R. v. James, 2001 YKSC 54

Date: 20010921
Docket: S.C. No. 00-00067A/B
Registry: Whitehorse

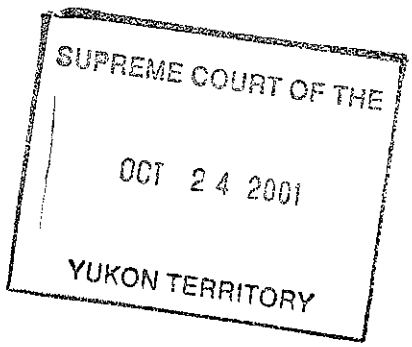
IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

ALBERT JAMES



JUDY HARTLING — Appearing for Crown

MICHAEL COZENS — Appearing for Defence

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

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[1] LYSYK J. (Oral): The Indictment contains a single count. It alleges that the accused sexually assaulted G.J. between the dates of March 1 and August 31, 1984, at or near Ross River, contrary to what was then s. 246.1 of the *Criminal Code*.

[2] The charge arises out of what transpired between these two persons on a single occasion within that five-month period. It is common ground that they

spent one night together in the accused's camper truck during which sexual intercourse took place. As will appear, the central issues relate to whether or not G.J. consented to this sexual activity and, if not, whether there was an honestly held belief on the part of the accused that she had consented.

[3] The only witnesses called upon to testify at trial were the complainant, G.J., and the accused.

[4] G.J. stated that her date of birth is January 22, 1954, so she was 30 years of age at the time of this occurrence. The accused gave his date of birth as October 10, 1943, so he would then have been 40 years of age. Both are members of the Carcross/Tagish First Nation.

[5] G.J. testified that in 1984 she was a single mother with three children, employed in Carcross as a Band Resource Officer. Her duties included compiling information on land claims. She stated that at the time the accused held a position with the Council for Yukon Indians, which I will refer to as the CYI, and that he carried the portfolio for land claims for the whole of the Yukon.

[6] G.J. testified that the accused had suggested to her that she might wish to attend a meeting in Ross River to learn more about the claims process. G.J.'s supervisor in Carcross, Ms. Bolton, approved her attendance at that meeting.

[7] According to her testimony, G.J. hitchhiked to Whitehorse where she joined the accused and accompanied him as a passenger in his vehicle from there to Ross River. She said that on arrival at Ross River they stopped first at the hotel where the accused spoke to a person named Sylvester Jack, Sr. After that, she said, the accused drove the camper truck out of Ross River to a small clearing, which she described as being about the size of the courtroom, where they parked and got ready for bed. She stated that the accused's sleeping area was above the cab of the vehicle and her own was on the right-hand side of the cabin as one faced the front of the vehicle.

[8] G.J. testified that the accused asked her to join him in the bunk that he occupied but she declined to do so, after which he came to the place where she had arranged her sleeping bag. She testified that he attempted to fondle her breasts and private parts and that when she removed his hands from one area he would fondle her elsewhere.

[9] G.J. testified that in response to the accused's invitation to sexual activity, she replied "No" three times, following which she concluded that he would not accept her refusal. According to her testimony, she then said, "You are not going to accept a 'no,' are you?" and he replied, "No, I am not." She testified that he then got on top of her and full sexual intercourse ensued.

[10] In her examination in chief, G.J. stated that no one else was with her and the accused on this trip and that on the evening in question they encountered no one other than Sylvester Jack, who is no longer alive.

[11] G.J. stated that at the time the accused came to her bed she was wearing a night-gown with no underwear beneath it and that he was wearing only his undershorts. In her testimony, she did not say that she fought or attempted to resist the accused otherwise than by trying to remove his hands as he fondled her. However, in her examination in chief, she did point out that he was considerably taller and heavier than she was. She stated that the place where they were parked that night was about a ten-minute drive from Ross River and that she knew of no source of help or assistance that would be available to her. She stated that she ended up having an orgasm and that this distressed her. As she put it in her testimony at trial, her body betrayed her.

[12] As to the date in 1984 on which this incident occurred, she stated that it could have been May, June or July because it did not get dark at night, but was close to 24-hour daylight.

