Citation: *R. v. Caesar,* 2013 YKTC 105

Date: 20131004
Docket: 12-10165
Registry: Watson Lake

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Luther

REGINA

v.

GERALD ANDREW CAESAR

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

Appearances:
Terri Nguyen — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR JUDGMENT

[1] LUTHER T.C.J. (Oral): In this case, Gerald Andrew Caesar is charged, that he, between the dates of January 1, 1989 and December 1, 1989, at or near Watson Lake, did commit a sexual assault on R.C., contrary to s. 271 of the *Criminal Code*. The Information was sworn on January 5, 2013. It was brought before the Court on February 12 of this year. The Crown elected to proceed by indictment on April 9, 2013. The accused elected to be tried by a Territorial Court Judge and entered a plea of not guilty. The trial took place yesterday in Watson Lake.

[2] During the course of the trial we heard from the complainant, R.C. We heard from the accused, Mr. Caesar, and we heard from Mr. Raymond Morris, an uncle to Mr. Caesar.

[3] This is what has traditionally been referred to as an historical sexual assault in that the offence is alleged to have occurred back in 1989. Of course, now we are in 2013; so we are looking at approximately 24 years since the alleged events. The delay in the complainant bringing it forth is not critical. In this case, in fact, it is somewhat understandable. R.C., from what I could see from the evidence, was a disadvantaged youth. She had spent time in group homes around the ages of 14 to 16; maybe even more time, we do not know from the evidence. We do know also that she was in a foster home at the age of 18, and that the accused is the nephew of the foster parents.

[4] R.C. could not tell her foster parents about what she claims occurred because of the relationship to the accused. She told her best friend, who did not believe her. She told her sisters and brothers, from whom she got no support. They told her she could not go to the police because she had already washed herself. In fact, they had talked to Sheila Caesar, the aunt of R.C.'s best friend, who, I take it, discouraged them from supporting their sister. The delay here was understandable, or at least some delay was understandable, but I do believe it would have helped if we knew why she spoke to Constable Maloff when she did.

[5] As to the evidence of R.C., it was crystal clear. She was 18. She lived with the foster parents, Barbara and Raymond Morris. Everyone was asleep. She was in her bed, awake. The door was opened, and the accused entered her bedroom, which was

on the main level. It was helpful that the complainant was able to draw a diagram, which we admitted as Exhibit 1, and which was largely confirmed, with a minor variation, by the owner of this home, Mr. Morris. He has lived in the home for decades, and the charge is the reversal of the bedroom of the complainant and that of the Morrises.

[6] Identity is not an issue here. Ms. C. vividly recalls the lighting from the lamppost across the street, and perhaps some lighting also from the living room area. The lights shining from the lamppost were not bright but they were enough to recognize someone that she knew. She describes the accused pulling the blankets off her, and she became stiff and afraid. A blanket was taken from the twin bed and put on the floor. She was pulled off the bed. At the time she was five feet tall. The evidence never really came out as to why the complainant spoke about the floor; however, one might assume that the noise factor would have been less on the floor than on the bed. There was no talking going on between the two. She was fear stricken, her legs were closed. The accused pried her knees apart and told her, “Loosen up, you’re so tense.”

[7] The accused had taken off Ms. C’s pyjamas and panties, and, with some difficulty, put his penis inside her vagina. I say with difficulty because she was so tense. She said that there was no asking; he just took the sex act for granted.

[8] Afterwards, the accused got up and left. There was a discussion testified to by the complainant, in which Mr. Morris demanded of the accused, “What are you doing here? That’s not my kid. Get off.” The complainant vividly remembers still lying on the floor, probably in shock, and that was largely the event.

[9] On cross-examination, the complainant was sure of the year 1989, that it was a school year, and confirmed that her whole body was stiff and that she had been pulled off the bed. There was no kissing or touching or foreplay or anything of that nature. The complainant was in no way shaken on cross-examination.

[10] The defence put forward by Mr. Caesar is that this simply did not take place. He was not there at the time; it did not happen. While he did have a sexual relationship with the complainant, he said that the last time he had sex with her was when he was 17, at his mom's house. He claims to have had sex maybe four times with her before that, at the group home, and that these were all consensual.

[11] Now, I have to raise the issue of s. 276 and the prior sex acts. Fortunately, my reading of s. 276 is somewhat beneficial to the case rather than harmful, because s. 276 has a specific purpose, and that is:

> … to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or (b) is less worthy of belief.

Well, neither one applies in this particular case because consent is not the defence. The defence is that this did not take place; therefore, s. 276 is not a problem and the limited evidence that we had about prior sexual activity does not present a problem to the legitimacy of the trial.

