Citation: *R.* v. *Boya*, 2006 YKTC 68 Date: 20051207
Docket: T.C. 05-10043A
Registry: Watson Lake

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

REGINA

v.
CLARENCE DONALD BOYA

Appearances:
Edith Campbell Counsel for Crown
Keith Parkkari Counsel for Defence

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): In this case, Clarence Donald Boya is charged with two counts of sexual assault. Both are said to have occurred on the 30th day of July, 2005, at or near Watson Lake in the Yukon Territory. Both are said to have occurred at the residence of Keith McLeod. The complainant, in respect of the first case, is S.P., then 13 years of age, and the complainant in the second is V.A., who, if I am not mistaken, was around 20 years of age.

[2] The trial heard from a number of witnesses and Mr. Parkkari, in particular, was at some pains to point out some inconsistencies between various witnesses on a number of points, as, for example, who arrived at Mr. McLeod's house at what time and with

who and when people left and so on. It is true there are some inconsistencies with respect to these matters. In my view, it is not particularly surprising, given that these events were essentially very ordinary and unremarkable events. Where there is much less inconsistency is with respect to the crucial events of the evening, that being the two alleged assaults.

[3] I should also mention that it was argued that there was some inconsistency particularly between Ms. A. and Mr. McLeod when each testified as to the contents of a conversation between the two of them. I did not find the reports of this conversation particularly inconsistent. They neither claim to be saying verbatim what occurred and I think that both are clearly referring to the same conversation.

[4] Now, with respect to the alleged assault on Ms. P., proof of that offence depends pretty much entirely on the evidence of Mr. McLeod, although, as I will point out, there are some places where what Mr. McLeod says is, in fact, corroborated by other witnesses and indeed by defence witnesses. Essentially, what Mr. McLeod says was that he was asleep, he awoke to get a drink of water, went out and looked into the living room where he saw that the accused, Mr. Boya, who had been sleeping on one couch, had moved over to the futon where Ms. P. was asleep, and was laying on that futon, essentially on top of Ms. P. He rushed down and pulled Mr. Boya off. As he did so, he noted that Ms. P.'s jeans were now down around her ankles.

[5] Now, in my view, Mr. McLeod's evidence had the absolute ring of truth. I say that particularly for the reason that it was entirely apparent that he did not want to testify

against Mr. Boya. He was the most reluctant witness and, indeed, one who initially failed to appear and had to be arrested pursuant to a warrant.

[6] To make a long story short, it was obvious, I think, to anyone who was in the courtroom when he testified, that he wished he could have been anywhere else in the world rather than here. But despite all of that, he testified to the events in the manner that I have indicated. It is also worth noting that he reported to Ms. A. that he did not want to get involved in the matter because it would clearly cause problems with his wife's family because his wife is the sister of the accused. So for him to come in those circumstances and give the testimony he did, it makes it absolutely credible, in my view.

[7] As I have already indicated, there are other witnesses that corroborate or support some of the things he said. Without being in any way exhaustive, he mentioned Mr. O'Connell, who corroborates that he saw Mr. McLeod pulling Mr. Boya off the futon where Ms. P. was. There is Ms. P.'s evidence that she was at the residence and that she was asleep, essentially passed out, and is able to confirm at least that she was indeed on that futon on that occasion, and as well confirms that when she awoke in the morning she was advised by Mr. McLeod as to what he had seen.

[8] With respect to the other assault which is said to have occurred on V.A., in my view, Ms. A.'s evidence was also credible. I could discern no reason whatsoever for her to concoct some story out of whole cloth implicating Mr. Boya in a sexual assault upon her. Indeed, to the extent that anyone had encouraged her to talk about these matters, she had, in fact, been encouraged by Mr. McLeod not to speak of them. It is clearly not the case that her evidence is some sort of recent concoction, because she made a

complaint of what Mr. Boya had done to Mr. McLeod within a very few hours after the alleged assault. Mr. McLeod, while he was not a witness to the assault on Ms. A., is able to confirm that Ms. A. was at his residence during the critical period of time.