[13] Still in examination in chief, she was asked when she first reported this incident to anyone. She replied that it was a couple of years later, when she related what had happened to her husband. The agreed statement of facts marked Exhibit 3 states that the marriage was on March 30, 1985 and that this disclosure to her husband was shortly afterward.

[14] According to her testimony, the next time she mentioned this to anyone was to two co-workers, a Ms. Bev Sembsmoen, who is her cousin, and a Ms. Kendall. Exhibit 3 refers to Ms. Sembsmoen and states that G.J. told her about the incident sometime between April of 1997 and April of 1998.

[15] Under cross-examination, G.J. stated that she had not spoken to anyone other than Ms. Bolton in Carcross about going to the Ross River meeting and no one else from Carcross was at that meeting.

[16] Cross-examined about the circumstances of the incident, G.J. agreed that the accused did not physically threaten her at any time and that she had not sustained any marks or bruises from that encounter. Asked whether she had tried to leave the camper, she replied that the accused was between her and the door. Asked about their conversation prior to that, while the accused was in his bunk at the front end of the canopy, she stated that she had no clear recollection of what they had talked about but they had not discussed sexual matters before the accused invited her to come into his bed.

[17] Asked whether it was possible that she had driven to Ross River with someone other than the accused and met the latter there, she replied in the negative. She also denied the possibility that she returned to Carcross with someone other than the accused.

[18] In further cross-examination, she stated that there was no one else in the area where they had parked the camper truck that night. She agreed that the accused may have been outside the truck while she was getting ready for bed, but she denied that he could then have spoken to a person named Larson or to anyone else. She denied that they were at the Lapie Canyon campground or any other organized campsite, reiterating that it was just a clearing.

[19] When defence counsel put to her that she had gone up to join the accused in his bed in the camper truck, she strongly denied the suggestion. She stated that at the commencement of the sexual intercourse she was only a passive participant, but when her body betrayed her, she became an active participant.

[20] Turning to the accused's testimony, he stated, with respect to his present situation, that his recent employment has been as a contractor of the Carcross/Tagish First Nation on work related to land claims. He stated that he has been involved in this type of work to a greater or lesser extent since 1975 and that in 1984 he was a Vice-Chairman of the CYI, in charge of land claims for the whole of the Yukon.

[21] The accused stated that at the time of his encounter with G.J. in 1984, he was in Ross River to attend an assembly of the CYI, of the type held on a more or less annual basis, where delegates from all 12 First Nations are in attendance, together with consultants and others involved in the meetings and First Nations

persons who wish to attend. He said that these meetings typically last three to four days but could run considerably longer.

[22] The accused testified in his examination in chief that he does not now recall the dates of the CYI meeting in Ross River but does recall the days of the week. He stated that he drove from Whitehorse to Ross River on a Tuesday, arriving around 7:00 or 8:00 p.m., and that he left Ross River to go to Dawson City on the following Friday afternoon, after the meeting concluded around 2:00 or 2:30 p.m. on that day. He said that matters discussed at the meeting, in addition to land claims, included the emerging issue of self-government.

[23] The accused testified that no one accompanied him when he drove up from Whitehorse to Ross River and that, after the conclusion of the meeting, no one drove with him to Dawson City or, from there, back to Whitehorse. The accused agreed that a couple of weeks earlier he had met G.J. in Carcross and suggested that it would be good experience for her to attend the Ross River meeting. However, he stated that he had no knowledge of the arrangements she made in order to attend that meeting or how she got to Ross River. He stated that when he spoke to her in Carcross about the meeting there had been no discussion about the possibility of her travelling with him.

[24] It will be apparent that the accused's account runs directly counter to G.J.'s claim that she drove with him to and from the Ross River meeting, which she recalls as a one-day, relatively small gathering to discuss land claims.

[25] The accused described his vehicle as a 1976 GMC pick-up with a canopy fitted on the box of the truck. He stated that the canopy did not extend over the cab of the truck, but that he slept on a sleeping platform that he had built just behind the cab.

[26] The accused stated that during the Ross River meeting he stayed at the Lapie Canyon campground, located about six miles out of Ross River. He described it as a large, cleared area used for camping, with stalls or places designated for vehicles or tents. He stated that no one stayed with him on his arrival that Tuesday night and that about ten other campsites were occupied at the time.

