

Citation: *R. v. Rowe*, 2019 YKTC 47

Date: 20191112
Docket: 18-00469
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

GEORGE DAVID ROWE

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486 of the *Criminal Code*.

Appearances:
Kevin MacGillivray
Vincent Larochelle

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] George Rowe has been charged with having committed offences contrary to ss. 151 and 271 of the *Criminal Code*.

[2] These offences are alleged to have occurred on a day sometime between September 1 and 22, 2018.

[3] The alleged victim, O.E., was 10 years old at the time that she testified.

[4] The trial took place on May 30 and 31, 2019.

Evidence of Witnesses

Testimony of O.E.

[5] O.E. testified at trial. Two video-taped statements that she provided to the RCMP were played in Court. By agreement of counsel, both video-taped statements formed a portion of the trial evidence of O.E.

[6] The first of these statements was made October 11, 2018. The second statement was made October 12, 2018.

Statement made October 11, 2018

[7] O.E. stated that a man named George was trying to have sex with her.

[8] O.E. said that he was trying to get her on the bed. He said: “come lay down with me”. She did not want to but she walked to the bed and got on it, with her clothes on, and the man went on top of her and “tried to do sex”. She said that he touched her over her clothes, but that she did not know where he touched her.

[9] O.E. then said that he touched her “right there” and pointed to her vaginal area, which she called her “anus”. She said that if she was shown a picture she would not be able to show where he touched her.

[10] O.E. subsequently, however, looked at two drawings of male and female body forms that she was provided by Cst. Smee, and she pointed to the front vaginal and penis area.

[11] She said that he did not touch her with his hands but with his anus. He was moving up and down. She then agreed with Cst. Smee when he asked if the man was moving forward and back.

[12] She said that he did not pull his own pants down. He put his hands around her head. He was not making any sounds or looking at her. He was looking at the wall. The only thing she felt was around her anus.

[13] She could not describe how it felt, other than agreeing that it felt awkward. She said that she did not feel anything hard. She said this lasted only a minute and he got up. He told her that she did not want to keep her mom and dad waiting or for the ice cream to melt. They went out the door into the elevator and she went home.

[14] O.E. said that this had never happened to her before.

[15] O.E. stated that she did not touch him.

[16] When asked what "trying to do sex with her" meant, O.E. stated that she did not know. She also said that she forgot what he was doing when he "tried to do sex" with her.

[17] O.E. stated that she did not know what sex was and that nobody had told her what it was. She agreed, when she was asked if this was embarrassing to her, that it was.

[18] O.E. said that she knew George because he had given her, along with her mom and dad, a ride home from the Food Bank before. She did not know what he gave her a ride in.

[19] On the day of the incident the man was going to buy her ice cream and a toy.

[20] O.E. stated that she did not know where George lived and that he used his keys to get in. He said that he was going to show her around. She said he lived in a hotel near Boston Pizza. He lived on the top and she could see Rotary Park.

[21] O.E. stated that this incident took place in a bedroom without a door. She said that there was a bathroom door, a door to a deck, and a door to get in and out.

[22] She said that his room was small and unfinished. She said that the walls had nothing on them and they were grey, but that they were actually white. There was just a white pillow and green blanket on the bed. The bed was small and in the corner of the room.

[23] O.E. stated, or at least appeared to state or agree, that her dad, her brother and her sister were at the man's house when he tried to have sex with her. On p. 10 of the transcript, O.E. answered some questions in relation to where she first met George. She said this was at the Food Bank. She was then asked further questions, and the transcript at lines 218 – 223 reads as follows:

Q. yeah you were getting stuff from the car? And you were with uh family, your dad and your brother and sister was it? Okay, and where were they when you were when he was trying to do sex?

A. At his house.

Q. Okay and were you in a different room?

A. In only in the bedroom

[24] O.E. stated that the man never said anything to her about telling or not telling anyone.

[25] O.E. said that she has not seen the man since this happened. She said that she did not know what he looked like. She then said that she only knew a little bit what he looked like. She said that he had white hair and mustache, and that he had hair on his face. She agreed, when she was asked, that he had a big beard. She said that he was old.

