Citation: *R. v. Lennie*, 2017 YKTC 59

Date: 20171215
Docket: 16-00618
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Faulkner

REGINA

v.

PETER JAMES LENNIE

Restriction on publication: publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code.*

Appearances:
Kevin MacGillivray — Counsel for the Crown
David McWhinnie — Counsel for the Defence

REASONS FOR JUDGMENT

[1] In October of 2016, R.A. then aged 12, went with her sister to babysit at the home of the accused, Peter Lennie, and his partner, Amber Aleekuk. Mr. Lennie and Ms. Aleekuk have two children, boys aged six and two. At some point, there was an altercation between the accused and Ms. Aleekuk which led to the police attending at the residence. The accused was charged and then released on an undertaking given to the officer in charge. The conditions of the undertaking included a term forbidding the

accused from having contact with Amber Aleekuk, R.A. or R.A.'s sister. A further term prohibited the accused from attending Ms. Aleekuk's place of residence.

[2] Despite this, on or about November 11, 2016, R.A. again went to babysit at the accused's home, this time without her sister. The accused, though still bound by the undertaking was residing with Ms. Aleekuk. The couple went out for the evening to visit friends, leaving R.A. with the two boys. R.A. and the children watched TV for a while, eventually falling asleep on a mattress located in the living room. Around 5:00 AM, the accused and Ms. Aleekuk arrived home. They went to bed but asked R.A. to wake them at 6:00 AM as the accused had to go to work. R.A. got up at 6:00 and tried unsuccessfully to wake the accused, so she went back to sleep on the mattress.

[3] Some hours later, she awoke to find the accused touching her vaginal area. She told him to stop and jumped up.

[4] According to the accused, he never touched R.A. In fact, he said, he never got closer to her than when he was at the stove, which was about six feet away.

[5] It is common ground that R.A. immediately accused Mr. Lennie of assaulting her and that R.A.'s protests brought Amber Aleekuk to the living room. Ms. Aleekuk was angry with the accused and began hitting him. He retreated to the bedroom and began packing his personal effects. Ms. Aleekuk then ordered R.A. to leave. She did, and walked home.

[6] Although it was not made entirely clear in the evidence, it appears that, some weeks later, R.A.'s mother learned something about the incident from Ms. Aleekuk.

R.A.'s mother asked her daughter what had happened and R.A. told her. Subsequently, R.A. provided a statement to the police and in December 2016, Mr. Lennie was charged with sexual assault contrary to s. 271 of the *Criminal Code*, sexual interference contrary to s. 151 of the *Criminal Code* and two counts of breach of his undertaking for having contact with R.A. and Ms. Aleekuk and attending Ms. Aleekuk's residence.

[7] Both R.A. and the accused testified. They agree on much of what happened save and except for the single critical point involving the alleged sexual touching of R.A.

[8] R.A., now aged 13, gave her evidence from outside the courtroom by way of a video link. She testified at considerable length and was examined (and cross-examined) in great detail. Although clearly tired and upset by the end of it all, she gave her evidence carefully, thoughtfully and without apparent rancour. She sought clarity from her examiners if she didn't understand their questions. Much of what she described about what happened prior to, and immediately after, the alleged assault, was confirmed by the accused when he testified. As Mr. McWhinnie himself conceded, R.A. was a credible witness in the sense that she was honestly trying to tell the Court what she believes happened.

[9] However, the defence says that despite her honesty, her evidence is insufficiently reliable to form a basis to convict the accused. This assertion is primarily based on certain inconsistencies, said to exist between R.A.'s evidence at trial and her statement to Constable Faulkner.[1]

[1] I should make clear that despite having the same surname, I do not know Constable Faulkner and am not related to her so far as I am aware.

[10] In considering the purported inconsistencies, I keep in mind what the Supreme Court of Canada has said in *R. v. W. (R.),* [1992] 2 S.C.R. 122 and *R. v. B. (G.),* [1990] 2 S.C.R. 30 about assessing the evidence of child witnesses. It may be wrong to apply adult tests of credibility to child witnesses. A contradiction, for example, might not be given the same effect as would a similar flaw in an adult's testimony. At the same time, the court must not end up effectively lowering the standard of proof by failing to give equally careful scrutiny to the evidence of all witnesses, regardless of age.

[11] In the case of R.A.'s evidence it is true that there were some inconsistencies between the evidence at trial and her statement to Cst. Faulkner. Some of these are minor. For example, there is a difference in what R.A. says about when, during the course of the incident, the older boy came out of his room. Nothing turns on this and there could easily have been confusion, given that R.A. had just woken up to find herself in a most uncomfortable and upsetting dispute with the accused and Ms. Aleekuk.

[12] Similarly, there was a difference in R.A.'s description of the extent to which Amber Aleekuk assisted in getting the accused away from R.A. Again, given the upsetting and fast-paced unfolding of the incident, it is understandable that there could be details which are unclear. In any event, R.A. was consistent in saying that Ms. Aleekuk did begin physically attacking the accused, and the accused confirms it.