[27] He testified that on Wednesday he attended the CYI meeting in Ross River where he met, among others, Chief Sylvester Jack and a Bill Larson. He said that Larson had asked about the campsite and expressed interest in staying there. Also, G.J. approached him and asked where he was staying, and when he told her he was camping in his truck she asked if she could stay with him because she wanted to save money.

[28] The accused stated that on that Wednesday evening he dined with Mr. Larson and the latter's young daughter, after which G.J. joined them and the four of them went to the campground. The accused stated that at the campground he assisted Larson in setting up his campsite and talked with him about the meetings, and they visited with others at the campsite. About 45 minutes or an

hour later, according to his testimony, the accused joined G.J. in the canopy of his camper truck.

[29] The accused stated that after returning to his camper, he and G.J. initially talked about the meetings, and eventually the conversation got around to sex. According to his testimony, he took off his clothing, down to his undershorts, beneath his bed covers. He testified that he talked to G.J. about making love and asked her if she wished to have sex with him. He said that when he first asked her this there was no response and that when he asked again a couple of minutes later she came to the edge of his bed. He testified that he then invited her to join him in bed and she did so.

[30] The accused denied that G.J. ever said "no" or anything to that effect. He said that she took her night-gown off and he removed his shorts, after which they engaged in sexual intercourse.

[31] The accused stated that G.J. was physically responsive during this sexual activity. He said that after sexual intercourse took place he asked G.J. if she wanted to sleep with him, but she declined, put on her night-gown and went back to her own bed. He stated that she made some comment to the effect that they would have no difficulty sleeping that night.

[32] According to his testimony, the accused at no time left his own bunk on the canopy to go to G.J.'s sleeping place. He reiterated that G.J. at no time said "no"

or indicated that she did not want sex, and that he assumed she agreed because she came willingly into his bed.

[33] According to his testimony, he had no physical contact with her before she entered his bed and, after she did so, they made advances to each other. He stated that there was no "struggle" during this encounter.

[34] The accused stated that on Thursday he attended the meetings until about 4:00 p.m. He testified that he never saw G.J. again during the course of those meetings, except that on that Thursday he had given her the keys to his camper truck so that she could recover her belongings.

[35] The accused stated that on Friday he attended the meetings, which wound up around 2:00 or 2:30 p.m., and that around 3:30 p.m. he left Ross River to drive to Carmacks and then onward to Dawson City, where he arrived at about 10:00 p.m. that night. He stated that he went to Dawson City to attend the opening of the Chief Isaac Memorial Centre, and after his arrival he learned that Mr. Larson had been killed in a highway accident on June 9, 1984 on his way up to Dawson City to attend that opening. The accused stated that on the Sunday, on his way back to Whitehorse, he stopped at Mayo to talk to the family of Mr. Larson and that he left there about 3:00 p.m. to make his way back to Whitehorse. He stated that he has no knowledge as to where G.J. went after they parted company in Ross River.

[36] In response to questions from defence counsel, the accused stated that neither he nor G.J. had consumed alcohol that Wednesday evening, and that he himself had been "dry" since 1975.

[37] He stated that he had had no intimate relationship with G.J. since that 1984 episode in Ross River and that he had never discussed that incident with her subsequently.

[38] It may be noted at this point that at the conclusion of the examination in chief of the accused, counsel filed an agreed statement of facts stating that Bill Larson, the Mayo Band Manager, was killed in a motor vehicle accident on the morning of June 9, 1984, while travelling to Dawson City to attend the opening of the Chief Isaac Memorial Centre.

[39] Under cross-examination, the accused stated that his responsibilities as Vice-Chairman of the CYI for land claims, which commenced in May of 1984, involved many meetings around the Yukon and also outside the Yukon. He stated that within the Yukon he would travel to meetings in his truck, but only slept in it when a hotel room was not available, as was the case at the time of the Ross River meeting attended by him and G.J.

