

SUPREME COURT OF YUKON

Citation: *R. v. Magun*, 2017 YKSC 65

Date: 20170713
S.C. No. 16-01505
Registry: Whitehorse
Heard: Watson Lake

BETWEEN:

HER MAJESTY THE QUEEN

AND

JAMES MAGUN

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

Before Madam Justice B. Keyser

Appearances:
Paul Battin
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] KEYSER J. (Oral): James Magun is charged with the sexual assault of D.C. on January 1, 2016. He has pleaded not guilty to the charge.

[2] What is common about this case is that almost every witness, with the exception of police officers, was extremely drunk. What is not common about this case is that the position of the accused is not that sexual intercourse was consensual, but that, in fact, he was sexually assaulted by D.C.

[3] I start by saying that I do not subscribe to any myth as articulated by defence counsel that women cannot initiate unwanted sexual contact nor that men cannot be victims of sexual assault by females.

[4] On the evening of December 31, 2015, to the early morning hours of January 1, 2016, there was a party going on at J.W.'s. Everyone was in good spirits and drinking heavily, by all accounts.

[5] Mr. Magun testified that he was at the party. He sat on a couch and D.C. was trying to kiss him. He passed out, woke up briefly to someone fighting, saw that D.C.'s legs were over his legs, and passed out again. He says he woke up to a sharp pain up his chest and someone — that he later discovered was D.C. — was on top of him with her back to him and trying to have sex with him. His penis was out and she was playing with it. She was trying to put it in her vagina, but he did not know if they had sexual intercourse or not. He pushed her off him, said, "What the fuck?" two times. She screamed something which might have been her boyfriend's name. Mr. Magun then put on his boots and left the house to walk home.

[6] Because Mr. Magun testified, I must have reference to *R. v. W.(D.)*, [1991] 1 S.C.R. 742. Firstly, if I believe him, I must acquit. Secondly, even if I do not believe him, but his evidence raises a reasonable doubt, I must acquit. And thirdly, even if I do not believe him and his evidence does not raise a reasonable doubt, I must still evaluate all of the other evidence I do accept to determine if I am satisfied beyond a reasonable doubt that the charge has been made out.

[7] I do not believe the evidence of James Magun, nor does it raise a reasonable doubt in my mind.

[8] I do accept that there was some mutual kissing that went on earlier that night between D.C. and James Magun before they each passed out. Mr. Magun, in his testimony, while frequently peppering his answers with comments like "I would never lie" and "I'm under oath, so I'm telling the truth" tended not to answer questions directly, particularly on cross-examination.

[9] His version makes no sense. He is passed out on the couch, slouched down, wearing blue jeans. He weighs 240 pounds, yet somehow D.C. is able to pull the front of the jeans down enough to expose his penis. She is then going up and down on him backwards and playing with his penis. It was unclear whether it was hard or semi-hard, and he did not know if his penis was in her vagina or not.

[10] He maintains that he was the one who was sexually assaulted, yet he did nothing to suggest he had been victimized. He did not call the RCMP to report this personal violation. He did not stay at the house to protest what had happened. He did not seek medical attention for the pain he says woke him up and the concern he had for his stitches. Instead, he immediately bolts from the house after putting on his boots, but leaves without his coat and cellphone on January the 1st, in the Yukon, to walk half a kilometre away to his home, while still extremely drunk.

[11] When asked why he did not take his jacket, his response was, "I got lots of jackets." When asked why he did not call police to report this sexual assault on his person, he had a theory about it not mattering because women's advocacy groups were strong and whoever phones first gets in trouble and has to prove it.

[12] He also suggested that Cst. Sauv  presented a doctored statement purportedly by him in court. He said Cst. Sauv  kept shutting the recorder off and later pieced

together what he wanted. Perhaps this was because Mr. Magun in his statement to police said, "I'm pretty sure I did nothing. I was passed out and then she was flirting around with me or whatever. I don't know what the fuck happened. I was drunk." He also said although there was kissing earlier on that because of his surgery he stopped that activity.

[13] That is just not plausible in my mind. Thus, for a multitude of reasons, I do not believe Mr. Magun, nor does his testimony raise a reasonable doubt.

[14] I now turn to the third part of the *W.(D.)* test. Am I satisfied beyond a reasonable doubt on the evidence I do accept that Mr. Magun sexually assaulted D.C.?

[15] Like Mr. Magun and everyone else at the party, D.C. was extremely drunk that night. She denied kissing Mr. Magun that night but told Cst. Gregorash after her formal statement that there had been some kissing. I believe it to be more than just the New Year's Eve hug she said she gave him like everyone else.

[16] Defence counsel elaborated on a number of internal inconsistencies in D.C.'s testimony, along with conflicts and details from other witnesses that he says call into question both her credibility and her reliability. Most of these centre on her positioning on the couch when she passed out and when she says she came to and found Mr. Magun sexually assaulting her.

[17] D.C. appeared to be trying to answer questions as completely and honestly as she could. There were inconsistencies and she largely acknowledged them. She was unshaken in her testimony that she woke up to find Mr. Magun penetrating her without her consent, and her actions immediately upon waking are telling. She says she kicked

at Mr. Magun so he fell on his butt. She started yelling, and her uncle, J.W., came running out. She told him what had happened. By then, Mr. Magun was gone.

[18] J.W. took her to a neighbour's to phone police. They arrived at J.W.'s house shortly thereafter. She was taken to the hospital for a sexual assault kit, then to the RCMP for a statement before being taken home.

[19] The suggestion that this was perhaps motivated by need to cover up that she was sexually assaulting Mr. Magun, so that her boyfriend would not find out, does not hold up. D.C. was drunk. It is hard to believe that she could formulate a false complaint of sexual assault against James Magun so quickly and carry it out so effectively. Numerous people as well as the police saw her crying and distraught. She then went with police to her home to get clean clothes, underwent an invasive sexual assault protocol, and spent a lengthy period of time at the RCMP detachment.

[20] Although no corroboration is needed, there is corroboration in her demeanour and actions after the alleged assault.

[21] I acknowledge there are differences in her testimony between her statement at times, her testimony at the preliminary hearing, and her testimony at trial. Most of it is not major, and she is unshaken at any stage of the process that she awoke to find Mr. Magun penetrating her without her consent. It is not surprising that there are such differences, given the state of intoxication of everyone that night.

[22] As a result, I am satisfied beyond a reasonable doubt that D.C. was sexually assaulted by Mr. Magun on January 1, 2016, and a conviction will therefore be entered.