

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

JAMES GERALD MALCOLM

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

Appearances:
Kevin W. MacGillivray
Gordon R. Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM T.C.J. (Oral): Mr. James Malcolm is charged with three offences, namely: for a sexual purpose, touching a person under the age of 16 years; sexually assaulting her; and for failing to keep the peace and be of good behaviour, a condition of his probation order. These offences are alleged to have occurred in the Village of Mayo, Yukon, on December 4, 2014. The trial occurred on September 24, 2015, in Mayo.

[2] J.L. is 13 years of age. She testified that she was at James Malcolm's house around dinnertime on the day in question. Her older sister, P.L., and P.L.'s boyfriend,

S.B., were also present. P.L., S.B., and Mr. Malcolm were drinking alcohol; J.L. was not. She described Mr. Malcolm as a little bit drunk. P.L. and S.B. were watching television when Mr. Malcolm, who was in the kitchen, asked J.L. to come to the kitchen. She did. He had money in his left hand, which he passed to J.L. She says that he then touched her on her left breast with his left hand. He touched the breast directly, underneath her shirt and bra. She told him to stop and he did so.

[3] J.L. initially described his touching her breast for about a minute, but under cross-examination she reduced that estimate to a matter of seconds. Although she does not remember what she was wearing that evening, she recalls that he manoeuvred his hand under her shirt and clothing from the top of her shirt. I understood this to mean that he entered her clothing from the area above her breasts. J.L. indicated that she stepped away from Mr. Malcolm when this occurred. She told her sister what had happened. There was some yelling between P.L., S.B., and Mr. Malcolm. The three visitors then left the residence.

[4] P.L. testified that she drinks alcohol with James Malcolm, and her spouse, S.B., on a daily basis. She remembers drinking alcohol at Mr. Malcolm's house on an occasion with Mr. Malcolm and her spouse, when her sister, J.L., was also present. She stated that she is unsure if this was in the morning or in the evening. She remembers sitting in the house and at some point going to the store with her sister. She described herself blacking out at times. She did not remember J.L. telling her about the subject matter of these court proceedings at Mr. Malcolm's house. She says that J.L. told her two or three days later about something untoward having happened at the

residence. She could not remember where this conversation took place. She does not remember arguing with Mr. Malcolm on the day in question.

[5] S.B. testified that he has known Mr. Malcolm most of his life. They sometimes drink alcohol together. S.B. recalls drinking alcohol at Mr. Malcolm's home when Mr. Malcolm, S.B.'s common-law spouse, P.L., and her sister, J.L., were present. He did not remember any sort of yelling or altercation at the house, although he believes he did have a conversation later with P.L. at S.B.'s parents' house. I understood this conversation to have been about what J.L. alleged had happened to her at Mr. Malcolm's home. According to S.B., that conversation could have occurred on the same day or night they were drinking with Mr. Malcolm. He is not certain about this, as he and P.L. continued to drink at his parents' home after having left Mr. Malcolm's residence.

[6] S.B. says that he did not hear any accusations against Mr. Malcolm while at his home. He believes that he would remember if there had been yelling between him and Mr. Malcolm. S.B. indicated that he had a lot of wine to drink on the day in question. He does not have any real recollection as to the date of this incident. He stated that it could have occurred a month before the trial, as opposed to the nine months that had actually elapsed.

[7] Mr. Malcolm testified. He confirmed the fact that he, S.B., and P.L. were drinking alcohol at his home on the day in question. He recalls J.L. coming into the kitchen. Mr. Malcolm understood that she wanted to go to the store, but that neither she nor S.B. had any money. He handed her \$20 with his right hand but she did not want it and gave

it back to him. He indicates that while in the kitchen, he may have touched her breast by accident. He cannot really say one way or the other. After the attempted exchange of money, he heard J.L. say that he had reached inside her shirt.

[8] I am mindful of the fact that this is not a credibility contest between Crown and defence witnesses. The Crown must prove beyond a reasonable doubt each and every element of the offences. The burden is on the Crown and never shifts to the defence. When assessing the evidence of younger witnesses with respect to credibility, I am not to hold them to adult standards. As the Supreme Court of Canada stated in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at paragraph 26:

... Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. ...

[9] This does not lead to a different standard of proof in criminal cases involving children witnesses. All it means is that in assessing a child's evidence, I should be cognizant of the child's mental development in taking a common sense approach to his or her testimony. See *R. v. B. (G.)*, [1990] 2 S.C.R. 30. I should assess each child's evidence in the context of his or her age at the time of the events and at the time of testifying.