[40] When cross-examined about the date of that Ross River meeting, he reiterated that it was immediately prior to June 9, 1984, a date which could be related to the opening of the Chief Isaac Memorial Centre in Dawson City and to

the death of Mr. Larson. Cross-examined about the meeting itself and the number in attendance, he stated that the meeting involved delegates from the 12 First Nations and a number of others, likely totalling more than 60 people. In response to further questioning, he provided the names of certain persons he recalled as having been in attendance.

[41] Under cross-examination, he repeated that he had suggested to G.J. in Carcross that she attend the Ross River meeting because she was working on land claims at the time and he thought that this would be a good experience for her. He denied, however, that he had made any attempt to help her get to Ross River and, in particular, he denied that he had given her a ride to or from there.

[42] In further cross-examination, the accused agreed that the accusations which are the subject of the present proceedings were first brought to his attention in March of 2000, when G.J. wrote him a letter containing the allegations. He also agreed that this would have been the first time since 1984 that he had to attempt to recall details about what had occurred almost 16 years earlier.

[43] The accused agreed that he had had no previous relationship with G.J. that could be described as romantic in nature, and that he knew her only vaguely prior to the incident in question. He reiterated that G.J. had approached him in Ross River at the time of the meeting and asked if she could stay with him in his camper, as the hotel was too expensive.

[44] Under cross-examination, the accused stood by his evidence in examination in chief to the effect that G.J. had accepted his invitation to join him in his bed, that she had not said "no" to his invitation to engage in sexual activity, and that she had not taken his hands away when he touched her.

[45] Crown counsel suggested to the accused that even if he had accurately described a meeting held in Ross River immediately prior to June 9, 1984, that there may have been another meeting during the five-month period mentioned in the Indictment and that this other meeting could be the one-day gathering described by G.J. in her testimony. The accused testified that he was certain that this was not the case and that there had been only the one meeting in Ross River during that period in 1984.

[46] In submissions, counsel by and large treated this as a "facts" case and there was little contention about the governing legal principles.

[47] With respect to the essential elements of the offence charged in the Indictment, there is no dispute about the incident in question having occurred at or near Ross River within the five-month period specified and, of course, there is no issue as to identity. It is common ground that on this occasion sexual intercourse took place, so there is obviously no issue about the sexual nature of the contact.

[48] As stated at the outset, the real issues are whether G.J. consented to this sexual activity and, if not, whether the accused honestly, although mistakenly, believed that she had. It will be evident that in this case credibility is at the heart of the inquiry.

[49] Where, as here, credibility is important, the rule of reasonable doubt applies to that issue.

[50] In a case in which the prosecution depends on the credibility of the complainant and the accused testifies, the question to be determined by the trier of fact is not merely whether to believe the one or the other. To frame this as the sole or core issue is an error of law, as pointed out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. There Mr. Justice Cory stated that the jury must be told that they must acquit in two situations: first, if they believe the accused, and second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt in the context of the evidence as a whole. He went on to state that the jury might well be instructed along the following lines (at page 758):

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[51] Mr. Justice Sopinka put it this way (at pages 751-752):

> When dealing with the burden of proof, the trial judge is dealing with the most fundamental rule of the game. It is particularly important in a case in which the prosecution depends on the credibility of the complainant and the accused testifies, that it be very clear and unequivocal that the prosecution has not proved its case beyond a reasonable doubt if, after considering the evidence of the accused and the complainant together with any other evidence, there is a doubt.

[52] In *R. v. Ay* (1994), 93 C.C.C. (3d) 456, a decision of the British Columbia Court of Appeal, Mr. Justice Wood, after referring to *R. v. W.(D.)* and to the application of that decision by his court in *R. v. H.(C.W.)* (1991), 68 C.C.C. (3d) 146, went on to summarize the governing principles to be explained to the jury as follows (at pp. 476-477):

> (a) If they believe the accused they must acquit;
> (b) If they do not know whether to believe the accused or the complainant, they must acquit;
> (c) If they do not reject the evidence of the accused they will have a reasonable doubt and must acquit;
> (d) If they disbelieve the accused, that is if they reject his evidence as untrue, they have to be convinced beyond a reasonable doubt of the guilt of the accused on the whole of the evidence before they could convict.

[53] The concept of reasonable doubt, as applied to the issue of credibility, is of crucial importance in the present case.

