IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R*. v. *Dyck*, 2004 YKSC 32

Date: 20040407
Docket: S.C. No. 03-01507
Registry: Whitehorse
Heard in Teslin

Between:

HER MAJESTY THE QUEEN

And:

JOHN CHARLES DYCK

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486(3) of the *Criminal Code*.

Before: Mr. Justice L. Gower

Appearances:
Melissa Atkinson — For the Crown
Gordon Coffin — For the Defence

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): John Charles Dyck is charged that between January 1st, 1999 and July 31st, 2003 in Teslin, he touched M.W.S. (referred to also as M.S.) a person under the age of 14 years, for a sexual purpose, with his hand, contrary to s.151 of the *Criminal* Code. And further, during the same time and at the same place, he sexually assaulted M.S., contrary to s. 271 of the *Criminal Code*.

[2] The trial took place here in Teslin on April 5th, 6th, and 7th, 2004. As part of the Crown's case, I heard evidence from the complainant's mother, D.S., and the complainant. I have seen a series of four photographs depicting the houses in the cul-de-sac where the accused and complainant have resided during the time period of the indictment. For the defence, I heard from the accused and his wife T.D.

[3] Both Crown and defence agree that this is a case where credibility is the primary issue, in particular the credibility of the complainant and the accused. They also agree that the case of *R.* v. *W.(D.) [D.W.]*, [1991] 1 S.C.R. 742, sets out the test that I am bound by, and I will paraphrase from that case. First, if I believe the evidence of the accused, I must acquit him. Second, if I do not believe the evidence of the accused, but if I am left in a reasonable doubt by it, I must acquit the accused. Third, even if I am not left in a reasonable doubt by the evidence of the accused, I must ask myself whether I am convinced of the guilt of the accused beyond a reasonable doubt on the basis of the evidence which I do accept as fact.

[4] Let me say at the outset that this is a very difficult case for a number of reasons. First, there is the young age of the complainant, who was born May 18th, 1996. She is currently almost eight years old, but was around the age of four when she says that some of the sexual contact occurred. Second, there is the fact that the complainant is the accused's niece. Third, there is the fact that

the accused's daughter is the best friend of the complainant, so close that they are like sisters. Fourth, there is the fact that the complainant's family and the accused's family reside in houses which are only metres apart in a small subdivision just outside of Teslin. Fifth, there is the fact that the two families have historically been extremely close, indeed almost communal, and that they in turn are part of a close-knit extended family which will somehow have to bear the burden of this conflict for some time to come.

[5] It is clear the Crown has the burden of proving these offences and that this proof must be beyond a reasonable doubt. Mr. Dyck is presumed innocent unless and until I find him guilty.

[6] M.S. presented herself, in her evidence, as the Crown submitted, in an open, clear and honest manner. She testified on her promise to tell the truth. She showed remarkable courage and clarity in parts of her evidence. She seemed certain about specific incidents of sexual contact by the accused.

[7] I am not saying in these reasons that I disbelieve the complainant and I hope that the witness assistants will convey that to her. However, I am not persuaded beyond a reasonable doubt that what she said happened actually happened, at least not by the hand of this accused. After considering all the evidence from all the witnesses and both of the exhibits, I am left with a reasonable doubt about the guilt of the accused.

[8] As defence counsel paraphrased *W.(D.) [D.W.]*, this is not a choice of who to believe. As I said, if I believe the accused, I must acquit. I do not say I believe the accused. Conversely, I don't disbelieve the complainant. Rather, I don't know who to believe and, therefore, must give the benefit of the doubt to the accused and acquit him. I may be suspicious that something unlawful occurred here, but that is not enough. In order to reject entirely the evidence of the accused, I need to be able to articulate a reason or reasons, and I find myself unable to do so. I was put off a bit by the unfortunate tendency of the accused to smile repeatedly during his testimony. I found that odd given the serious allegations being made and the family turmoil which has apparently resulted. However, I really don't think it would be fair to the accused to make too much of that aspect of his demeanour. No doubt he was nervous and perhaps this was his way of releasing his internal tension.

