

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

GERALD TAYLOR

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

Appearances:

Jennifer Grandy

Malcolm E.J. Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY C.J. (Oral): Gerald Taylor is charged with a single count of sexual assault, contrary to s. 271 of the *Criminal Code*.

[2] The offence is alleged to have occurred on Boxing Day 2014, when a number of individuals, including the complainant, C.G., were drinking at the home Mr. Taylor shares with his spouse, Bonnie Taylor. C.G. went to sleep on a couch in the living room. Her then-boyfriend, Donald Alwarid, attempted to wake her up without success. C.G. says that when she did awaken, Mr. Taylor had his hands down her pants touching her in the vaginal area.

[3] Mr. Taylor denies the offence.

[4] The burden rests on the Crown to prove beyond a reasonable doubt that Mr. Taylor committed the offence.

[5] In determining whether the Crown has met the onus, the sole issue to be decided is that of credibility. An assessment of credibility requires application of the test set out by the Supreme Court of Canada in *R. v. W.(D.) [D.W.]*, [1991] 1 S.C.R. 742, in which the Court made it clear that the role of the trial judge in credibility cases involving conflicting versions of events is not simply to prefer one version over the other. Rather, I must consider whether I believe the evidence of the accused or other evidence inconsistent with guilt and if so, I must acquit.

[6] Even if I do not believe the evidence of the accused, I must ask myself whether I am nonetheless left with a reasonable doubt by the evidence of the accused, in which case I must acquit.

[7] Even if I do not believe the accused's evidence and I am not left with a reasonable doubt by it, I must still ask myself whether the evidence I do accept establishes guilt beyond a reasonable doubt.

[8] In applying the test, the evidence of each of the parties is not viewed in isolation, but is considered within the context of the evidence in its entirety. In assessing the evidence of the main parties, the complainant, C.G., and the accused, Mr. Taylor, I note that there are frailties in the evidence of both.

[9] Beginning with C.G., her state of intoxication does raise some concern with respect to the reliability of her recollection. Donald Alwarid's inability to wake her by picking her up off the couch, shaking her, and yelling her name suggests her state of intoxication was extreme.

[10] Also, in terms of the reliability of her recollection, it is notable that C.G. testified that she was in a relationship with Donald Alwarid for 18 months. However, she testified that his name was Edwards. Donald Alwarid was clear that he has never gone by the name "Edwards". I find it odd that C.G. would not recall his name after being in a relationship of such duration.

[11] Next, C.G. testified that she has a memory of Donald Alwarid trying to arouse her but could not wake up. She did not tell the police about this recollection when she gave her statement a couple of days after the incident, stating that she did not remember it then. She did note, however, that she had discussions with Donald Alwarid on this point causing me some concern as to whether her memory is an independent recollection or whether it has been influenced by those discussions.

[12] Similarly, C.G. made several comments about learning, after the fact, about what she referred to as Mr. Taylor's "reputation", suggesting it was common knowledge that one should not fall asleep at Mr. Taylor's house.

[13] Obviously, there are a number of issues with this evidence.

[14] Firstly, there is no corroboration of this so-called "reputation" to be found in Mr. Taylor's criminal record, which was put to him; and even if there had been,

Mr. Taylor's character was not put in issue. Accordingly, despite the fact that no objection was made at the time the evidence was given, there are questions with respect to whether it is properly admissible.

[15] What is clear is that I could not use this reputation evidence as the basis upon which to conclude that Mr. Taylor is more likely to have committed this offence. I reference it here only as another instance in which C.G. clearly discussed the incident with others in a way that may well have influenced her recollection of events.

[16] Finally, C.G. referenced seeing a doctor, after having given her statement to the police, as a result of stomach cramps and what she called a "scratchy feeling". She saw the doctor on two occasions and says she was told by the doctor that there was evidence of trauma.

[17] This evidence is clearly hearsay but raises a concern that potentially corroborative evidence was not put before the Court. In so saying, it does not appear that C.G. ever advised the Crown or the police that she had seen a doctor or that there was potential evidence to support her claims. While corroboration is not required, if such evidence existed, it is concerning to me that it was not brought to the attention of the proper authorities.

[18] A second concern with respect to C.G.'s evidence concerning her medical visits arises from her testimony that the doctor also told her on the second visit that she, the doctor, was upset with herself for not having tested C.G. to see if she had been drugged.

[19] It makes no rational sense to me that the doctor would have said this to C.G. When one considers that C.G. did not see the doctor until three to four days after the incident, there would be no logical reason to test her for any so-called "date rape" drugs, as they would clearly have no longer been in her system.

[20] While I did not have the impression that C.G. was deliberately attempting to mislead the Court, each of these factors caused me some concern with respect to the accuracy and reliability of her recollection.

[21] Turning to Mr. Taylor, his evidence also raised some concerns for me.

[22] Like C.G., Mr. Taylor's state of intoxication raises issues with respect to the reliability of his evidence, particularly when one considers that he consumed some 10 to 12 beer in approximately four hours. Unlike C.G., however, Mr. Taylor's adamant insistence that he clearly remembers everything that happened that day, notwithstanding his state of intoxication, raises questions for me with respect not just to his reliability but also to his credibility.