Statement made October 12, 2018

[26] In her second statement, O.E. said that she learned something “sexual” at school from her teacher. Sexual means one anus into another anus. She said that she did not know what that meant but that she learned it at school, in grade four.

[27] She said that George was going to show her a room. They went to his house. She had thought that the room would be big but it was “very, very small”.

[28] She was going to go to the deck and he said yes. She said it was “so big deck”.

[29] She said that she went into the bedroom, and that he came into the bedroom after. She looked at the mirror and saw her reflection. He came out and was going on the bed. He said to come lay down with him. She did not know what to do so she went

and lay down on the bed. She said that is when he was trying to get her “comfy for sexuality”. She then said that she forgot what happened.

[30] She stated that the man was trying to do sex with her with his clothes on. Her clothes were on. She said that he never said anything and that he did not put his anus into her anus, just on it.

[31] She just remembered there being a pillow, a bed and a blanket.

[32] She remembered there being a flat screen television and DVD in the living room, and that his clothes were in the living room.

[33] She said that they were going to go to the store afterwards because she wanted to buy a toy. She said that she thought he was trying to be nice to her “because he...the girls are pretty nice and sexy” (*not clearly audible or transcribed*).

[34] She said that he had called her beautiful and that she was his only girl. She said he told her that every day. She said that she had known George for only a month.

[35] O.E. said that the man drove a blue car and that when she sits in the front seat beside him he puts his hand on her thigh. She demonstrated this by touching her upper thigh very near to her vaginal area.

Cross-Examination of O.E.

[36] In cross-examination O.E. stated that she did not know the name of the hotel.

[37] She said that Rotary Park was not beside the bridge. It was beside the river.

[38] She said that she went for a lot of rides in the blue car, between 20 and 30 rides. The car was small and had four doors. She would sit in the front seat and her mom and dad would sit in the back seat.

[39] She confirmed that she got mint ice cream at Marble Slab on the day of the alleged incident. That was the only time that she went with George to get ice cream at Marble Slab.

[40] O.E. testified that George lived at her house for a bit, maybe a day, some time before the day of the incident. She was unable to say whether this was before or after the ride from the Food Bank.

[41] O.E. said that she only talked about this incident with her mom, her dad and the police officer. She said that she talked to her mom about the incident between the two statements she provided. She also said that she did not talk to her dad about the incident.

Testimony of E.N.

[42] E.N. is O.E.'s mother.

[43] She testified that when she first met George he had a cap on, white hair and a big, white beard. He was in his 50's or 60's. They first met at the Food Bank. She was there with her husband and their three children. They had missed the bus and George offered to give them a ride home. He took one of the children and her husband first. He returned and took E.N. and the other two children. E.N. said that this was in September 2018 at a time the kids would normally be in school.

[44] After bringing them home, George stayed for a while. He asked the children what they wanted and the next day he came over with the items they had requested. He came over every day after that. He brought stuff for the kids and asked E.N. if she needed anything else. About two days later he took them to where he was supposed to be staying. This was near Lowe's. (*I note that there is no Lowe's in Whitehorse. The only similar hardware store in the central Whitehorse area is Home Hardware*).

[45] George's place was on the second floor with stairs going up. It was on a corner. She described it as a new condo that had just been finished.

[46] George stayed at E.N.'s residence for a few days. She said that this was just after they met him. He told her that he had lost his residence at the Salvation Army after he had returned from approximately a one-month period of time out of the Yukon. The Salvation Army had given up his room because he had been gone for that long. E.N. said that she was uncomfortable with this arrangement of George staying with them.

[47] E.N. stated that George left their residence because he said that he had been accepted to live in the condo he had shown them. When he left their place, he moved into a trailer or equivalent residence. She said this was approximately five days after she had first met him at the Food Bank. E.N. agreed that she had never told the police this when she gave her statement, but explained that she was never asked this.

[48] E.N. said that she never went into George's place.