[9] I agree with defence counsel that the accused was relatively straightforward and consistent in his testimony. He admitted his criminal record. Although, there was a small glitch in that regard, that was clarified once I asked the Crown to show the written record to the accused, as the Crown's questions on the point had become confusing even for me. He freely admitted, on cross-examination, to having an alcohol problem even though this was not necessarily apparent from his criminal record and was not a factor in evidence at this trial. He didn't try to dodge the question, argue the point or sugarcoat his answer. He

simply said “Yes”. He also said he always slept with his wife T.D. when the […] children slept over. T.D. corroborated that and I found her to be a credible witness in general.

[10] The Crown says I should reject the accused’s testimony for four reasons. One, that the fluid nature of the children going back and forth between the two households for sleepovers on weekends and holidays and almost daily in the summer means that it was at least possible there were times when M.S. slept over at the accused’s residence and T.D. would not have been present. However, that was contradicted directly by not only the evidence of the accused, but also by his wife T.D. Further, as I recall, there was no particular cross-examination by the Crown on that point, to create the possibility that there were times during these sleepovers when T.D. would not have been present.

[11] Second, the Crown mentioned that there was inconsistency in the accused’s evidence about whether his children were heavy or light sleepers, and inconsistency between his evidence and that of T.D. I agree that there were some inconsistencies there.

[12] Third, the Crown submitted that the accused said he never moved M.S., during sleepovers, and that it was not plausible that he would have treated M.S. any differently from his own children, which he did pick up and move from time to time. However, the note I have is that when the accused was asked about M.S.’s

evidence and the proposition that he carried her elsewhere in the house, his answer was that he would probably be picking her up and putting her on the couch. And then a further question was asked, whether he recalled taking her out of C.'s bed (the complainant's cousin) and moving her, and he said no, that didn't happen. However, he didn't absolutely deny picking her up and moving her from the floor onto the couch, as he might have done with his own children. So there was not a complete denial in that regard.

[13] The fourth point made by the Crown was there was internal inconsistency by the accused regarding his time in Grande Prairie, which he described as a "rough time". The Crown said that he started off by saying that he had a generally good paying job, but then noted the various problems that he experienced in order to justify why he described it as being a rough time. I have to say I don't fully understand the Crown's submission on that point. One has to be fair to the accused in recognizing that this was testimony that was given all at once. When he initially talked about this being a rough time, my notes indicate that he described making a lot of money, but that half of that went to pay bills, that he lost weight, that it took a toll on "our health", meaning the health of the family and that they were basically living from paycheque to paycheque. So in a global context, as the accused was testifying about that point, I don't find that there is an internal inconsistency at all.

[14] In summary, I don't accept the Crown's submission that these four points were fatal to the accused's testimony and should cause me to reject it entirely.

[15] Next, I turn to the evidence of D.S. and M.S. It is important here to recognize the context of the family. Sometime prior to the summer of 1999, D.S. went through a "custody battle" with W.S. I understand that went to court, as D.S. testified about court documents being exchanged. The mere fact that she referred to it as a custody battle is evidence that it would have caused some trauma within the family.

[16] There is also the point that D.S. moved from Whitehorse to Teslin in August 1998, initially into her grandpa's house, which was house number 2 in the photographs of the subdivision. Then she moved into Yukon Housing in Teslin from February to June of 1999. Then she moved back to the subdivision into house number 4, where she currently resides. Again, it is reasonable to presume that all these moves would have caused a fair amount of stress for D.S. and her family, including M.S.

[17] There is also a reference in the evidence of D.S. that as early as September of 1998, she noticed her daughter's masturbation behaviour was on the increase. She referred to M.S. as starting to "retaliate" to various household rules by resorting to masturbation. She was concerned enough that she involved the CATS ("Child Abuse Treatment Services") Program in Whitehorse. At this

time, M.S. would have been about two and a half years old, and that was well before she started sleeping over at the accused's home. There was also reference by the mother of bedwetting behaviour by her daughther. D.S. said that increased and decreased at different times. At times it reduced to almost nothing. However, that is somewhat at odds with the testimony of T.D., who apparently was aware of the problem. In fact, she was asked whether she was aware that M.S. had a bedwetting problem. She answered in the affirmative, but she said that never happened at their house and that she always checked.

[18] I mention the masturbation and the bedwetting because it initially seemed to figure as an important piece of evidence in the Crown's case, but there was an absence of any expert evidence as to how I should interpret this evidence, other than it being part of the big picture. I am unable to conclude it is probative of a material fact in this case.