[13] The third alleged inconsistency revolves around R.A.'s evidence that, after the assault, the accused went to his bedroom and started packing. Earlier she had said that she was not sure what he was doing. She was also cross-examined about the

arrangement of the rooms in the house to show that R.A. could not have seen into the bedroom from her position in the living room. Surprisingly, when the accused testified, he confirmed that he did, indeed, go to the bedroom and begin packing.

[14] R.A. testified that her pants had been pulled down somewhat. She said the same thing in her statement, however, in one case she said the accused pulled them down while in the other, stated that she didn't know how it happened. This is not really much of a discrepancy, in my view. If she did not actually remember the accused lowering her pants, but did remember they were down, it would only be natural to assume that he was the one who lowered them.

[15] The only inconsistency that might fairly be called material has to do with whether the accused touched R.A. over or under her clothing. Unfortunately R.A. was never asked to clarify how far down her clothing had been lowered so it is unclear whether her vaginal area was exposed. It is not clear to me that R.A. really understood some of the questioning in this regard, nor was she given any opportunity to explain the apparent differences in her description of the event.

[16] In her statement, R.A. also said that the accused first touched her on her legs before moving to her vaginal area. This detail was absent in her description at trial. However, it must be noted that when R.A. spoke to Cst. Faulkner, she was having difficulty in articulating the words necessary to describe where she was touched. Some of the description involved her motioning with her hand.

[17] With this, as with all of her evidence, it must be recalled that it has been a year since the incident and nearly a year since she gave her statement. A year is a very long

time in the world of a child. Too finely parsing what she said then and now is simply unfair.

[18] The defence also pointed to R.A.'s uncertainty over whether or not Amber Aleekuk left her cellphone with R.A., whether she got up at some point in the night to take a "selfie" photograph and her uncertainty over whether the incident occurred on a Friday or a Saturday, as further instances of unreliable memory. However, nothing turns on any of these issues. Uncertainty about the phone could easily arise since R.A. had babysat for the couple more than once and dates of far-off events are often forgotten or mistaken. The timing of the "selfie" was an entirely peripheral matter.

[19] Looking at her evidence as a whole, R.A. had no motive to concoct. Indeed, if she did, she did so right on the spot since the complaint was first made then and there in the accused's living room. Nor can there be any suggestion that she misconstrued some innocent action by the accused since, on his evidence, he never got closer than six feet away. The only remaining possibility is that she imagined or dreamed the assault, but to conclude that she did so would be sheer speculation unsupported by any evidence.

[20] The testimony of the accused must also be weighed. Scrutiny of evidence amounting to a denial that the assault occurred can be difficult, but there are some clues in what he says about other matters. For instance, early in his evidence he stated that the reason he was at the house, despite the conditions in his undertaking, was that he needed to teach Amber how to run the wood stove, when in actual fact, he was living

there full time. This patently absurd rationalization was offered with as much apparent conviction and sincerity as anything else he said.

[21] He was not asked why he found it necessary to further breach his undertaking by having R.A. in his residence, and he did not say.

[22] He claimed to be extremely concerned over the safety and welfare of his boys, and I do not doubt that he is. Notwithstanding this, he was prepared to go out all night leaving his children in R.A.'s sole care despite not knowing how old she was. He said that he had tried to ask R.A. her age but that he was never able to get an answer. Even allowing for poor cross-examination skills, this seems highly unlikely.

[23] Finally, the accused's claim that he never got close enough to even touch the complainant must be weighed together with the likelihood that something, whether or not it was a sexual touching, must have occurred for R.A. to immediately accuse Mr. Lennie of doing so.

[24] Accordingly, I do not accept Mr. Lennie's evidence, nor does it raise a reasonable doubt.

[25] It remains to consider whether or not the evidence as a whole is capable of supporting a finding of guilt on the sexual touching charges.

[26] I have already indicated that I find R.A.'s evidence both honestly given and reliable. I was urged to draw an adverse inference from the failure of the Crown to procure the attendance of Amber Aleekuk, a potentially important witness to at least a portion of the events. It may be true that the investigators could have made more

diligent efforts to locate her. However, it is also true that the accused is in regular contact with Ms. Aleekuk and there is nothing to indicate that he sought to procure her attendance as a witness. Moreover, it appears to be common ground that Ms. Aleekuk arrived on the scene in response to R.A.'s allegations and thus, could not have said whether or not the touching occurred. Although it would have been preferable if she had testified, I do not draw any inference from her failure to do so, nor does it leave me with a doubt as to what happened.

[27] At the end of the day and on the whole of the evidence I am satisfied beyond a reasonable doubt that the accused did touch R.A. in her vaginal area on the date in question. It has not been proved to the requisite degree of certainty whether this touching was under or over R.A.'s clothes and, therefore, must be taken to be the latter.

[28] As such, the elements of sexual assault and sexual interference have both been made out. However, a conviction can only be entered for one or the other. To do otherwise would offend the rule against multiple convictions, *R. v. Kienapple,* [1975] 1 S.C.R. 729.

[29] My review of prior cases dealing with this issue revealed that courts have generally opted to convict on the sexual interference charge. However, recent amendments to the penalty provisions of ss. 151 and 271 of the *Code* may have introduced some uncertainty into the law. In the circumstances, I will hear from counsel before making the determination.

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FAULKNER T.C.J.