[49] E.N. testified that O.E. was alone on one occasion with George on a Sunday. He came over and asked if he could take O.E. and buy her something that she wanted. E.N. agreed that he could. After picking up O.E., he texted E.N. and said that he was with O.E. at the Dollar Store. He then texted and said he would take O.E. to Walmart instead.

[50] When O.E. returned home, she told E.N. that George had taken her to the Dollar store and Superstore. E.N. said that O.E. returned with ice cream and a bag full of gifts. As she watched through the window, she noticed George hugging O.E. She wondered why he was doing that.

[51] E.N. said that George came in and everyone seemed happy. George left without saying anything. He returned two days later and kept coming over.

[52] E.N. said that George drove a purple four-door sports car.

[53] E.N. said that O.E. first told her about the incident on an occasion when there was a fire in Hillcrest. Counsel have agreed that this fire occurred September 22, 2018.

[54] E.N. testified that this fire was approximately a week after George had taken O.E. on her own. E.N. agreed that she had initially told Cst. Smee that the incident happened approximately two weeks before the fire in Hillcrest.

[55] As a result of what O.E. told her, E.N. spoke with the family's social worker and a Crown Witness Coordinator. O.E. was not present when E.N. spoke with the social worker, but she was present when E.N. spoke with the Crown Witness Coordinator.

[56] E.N. said that George had only given her a ride on one other occasion. This was to the free store, and was approximately a half-hour drive. At another point, E.N. testified that George had pretty much given her a lot of rides in his car. Other than the time she observed George hugging O.E., she had never observed him touching O.E.

[57] E.N. agreed that she had seen O.E. give her first statement to the RCMP, and that she had spoken to her about the incident before O.E. returned the next day to give her second statement.

[58] E.N. said that when O.E. first told her about the incident, she had said that George had taken her pants down.

Cst. Smee

[59] Cst. Smee testified that he became involved in the matter after being contacted by Family and Children's Services ("FCS"). This contact occurred September 25, 2018. On that day, E.N. and O.E., in the company of a worker from FCS, came to the RCMP Detachment in Whitehorse. Cst. Smee spoke privately with E.N. He did not speak with O.E. on that occasion, due in part to some time constraints E.N. was under.

[60] Later that evening, Cst. Smee contacted E.N. in order to see whether he could obtain a statement from O.E. He did not obtain a statement at that time as he understood that O.E. was not ready to provide one yet. Cst. Smee then gave E.N. and O.E. a ride back from the RCMP Detachment to their residence. He engaged in casual and unrelated conversation with O.E. on the drive. O.E. was sitting in the front seat of the police cruiser.

[61] On the following day, September 26, 2018, Cst. Smee contacted E.N. as he wished to advance the investigation. At that time, E.N. said that O.E. was still not ready to talk.

[62] Cst. Smee testified that he believed the next contact he had with E.N. and O.E. was on October 11, 2018. This contact was facilitated through FCS. A Victim Services worker brought E.N. and O.E. to the RCMP Detachment.

[63] On that date, Cst. Smee interviewed O.E. in one of the RCMP Detachment's interview rooms. E.N. monitored the interview from a separate room.

[64] Cst. Smee testified that he had received Step-Wise training through the RCMP. This is a five-day child-interviewing course.

[65] Cst. Smee stated that when O.E. had described where the anus was located, on the image of a female she touched the vagina, and on the image of the male she touched the penis.

[66] A hand-drawn map of the location where the incident was alleged to have occurred was tendered as an exhibit through Cst. Smee. He testified that O.E. may have drawn the map, but that he had written notes on it as she was giving her statement.

[67] Cst. Smee took a statement from E.N. following the statement he had obtained from O.E.

[68] Cst. Smee, using the description he had been provided of George from O.E. and E.N., conducted police checks using the PROS database. Through this search he located a male who lived at 22 Waterfront Way. This information was cross-referenced with the Motor Vehicles Branch system. From this cross-referencing he was able to obtain a date of birth, name, model of car, as well as a photograph.

