, Ms. P. was only 13 years of age at the time. Mr. Scurvey was 19 years old.

[2] These circumstances thus engage the provisions of s. 150.1 of the *Code*. That section firstly provides that consent is not a defence where the complainant is under 14 years of age. Subsection (4) goes on to provide that it is not a defence even if the accused believes that the complainant was at least 14 years of age unless he “took all reasonable steps to ascertain the age of the complainant." The case law is clear that this provision places only an evidentiary burden on the accused. If there is an air of reality to the claim of belief, it then falls to the Crown to prove beyond a reasonable doubt that the accused did not take all reasonable steps to ascertain the age of the complainant.

[3] In this case, the complainant was described by the constable who found her as a small child of 13 or 14. John Carlick, a youth who was present at the house in question, thought that Ms. P. looked around 15. At the time of the trial Ms. P. was 14 years of age and she looked, in my judgment, neither noticeably younger nor older than her stated age.

[4] Given that the apparent age of the complainant was in the range of 13 to 15 years, I agree with the decision in *R.* v. *N.W.,* [2005] M.J. No. 108 (QL), that absent some circumstances which would have made it unnecessary, all reasonable steps to ascertain the age of the complainant would clearly include some inquiry by the accused to ask the complainant her age. In this case, there is no evidence whatsoever that Mr. Scurvey asked anyone, never mind Ms. P., how old she was. Indeed, he admitted to the police that he had not done so and confirmed as much when he testified.

[5] The question then is whether there were circumstances that made such an inquiry unnecessary. In my view, there was nothing in the circumstances that would have suggested that Ms. P. was definitely older than she was. It is true, as Ms. Cairns pointed out, that she was drinking alcohol and appeared to be out at all hours without parental supervision. Regrettably, neither of these circumstances are, in this Territory, confined to persons substantially older than Ms. P. It is also true that she was hanging around with persons who were somewhat older that she was. The others present appeared to have ranged in age from 16 to 19 years. Again, this fact would not reasonably suggest that Ms. P. was significantly older than she was.

[6] It was also suggested by the defence that the fact that Ms. P. was described by both the accused and Mr. Carlick as the instigator of the sexual activity might have led the accused to conclude that Ms. P. was older than she was. Such an argument, if sustained, would make mockery of s. 150.1(1). The whole point of the provision is to proscribe sexual contact with children, whether or not they are consenting. In this case, the only circumstance capable of obviating the need for an inquiry as to age is the claim by Mr. Scurvey that Ms. P. told him she was 15 years old. I hasten to add that even if the complainant told an accused she was 15, the Court might nevertheless conclude that all reasonable steps had not been taken. See, for example, some of the incidents described in *R.* v. *Slater*, [2005] S.J. No. 412 (QL).

[7] As indicated, Mr. Scurvey claimed in his evidence that Ms. P. told him that she was 15 years old. His evidence on this point, even in his testimony in chief, was somewhat vague and it got a bit vaguer on cross-examination where he said that, "It

was at the house, I think. She told me she was 15. I don't really recall." In my view, this assertion is simply incapable of belief.

[8] When interviewed by the police four days after the incident, Mr. Scurvey was sober. He was told by Constable Thur that the legal age for sex in Canada was 14 years. Constable Thur then asked the accused the following:

> Q All right, and do you know how old S.P. is?
>
> A No.
>
> Q You don't know how old she is?
>
> A I don't even know her.
>
> Q That's the girl we're talking about?
>
> A Yeah, I know, but I just don't even know her.
>
> Q Well, you know her but you had sex with her the other night. What do you mean you don't know her, like you didn't know her before that night?
>
> A No.
>
> Q Okay, but you know her now so you know who I'm talking about, right?
>
> A Well -- I like -- okay. Knew her before, but I didn't like -- I knew her as the kid's girlfriend and that's all.
>
> Q Whose girlfriend?
>
> A Darren.
>
> Q Oh Darren, oh yeah right, but you know how old she is?
>
> A I didn't know.
>
> Q Okay, do you know now?
>
> A No.

[9] Later on there was the following exchange:

> Q Okay, so did you think about how old she may have been when she was kissing you when you were upstairs and she was doing the, you know, on your lap and things?

A No.

Q Okay. Did you -- did you try to find out how old she was? Did you ask? Did it even cross your mind how old do you think she is?

A I thought she was at least 14, 15.

Q Yeah, did it cross your mind to ask how old she was, to ask her?

A No.

Q Okay. Does it surprise you that she's 13?

A Shocked the shit out of me.

[10] The statement goes on at some length, but the salient point is that Mr. Scurvey at no time tells the police that S.P. told him she was 15 years old. Mr. Scurvey's explanation for this is that he was upset about being taken for questioning by the police and further was angry that S.P. had lied to him about her age.

[11] In such circumstances, the clear and obvious reaction of anyone would be to protest as vigorously as possible to the police that S.P. had told him she was 15. Particularly, one would have told the police that when the specific issue of her age and what inquiries he had made and what he thought were raised. One would have been shouting to the roof tops that she told him she was 15, unless, of course, it never happened.

[12] I am satisfied that the accused took no steps at all to determine S.P.'s age. It follows that the Crown has satisfied the onus on it with respect to that issue and, indeed, with respect to the other elements of the offence. By making the finding I make, it further follows that consent, even if obtained, would not be a defence. I think it is, however, necessary to make some comment on the consent issue as it may be relevant

to the issue of disposition. Ms. P, herself cannot tell us if she consented. She was grossly intoxicated and remembers little from the time she arrived at the house until she was discovered by the police and removed from the premises.

[13] Shortly after the sexual encounter with the accused, Mr. Scurvey, on his own admission, found Ms. P. passed out and unable to be aroused. Some time not too long after that, Ms. P.'s boyfriend found her in a similar condition and again was unable to arouse her. Still later, the police found her unconscious. She was awakened only with difficulty and remained for some time largely insensible of her surroundings and circumstances.

[14] Section 273(2) of the *Code* provides that no consent is obtained where, amongst other circumstances, the complainant is incapable of consenting to the activity. Given the degree of intoxication demonstrated and given the fact that there is no evidence that Ms. P. consumed more alcohol between the time of the sexual relations and her being rendered into the comatose condition, it seems to me that it is clear that she was not in a position to consent.

[15] It is not entirely the end of the matter, because other considerations such as the state of the mind of the accused have to be considered. The circumstances here must be assumed to be those as described by both Mr. Scurvey and Mr. Carlick, since nothing refutes their claim that Ms. P. was the initiator of what occurred. However, it is also clear that the accused knew Ms. P.'s actions were fuelled by alcoholic consumption. Indeed, he admitted as much in cross-examination. What happened here is, in my view, quite clear. Mr. Scurvey took advantage of the opportunity

presented to him in the form of a grossly intoxicated girl. To the extent that Ms. P.'s actions may have induced a mistaken belief in consent, in my view, there is evidence to support a claim of that sort.

[16] However, had the case turned on this point, s. 273(2) provides that belief and consent is not a defence where the belief arose from the accused's self-induced intoxication. While it does not appear that the accused was so intoxicated as to be incapable of assessing the issue of consent, his drunkenness clearly contributed to his actions.

[17] In my view, the case has been proved. I find the accused guilty.

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FAULKNER C.J.T.C.