[54] There is no independent evidence to corroborate either the complainant's or the accused's version as to just what was said or the circumstances in which the sexual activity occurred on the evening in question. Nor was there independent evidence before the court concerning other matters on which their testimony differed, such as whether or not the complainant travelled to and from Ross River with the accused and whether the meeting at Ross River lasted a single day or extended over three days.

[55] As to the content of the testimony of the complainant and the accused, there were certain matters on which the recollections of each, concerning surrounding circumstances, were hazy. Given the 17-year interval, that is not altogether surprising. Neither G.J.'s nor the accused's version of what happened can be rejected as wholly implausible. Nor, in my view, were there internal inconsistencies in the testimony of either that were of such significance as to warrant a conclusion that he or she was unworthy of belief. The evidence of prior complaints by G.J. to her husband and much later to Ms. Sembsmoen was tendered by the Crown solely as narrative and cannot bolster G.J.'s credibility.

[56] Finally, there are the factors of the demeanour of the witness and the manner in which the testimony was given. Both the complainant and the accused were quite persuasive witnesses and I am unable to say that the opportunity to observe them testifying provides a reliable basis for a conclusion as to veracity.

[57] In submissions, counsel for the Crown placed considerable reliance on the decision of the Supreme Court of Canada in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. A significant aspect of the fact situation considered there arose out of the complainant's testimony to the effect that she was extremely afraid of the accused and that she complied with his wishes in order to avoid a violent assault. In the present case, in contrast, G.J. did not say that she submitted to the accused's advances through fear of physical harm if she failed to yield to him. However, Crown counsel did point to the disparity in size between G.J. and the accused and invited the drawing of an inference that fear of the accused was in fact a controlling element.

[58] More importantly, *Ewanchuk* was a case in which the accused did not testify, and the version of events provided by the complainant, whom the trial judge had found to be a credible witness, was not contradicted or disputed: see para. 13 of Mr. Justice Major's reasons. Accordingly, while the *Ewanchuk* decision is instructive on the law applicable to certain findings of fact, it was unnecessary for the Court to address the crucial issue of credibility where, as here, the complainant and the accused offer conflicting versions of the event.

[59] Given irreconcilable versions of the complainant and the accused about their encounter, the issue of credibility is not one to be resolved on the basis of likelihood or balance of probabilities as to whose version of what happened is accurate or more closely corresponds to what actually happened. The question is

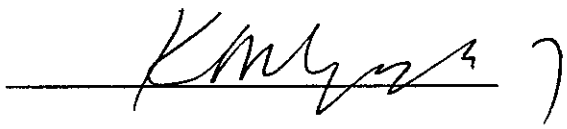
whether the state of the evidence is such as to demonstrate the guilt of the accused beyond reasonable doubt.

[60] In a line of recent decisions, the Supreme Court of Canada has considered the manner in which the reasonable doubt standard ought to be defined for a jury. These include: *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Bisson*, [1998] 1 S.C.R. 306; *R. v. Starr*, [2000] 2 S.C.R. 144; *R. v. Russell*, [2000] 2 S.C.R. 731 and *R. v. Avetysan*, [2000] 2 S.C.R. 745. In *Starr*, Mr. Justice Iacobucci, delivering the majority judgment, put it this way (at pp. 267-268):

> In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in *Lifchus* as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof beyond a reasonable doubt. In this regard, I am in agreement with Twaddle J.A. in the court below, when he said, at p. 177:
>
> > If standards of proof were marked on a measure, proof "beyond reasonable doubt" would lie much closer to "absolute certainty" than to "a balance of probabilities". Just as a judge has a duty to instruct the jury that absolute certainty is not required, he or she has a duty, in my view, to instruct the jury that the criminal standard is more than a probability. The words he or she uses to convey this idea are of no significance, but the idea itself must be conveyed....

[61] For present purposes, credibility is crucial on the issue of consent, that is to say, whether the Crown has established lack of consent and the accused's knowledge of lack of consent to the requisite standard of proof beyond reasonable doubt. I find that the evidence, taken as a whole, falls short of meeting that standard. It follows that there must be an acquittal.

[62] Mr. James, would you please stand? I find you not guilty of the offence charged.



LYSYK J.