[23] My concerns with respect to his credibility are further heightened as a result of both internal and external inconsistencies.

[24] Internally, Mr. Taylor testified that C.G. did not at any time accuse him of sexual assault or being a sexual predator before the incident in question. This is contrary to the statement he gave the police two days later. When this inconsistency was put to Mr. Taylor at the end of cross-examination, he conceded that there may well be things he does not recall.

[25] With respect to external inconsistencies, Mr. Taylor's recollection as to what was said during the course of the gathering differed in many respects from that of Donald Alwarid, who recalled a sexual assault joke being made, and who made no mention of C.G. taunting Mr. Taylor about cheating on his spouse, as Mr. Taylor suggests happened.

[26] Furthermore, sometime after the date of the incident, Mr. Taylor was seriously injured resulting in a month's hospitalization. When asked about the cause of his injury, he indicated that he had been kicked in the head by a horse. This is contrary to his wife's evidence that he had not been kicked in the head by a horse, but had suffered a gunshot wound to the head.

[27] Finally, I observed that Mr. Taylor's answers, particularly during cross-examination, were frequently not responsive to the questions being asked. Indeed, at times, he did not seem to understand what was being asked of him, suggesting either problems with cognition, a distinct possibility in light of his head injury, or a deliberate attempt to obfuscate or mislead the Court.

[28] The cumulative impact of these factors is such that I do not believe the evidence of Mr. Taylor.

[29] Having concluded that Mr. Taylor's denial is not credible, however, does not mean that I can find that the contrary has been proven beyond a reasonable doubt. I must consider whether the evidence called by Mr. Taylor nonetheless raises a reasonable doubt. This includes the evidence provided by his spouse, Bonnie Taylor.

[30] Bonnie Taylor testified that she joined in the gathering during its initial stages and consumed three beer. However, her employment requires her to be up at 4 a.m. on workdays, a schedule which she maintains on her days off. Her practice is to then nap in the late morning. Such was the case on the day of the incident. She went to her bedroom and slept from 11 a.m. to 3 p.m. When she woke, she says that C.G. was sitting on the couch eating chips and Mr. Taylor was asleep on the loveseat.

[31] I found Bonnie Taylor's evidence to be entirely credible. She had consumed minimal alcohol, followed by several hours of sleep, after which I conclude she was not intoxicated. She was fair and balanced throughout her testimony. When I asked about C.G.'s demeanour, Bonnie Taylor says that she did not seem upset but also noted that C.G. was not someone she knew well.

[32] Similarly, with respect to the question of whether C.G. could have walked instead of waiting for a cab, Bonnie Taylor freely admitted that it was very cold and that C.G. may well not have been dressed for walking, particularly, Bonnie Taylor volunteered, as C.G. got a ride from Mr. Taylor to the residence in the first place.

[33] There is simply no basis, in my view, upon which to reject Bonnie Taylor's evidence. The question is whether it is sufficient to raise a reasonable doubt. What is notable about B.T.'s evidence, in this regard, is what she did not see or hear.

[34] C.G. testified that Mr. Taylor stopped the assault when he heard the tinkling sound of the dogs' tags just before Bonnie Taylor and the dogs came out of the bedroom, at which point he jumped up and went to the loveseat, where he pretended to be asleep. B.T. did not observe anything untoward when she exited the bedroom. The

couch on which C.G. said the sexual assault occurred is within the direct line of sight of Bonnie Taylor's bedroom door, and is a relatively short distance away.

[35] That is not to say that it could not have happened as C.G. described before Bonnie Taylor exited the bedroom, but is it sufficient to raise a reasonable doubt that it happened in the manner described?

[36] On its own, perhaps not; however, I must also consider what Bonnie Taylor did not hear.

[37] With respect to what was not heard, C.G. testified that while Mr. Taylor was assaulting her, she was telling him to stop loudly enough that she believes Bonnie Taylor would have heard. Indeed, she told the police that she was deliberately making noise to get Mr. Taylor to stop. Bonnie Taylor says she heard nothing.

[38] Crown notes that neither did Bonnie Taylor hear Donald Alwarid's efforts to wake C.G. up before he left the residence. However, on C.G.'s timeline, Donald Alwarid's efforts to wake her up would have occurred while Bonnie Taylor was asleep. C.G.'s efforts to make noise to get Mr. Taylor to stop assaulting her, however, would have occurred immediately before Bonnie Taylor came out of the bedroom at a time when Bonnie Taylor would clearly have had to have been awake.

[39] It is notable that Bonnie Taylor testified that when she first went to bed, she could hear the voices of the others. Accordingly, if awake, one would expect her to have heard C.G. making noise to get Mr. Taylor to stop. Bonnie Taylor did not.

[40] I find that I must conclude that the evidence of Bonnie Taylor, which I do accept in its entirety, particularly the fact that she heard nothing immediately before she came out of the bedroom, when combined with the aforementioned frailties with respect to C.G.'s evidence leaves me with a reasonable doubt in all of the circumstances.

[41] Accordingly, I am not satisfied that the offence has been proven to the requisite standard and I must acquit.

RUDDY C.J.T.C.