[69] As a result, Cst. Smee formed the opinion that the accused, George Rowe, was the George that O.E. and E.N. were referring to. The picture obtained from the Motor Vehicles Branch showed an older Caucasian male, about “70ish”, with short white hair and a long white beard. The date of birth was July 20, 1951 and the address was Apartment 312 - 22 Waterfront Place.

[70] As a result of the information that he had obtained through the taking of the statements from O.E. and E.N. on October 11, 2018, and his subsequent investigation, Cst. Smee began to take steps to obtain a search warrant for Mr. Rowe’s residence.

[71] Prior to obtaining a search warrant, O.E. attended the RCMP Detachment and provided her second statement on October 12, 2018. Following the obtaining of this statement, Cst. Smee modified the Information to Obtain that he was preparing, to include additional information arising out of the second statement. He then obtained the search warrant for Mr. Rowe’s residence and executed it at approximately 8:35 p.m. on October 13, 2018.

[72] Mr. Rowe came to the door when Cst. Smee attended his residence to execute the search warrant. Mr. Rowe was advised that he was under arrest for sexual assault and sexual interference. Pursuant to the search warrant authorization, Cst. Smee took

photographs of the inside of Mr. Rowe's residence. These photographs were filed as an Exhibit at trial, and depict the following:

- Photograph 1 depicts a television and DVD player;
- Photograph 2 depicts the search warrant (I note that I was the Judge that issued the search warrant);
- Photograph 3 depicts the suite from the front entrance door, in particular the living room and a portion of the kitchen. It shows disarray consistent with someone who has not yet moved in completely);
- Photograph 4 depicts the same as photograph 3, with slightly more of the kitchen showing;
- Photograph 5 depicts the kitchen area only;
- Photograph 6 depicts the kitchen and the living room area, as well as a portion of a bedroom and a bed as seen through an open doorway;
- Photograph 7 depicts the front entry doorway, a mostly closed door to a bathroom and the front hall closet;
- Photograph 8 depicts the same as Photograph 6;
- Photograph 9 depicts the living room, television, DVD player and some furniture;
- Photograph 10 depicts the living room from a different angle with some furniture and boxes;
- Photograph 11 depicts most of the living room;
- Photograph 12 depicts the far end of the living room, including a couch and two chairs with either clothing and/or linens on them;
- Photograph 13 depicts a close up of the clothing/linens on one of the chairs and the couch;
- Photograph 14 depicts the door leading out onto the deck;
- Photograph 15 to 17 depict fuzzy night views of lights and buildings as seen from the top floor deck. Cst. Smee identified the Boston Pizza building. He also testified that in Photograph 17 the sledding hill at Shipyards Park can be seen. He stated that Shipyards Park is adjacent to the river;

- Photograph 18 depicts the living room, kitchen, bedroom doorway and front entrance from the opposite end of the apartment;
- Photograph 19 depicts a portion of the living room and kitchen in a manner similar to Photograph 10;
- Photograph 20 depicts primarily a box in the living room corner that is visible in Photographs 10 and 19;
- Photograph 21 depicts a close up of the same box;
- Photograph 22 depicts the bedroom through the open door. It shows a bed in a state of disarray;
- Photograph 23 depicts a view of the bed, clothing, and other items from within the bedroom;
- Photograph 24 depicts a side view of the bed. Clearly visible are a white pillow and a blue, green, purple and white, large-checked-pattern floral-designed comforter with a green trim. There is an orange and pink undersheet and a mixed-bluish pastel coloured comforter with a white underside;
- Photograph 25 depicts a view of the end of the bed and the bedroom closet. There is a cardboard box for a new television set. The same general state of disarray of clothing is visible. The closet itself appears to be empty;
- Photograph 26 depicts the bed from an end view. Clearly visible are the orange and pink undersheet, as well as the same comforter. There is a purple sheet that could be the underside of the comforter. He described there as being two bedspreads: one bright orange and the other a dirty green. At another point he described what appears to be this same bedding as being beige/greyish;
- Photograph 27 depicts a portion of the bed, what appears to be a doorway into a furnace room, and a hallway;
- Photograph 28 depicts a view from the location of the bed into a bathroom through an open doorway. There is a sliding door at the bathroom entrance;
- Photograph 29 depicts a close-up of three pillows on the bed: one white, one in pastel flowers and one with a top side blue design and the bottom a red, off-white and yellow colour with designs. The same comforters are visible, as well as the pale green sheets;
- Photograph 30 depicts the bed and coverings from a different angle;