[9] Now, with respect to the evidence of the defence witnesses: Firstly, Mr. O'Connell essentially tried to put forward the thesis that V.A. could not have been there because she was claiming that she tripped over him and he certainly would have noticed that. I am not entirely sure that he would have noticed it if he was asleep, but, in any event, he also failed to notice a number of other persons who had entered the residence, including S.P. and others. As I earlier pointed out, he, in fact, provides support for Mr. McLeod's story of dragging the accused off the futon that Ms. P. was sleeping on. So to make a long story short with respect to Mr. O'Connell, nothing that he said caused any doubt in my mind that Ms. A. was present or that she was assaulted as alleged.

[10] With respect to Cheryl Pete's testimony: Cheryl Pete is the common-law wife of Mr. McLeod and, as I have already indicated, is the sister of the accused. Her testimony in chief, in my view, was a very transparent attempt to protect her brother because in cross-examination she was basically forced to resile from virtually everything she had said in chief; most particularly, she was forced to admit, after denying it in chief, that Mr. McLeod did indeed tell her about the assault on S.P., and insofar as she claimed to have a conversation with V.A. about Ms. A.'s allegations, I place no weight in that evidence at all in light of Ms. Pete.'s clear lack of credibility and clear partisanship.

[11] I should go back for a moment and deal a bit more with the matter of the assault on S.P. because it was argued that there was some doubt as to whether the proven facts amounted to a sexual assault within the meaning of *R.* v. *Chase,* [1987] 2 S.C.R. 293. In my view, the inference is absolutely irresistible in that this was an assault for a sexual purpose. The accused was lying down with the girl and her pants had been moved down to her ankles. It is simply inconceivable that the accused was there for other than a sexual purpose or that what he had done did not amount in any way to an assault, never mind a sexual assault.

[12] At the end of the day, I simply have no doubt whatsoever that both complainants were assaulted for a sexual purpose and that the perpetrator was Mr. Boya. I find him guilty on both counts.

[13] THE CLERK: There is a victim impact statement filed with the Court.

[14] MS. CAMPBELL: I'm not sure, Your Honour, that Crown or defence are prepared to go to sentencing right away. If we could have a brief recess before --

[15] MR. PARKKARI: Yes, could I have five minutes to speak with Mr. Boya?

[16] THE COURT: Sure, but you can give the statements to counsel.

(Proceedings adjourned)

(Proceedings reconvened)

[17] MR. PARKKARI: In light of Your Honour's decision and which, I would expect, the likely outcome on disposition, we would like to order a pre-sentence report. This is a matter that I expect should properly be dealt with -- continue to be dealt with in the community. We would ask that it go over to February 21st for disposition. I believe that Ms. Campbell would also want a custody status report, dealing with his custody and his access to programming.

[18] MS. CAMPBELL: If Your Honour grants the application for the pre-sentence report, I believe the credit for remand time will be an issue between Crown and defence and yes, at this point I would like to make an application to have a custody status report as part of the PSR so we know exactly what Mr. Boya has had access to. My understanding is that Mr. Parkkari would like the matter to be adjourned to the next circuit. I'm just wondering if it's necessary to adjourn it to the next circuit. A PSR can normally be done in six weeks and Mr. Boya has been in custody for some time now, I'm just saying that as soon as the PSR's ready, maybe we could have a sentencing.

[19] THE COURT: We can certainly deal with it sooner if Mr. Boya wants to. If he is prepared to have it go to February, then that is his call.

[20] MR. PARKKARI: Well, with the PSR being six weeks and the Christmas period coming up, I'm not sure that we'd get it much before February anyways.

[21] THE COURT: Well, it would probably be late January in any event.

[22] MR. PARKKARI: Yes.

[23] THE COURT: All right. The matter will go to February 21st at 10 o'clock for a pre-sentence report and sentence. I will direct that the pre-sentence report include a custody status report. The offender is remanded in custody.

[24] I am assuming it goes without saying; we will adjourn the disposition on the other matter as well to that time?

[25] Mr. PARKKARI: Yes.

[26] THE COURT: So ordered.

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FAULKNER C.J.T.C.