[12] The transcript reveals that we somewhat stumbled into the prior sexual activity on direct examination of the complainant. The Crown had asked about whether she had that sort of relationship with Mr. Caesar before this. She replied, "No." "What about

after?" "There was no relationship at any time. There was no consent at any time. He did have sex with me at the group home but that was rape. At the Upper Liard group home." So that is the sort of subject matter we stumbled into. But we did not really stumble into it in terms of the examination of Mr. Caesar by his counsel, because the question was directly put: "Did you have an intimate relationship with her? Did you have sex with her?" He said, "Yes, I did, and that was all consensual. I did not once ever force her to have sex with me."

[13] So getting back to s. 276 and the notice applications, quite simply, s. 276 does not apply here because that is not the nature of the defence. The defence here simply is, the sexual assault did not take place.

[14] Now, with the evidence of Mr. Caesar, Mr. Caesar was somewhat vague and evasive about the number of times he was at his uncle's residence at the time. Initially, he did not recall going there in 1989. Then he hardly went over there at all. Then there was some evidence that he cut wood for his uncle. But later we heard from Mr. Morris, the uncle, who said that there were monthly visits by the accused and his family.

[15] Despite the small close-knit community of Watson Lake, there has been no contact between the accused and R.C. for about 25 years. She has totally avoided him, and quite successfully so, and the accused admitted as much. In fact, since 1989, R.C. has not spoken to him, nor visited his home, nor called. I think that is quite a feat in that type of a community, given the familial inter-relationships.

[16] The accused could not remember if he was working in 1989. I am not going to make a lot of this other than to say that he has had eight months or so to think about it.

What he has told us is that the employment records were subject to some type of a disaster, I believe a flood, and they were not available. We also have to remember that we are dealing with a First Nations man in a remote community, with not a lot of education. Of course, I am not distinguishing between a First Nations man and a white man or a black man. I think anybody with a low education, in a remote community, is not going to be fastidious about keeping employment records from more than 20 years ago.

[17] However, for most men, and, indeed, women, that part of their lives is important, those first few years after high school. While the employment records are not available, certainly his family members and friends would be available to talk about their life experiences back at that particular time, after high school. As I said, he did have about eight months or so to think about this. So despite the fact that he was not able to tell us anything about his employment history from 1989, he was able to say that he spent periods of time in Whitehorse with his auntie in 1989.

[18] So what am I to glean from this? Is he really trying to tell us, and suggest, that he was not around Watson Lake all that much and would not have likely had all that much opportunity to commit the sexual assault? He can clearly remember having sex with R.C. at his mom's, after making out, apparently, and further claims that she gave him an STD. It strikes me that the memory of the accused is selective as to what may help him.

[19] Now, then, as to Raymond Morris, our third witness, for the most part, I would say that he was a credible witness. He is the uncle of the accused. He did admit to

doing a lot of shift work at the time, and while the normal practice at the home was to lock the door and have the foster children in bed by 9:00 p.m., obviously he was not there every night at that time. He does not recall confronting the accused after exiting R.C.'s bedroom and ordering him out of the house.

[20] R.C. was very clear on this quote, even to it being a specific, direct quote: "What are you doing here? That's not my kid. Get out."

[21] Mr. Morris asserts he would have remembered this if it had taken place, but the reality is that I am not so sure. He and his wife have fostered many children over the years and there were one or two at a time. So there were quite a number of them going through their home.

[22] R.C., typical of complainants in these types of cases, found it uncomfortable to give her story in a public courtroom, in her small hometown, yet she did so after all these years. It was not easy for her, yet she gave great detail as to her frightened and terrified state, the blanket on the floor, her being hauled to the floor, the accused prying her legs apart and removing her pyjamas and panties, the accused telling her, "Loosen up, you're so tense," even saying it was difficult for him to put his penis in her as she was so tense. "The accused didn't ask; he just took the sex, and then he just got up and left." She remembers what the foster father said and telling him to get out, and afterwards, she just laid on the floor.

[23] These are amongst the most difficult cases that a trial judge has. The Supreme Court of Canada has been somewhat helpful, and Judge Gorman in Newfoundland wrote, in the case of *R. v. Stuckless*, 2012 CanLII 79318 P.C., at para. 10:

> Any person charged with a criminal offence is presumed to be innocent until the Crown has proven beyond a reasonable doubt that she or he committed the offence with which that person is charged. The onus of proof, as regards proving guilt, never switches from the Crown to the accused. In deciding whether the Crown has met its burden of proof, I must consider "the whole of the evidence" and I may only convict if I am satisfied, on the basis of the evidence I "find to be both credible and reliable, that the Crown has established the accused's guilt beyond a reasonable doubt" (see ***R. v. Prokofiew,*** 2012 SCC 49).