[19] In terms of the family context, it is also important to remember that there is evidence that D.S. was not speaking with T.D. or the accused at different times. In particular, from February 1999 to about the end of September 1999. At other times, there was reference to her not being on speaking terms with the accused and his wife. That is some evidence of conflict within the extended family. Perhaps it was normal, but it is the sort of conflict that could have had an effect upon M.S. as a two or three-year old.

[20] D.S. candidly admitted that there may have been times when she might have spoken badly about the accused and his wife in her daughter's presence, although she took steps to ensure that didn't happen. She couldn't say definitively that it did not. Again, that is the sort of thing that might have had an impact upon M.S. and might relate to how this has all unfolded.

[21] There is the evidence of the first disclosure by M.S. to her mother when M.S. was about four years old in 2001. There was evidence that the family got together to talk about it. There apparently was a decision to resolve the matter internally within the family. There was no complaint to the police. D.S. said in her evidence that there were certain rules that were set up after that meeting, one of which was that her daughter was not to be around the accused alone. D.S. said that M.S. never really showed any fear and that she still stayed over at the accused's residence, while Tammy was present, before the accused and Tammy moved to Grande Prairie.

[22] As for this move to Grande Prairie between the summer of 2001 and the summer of 2002, there is evidence that M.S. wanted to join the accused and his family; that she wanted to go along with them. There was no evidence that I recall of her expressing any particular fears or concerns to anyone about the accused, communicating her desire to go along with them to Grande Prairie. Also, when the accused and his family left without M.S., she lost her best friend C., someone she regarded as a sister, for a period of about one year when she

was about four and five years old. That was something that no doubt caused some stress and perhaps even turmoil in her young life.

[23] Then there are a number of inconsistencies within the evidence of M.S. She said that the touching happened more than once. She talked about the accused touching her with his bare hands on her lower private, her front private, which I take to be her vagina. She said that it happened more than once and "just about every time I'd sleep over". She confirmed that evidence in cross-examination, that it happened just about every time she slept over. Yet there is a virtual absence of any evidence that she feared the accused, around that time. It was not until after the most recent disclosure, which led to the charges being laid and apparently some no-contact provisions being employed, that M.S. expressed her fear of the accused.

[24] Also, there is the point about the first incident of alleged penile contact by the accused, as testified to in this trial by M.S. She said, according to my notes, that "While he was doing it, I started to get sleepy and fell asleep." Not only does it strike me as somewhat counterintuitive that she would be falling asleep during that kind of behaviour by the accused, which was apparently novel and strange and perhaps even fear-inducing to her, but it appears to be contrary to the evidence that she gave at the preliminary inquiry in this matter on December 2nd, 2003. There she said, at page 18:

> When he was doing the thing to me, he put his private onto mine…

(I pause here to interject that it is clear from reading all of the transcript segments which were filed as Exhibit 2 that we are talking about the same incident.) The quote continues:

> Then I woke up and then I saw it.

[25] Then there is the point that M.S. did not disclose the evidence of her seeing male privates to Constable MacCracken, the RCMP officer who was involved in the investigation. Apparently she only disclosed the alleged penile contact at this trial. There was some mention by M.S., on cross-examination, of her having told her mother about that, but it was not part of the Crown's case. Therefore, I conclude that either it didn't happen, that is, that she did not tell her mother, or that her mother did not tell the police or the Crown about it.

[26] Then, M.S. said she told T.D. about a time when the accused stuck his finger in her mouth while he was sexually touching her. That is contradicted by T.D.'s evidence, which was that she was never approached by M.S. about that and nothing was said about that incident to her by M.S.

[27] There is also T.D.'s evidence that she heard M.S. tell her daughter C. "My mom's going to kill your dad." When M.S. was asked about that, she denied having said any such thing.

[28] There is T.D.'s evidence about M.S. complaining to her about the accused being mean and having too many rules: "He tells me what to do too much. I don't like it. I don't like to listen to your rules." When M.S. was asked about that, she denied saying any such thing to T.D.

[29] I have not covered all of the points raised by counsel in their final submissions because it is not necessary in light of my conclusion that the charges have not been proven beyond a reasonable doubt.

[30] Mr. Dyck, would you please stand? On both counts of the indictment, Sir, I find you not guilty. You are free to go.

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GOWER J.