[10] J.L. appeared nervous when testifying. She admitted that she did not have a complete recollection of every event that occurred that evening, particularly the interaction between her sister, S.B., and Mr. Malcolm after she was sexually assaulted. She did not waver, however, in terms of what she said Mr. Malcolm did to her in the

kitchen. It is important to note that of the four people in the residence that evening, she was the only one who was not consuming alcohol. Despite the fact that there were some inconsistencies in her evidence, I find her to have been credible and reliable.

[11] P.L. indicated that she always has alcohol in her system and that this affects her memory. Throughout her testimony, she referred to periods of lack of consciousness (“blacking out”), because of her alcohol consumption. Although she professes to not having argued with Mr. Malcolm about J.L., her evidence is, in my view, very unreliable.

[12] In support of this unreliability, I have considered the following:

- She states that she is not sure if this visit to Mr. Malcolm's home happened in the morning or the evening.
- In contradiction to J.L. and Mr. Malcolm, P.L. says that her sister, J.L., showed her the \$20 that Mr. Malcolm had given her. As indicated, J.L. describes taking the money momentarily but then giving it back to James Malcolm. Mr. Malcolm agrees that he gave J.L. the money but that she quickly handed it back to him.
- P.L. believes that she and J.L. then went to the store. Neither J.L. nor James Malcolm describe the L. sisters leaving the residence to go to the store at this time. It is clear to me that this did not occur.
- P.L. thinks that she would remember an incident as described by her sister to the Court if she had been informed of this at Mr. Malcolm's house. However, this is a woman with a severe alcohol abuse problem, who drinks daily. As she stated at one point in her testimony, she drinks each day whatever alcohol she is able to consume.
- Her evidence was confusing and difficult to follow.

[13] I do not accept her evidence.

[14] Both P.L. and S.B. presented in court as individuals who frequently consume alcohol. Based on my observations of them in court, there is a strong probability both

had been drinking some alcohol before testifying. Although S.B. did not speak to his frequency of alcohol consumption, from the testimony of his spouse, it appears he consumes alcohol on a daily basis.

[15] I question the reliability of his evidence based on his drinking pattern on the evening in question. He admits to having consumed a significant amount of alcohol. I am not confident his lack of recollection of a confrontation between him and Mr. Malcolm is accurate. I do not find his evidence to be trustworthy and I reject it.

[16] Mr. Malcolm had \$500 a month to spend on food and alcohol. He testified that at the beginning of each month he immediately spends \$300 on food. Based on this, by December 4, 2014, Mr. Malcolm would have had \$200 remaining for the rest of the month. Despite this, he was willing to part with 10 percent of it by way of a gift to J.L., a young girl he describes as just having met.

[17] I appreciate that he may not live a lifestyle where budgeting his monthly income is a high priority. Nonetheless, I have difficulty accepting that he would have offered in an unsolicited fashion this amount of money to a young teenager whom he had just met. I also find incredulous his testimony that after hearing J.L. accuse him of reaching inside her shirt and touching her breast, the evening continued in a normal fashion. I do not believe him when he states that after this incident, all four individuals sat down and had dinner. I reject his evidence as to what occurred between him and J.L., and his evidence does not raise a reasonable doubt as to what occurred.

[18] There is one more issue to be considered. The Crown led evidence with respect to an interview the RCMP conducted with J.L. According to the officer, he showed J.L.

a diagram depicting a young female child. She indicated by pointing to the left side of the diagram where Mr. Malcolm had touched her. The police officer marked the diagram. J.L. testified to recognizing the diagram, which was subsequently entered as an exhibit. She was not asked any further questions by either Crown or defence. Nobody raised an issue in this regard.

[19] The breast J.L. pointed to on the left side of the diagram is, in fact, the right breast. As earlier indicated, she indicated in her testimony that Mr. Malcolm touched her with his left hand on her left breast. Since no other questions were asked of J.L. in this regard, I am left with an apparent inconsistency. But with no other evidence to assist in assessing it, I cannot speculate as to what the witness may have said if questioned about it. In my view, it would be unfair to give this apparent inconsistency much, if any, weight when the witness was not questioned about it.

[20] As previously indicated, I find J.L. to be a credible witness. She was forthright in her testimony. Her testimony did not reveal any significant inconsistencies. She did not retract any of her evidence with respect to the sexual assault while under cross-examination. She was insistent that this incident could not have been an accident and her description of the event supports that statement.

[21] Having considered all of the evidence, the evidence that I do accept convinces me beyond a reasonable doubt as to the guilt of the accused. The Crown has proved beyond a reasonable doubt the essential elements of both the s. 151 and s. 271

offences. The s. 151 offence is conditionally stayed, pursuant to the *Kienapple* principle.

[22] As no evidence was led that Mr. Malcolm was on probation on December 4, 2014, the breach of probation charge is dismissed.

CHISHOLM T.C.J.