Gorman J. then examined *R. v. Lifchus*, [1997] 3 S.C.R. 320, *R. v*. *Starr* 2000 SCC 40, and *R. v*. *J.M.H*., 2011 SCC 45, which further helps us out on the concept and legal principle of proof beyond a reasonable doubt.

[24] Now, in this case, we are also drawn into the Supreme Court of Canada's direction in *W.(D.)*, [1991] 1 S.C.R. 742. In *W.(D.)*, the first step, the trial judge should ask himself whether he believes the testimony provided by the accused. If so, an acquittal must be entered. I do not believe the evidence of the accused that this did not take place.

[25] Secondly, the judge considers whether the accused person's evidence causes him to have a reasonable doubt concerning the accused person's guilt. If so, an acquittal must be entered. Again, the answer there is no.

[26] But in the final step, the trial judge has to consider the totality of the evidence presented to determine if the accused's guilt has been proven by the Crown beyond a reasonable doubt. Like I said, the evidence in this case, when I weigh the evidence, the crystal clear evidence of the complainant and the manner in which she gave it, and then

contrast that with some of the evasive elements of the evidence given by the accused, I am definitely of the view that there is not a reasonable doubt that has been raised.

[27] I want to comment a little bit further on that. In the case of *R. v*. *Van*, 2009 SCC 22, from the Supreme Court of Canada at para. 23:

> The purpose of the *W.(D.)* instruction is to ensure that the jury know how to apply the burden of proof to the issue of credibility. The jury must be cautioned that a trial is not a contest of credibility between witnesses and that they do not have to accept the defence evidence in full in order to acquit…

[28] An interesting case from Nova Scotia, *R. v*. *Ogden*, 2011 NSCA 89 says that a trial judge must be careful not to:

> [10]…fall into the trap of simply comparing the Crown and defence positions without then going on to assess the whole of the evidence to establish proof of guilt beyond a reasonable doubt...

[29] Then going back to the case of *R. v*. *J.H.S*., 2008 SCC 30, at para. 12 Mr. Justice Binnie noted with apparent approval the additional instructions suggested by Mr. Justice Wood in *R. v*. *H.(C.W.)(1991), 3 B.C.A.C. 205:*

> ...I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom you believe, you must acquit."

[30] So, in other words, after going through this trial, and having listened to all the evidence, if I come to the conclusion that I am really not able to decide whom I am going to believe, well, then, I have to acquit.

[31] In the case of *R. v*. *Kelly* from the Newfoundland Provincial Court, 2011 CanLII 66213, Judge Gorman paraphrases some of this at para. 25:

> Thus, it is critical that a trial judge not fall into the trap, in a case such as this one, of deciding the guilty or innocence of the accused solely on the basis of having concluded that a complainant was a more credible witness than the accused. This is a forbidden line of reasoning...

[32] In *R. v*. *Liberatore*, 2010 NSCA 82, the Nova Scotia court noted that one of the purposes of *W.(D.)* formulation is to prevent a trier of fact from treating "the standard of proof as a simple credibility contest."

[33] The New Brunswick Court of Appeal in *R. v*. *S.S.*, 2011 NBCA 75 at para. 36:

> … to ensure fairness of the process the trial judge must explain to the parties why he or she did not accept the accused's testimony, or at least find that it did not raise a reasonable doubt. If this is not done, it constitutes an error of law, which results in a new trial.

[34] R.C. gave her evidence in a compelling way. It was almost as if she were reliving the trauma in her mind as she told us the account. Yet she did not veer or waiver in any respect on cross-examination as to the details. She had obviously thought about this a lot over the years and prepared herself emotionally for the trial.

[35] The accused, on the other hand, denied this ever took place at his uncle's house. I have already discussed his evasive testimony as to how infrequently he was there, and generally his whereabouts and activities in 1989, between visits to Whitehorse with his aunt and not knowing if he worked there or, indeed, anywhere, at the age of 19 or 20, something that most would remember at the age of 43. That evasiveness and lack

of memory, coupled with the total avoidance by R.C. of the accused in such a small, tight-knit community, gives further credence to the testimony of the complainant.

[36] On the basis of my analysis of the facts in this case, and my understanding of the law as it has developed, I am convinced beyond a reasonable doubt that the Crown has proven all the elements of the offence and a conviction will register.

_____

LUTHER T.C.J.