- Photograph 31 depicts a close-up of the checked comforter;
- Photograph 32 depicts a close-up of the same comforter and the grey sheet;
- Photograph 33 depicts a close-up of the top of the bed;
- Photograph 34 depicts a close-up of the top of the bed.
- Photograph 35 depicts the view from the bedroom into the bathroom. Cst. Smee, who is standing in the bedroom, can be clearly seen in the bathroom mirror taking this photograph;
- Photograph 36 is a view from the inside of the bathroom, primarily of the toilet and shower area, including several towels;
- Photograph 37 depicts the laundry area of the bathroom as well as the closed door that leads into the kitchen and front entrance area;
- Photograph 38 depicts the same view with the bathroom door open;
- Photograph 39 depicts the view from the bathroom into the bedroom. The foot-end of the bed is visible;
- Photograph 40 depicts correspondence to Mr. Rowe from the Yukon Motor Vehicles Branch regarding his Letter of Experience for Operator's Licence;
- Photograph 41 depicts a Walmart receipt for an HDMI DVD player. It is dated 10/9/18;
- Photograph 42 depicts a close-up portion of the same receipt, without the date; and
- Photograph 43 depicts the television set and DVD player. A small television shipping box is visible behind the television.

[73] It is clear that in Photographs 31-34 the bedding on the bed had been altered from how it was initially observed.

Submissions of Counsel

Crown Counsel

[74] Crown counsel submits that there is persuasive evidence that O.E. was sexually assaulted by the accused in that he sexually touched her by going upward and downward on her while they were both lying on his bed with their clothes on.

[75] He states that when she provided her two statements, O.E. was not led by the questioning, but that she provided her answers to open-ended questions.

[76] O.E. was essentially consistent with what happened in both of her statements.

[77] O.E. was able to describe in detail what George was doing during the sexual assault. She was able to point to the penile and vaginal regions of the body when asked to describe what she meant by “anus”.

[78] O.E. was able to describe not only the layout of the apartment, which she had never been in on any other occasion, but also some of the items in the apartment.

[79] O.E. was able to see Boston Pizza and a park by the river. Counsel submits that it was an understandable error that O.E. stated “Rotary Park” rather than “Shipyards Park”.

[80] He submits that O.E.’s description of the bedding and pillows was confirmed in the photographs.

[81] The photographs also confirm O.E.’s testimony that she could see herself in the bathroom mirror from the bedroom.

Counsel for Mr. Rowe

[82] Counsel for Mr. Rowe submits that the Crown has not proven identity and, therefore, there is insufficient evidence to convict Mr. Rowe of having committed these offences.

[83] O.E. talks about a “George”, and being in his apartment. She describes him as a man with white hair and a beard. At no time, however, does she, or her mother, identify Mr. Rowe as the “George” she was talking about.

[84] Counsel also submitted, that even if identity had been proven, there remains insufficient reliable evidence to find Mr. Rowe guilty.

Issue of Identity

[85] Crown counsel asserted in his reply to the submissions of counsel for Mr. Rowe that he did not seek to prove identity because he understood that identity had been admitted by counsel for Mr. Rowe at the pre-trial conferences. (The submission of Crown counsel on the issue of identification is found in the excerpts from the transcript of proceedings from the second day of trial, May 31, 2019, on pp. 85 - 86, lines 8 - 47 and 1 – 23).

[86] The first pre-trial conference was held in Chambers on April 24, 2019. It was not recorded. I have reviewed my pre-trial conference notes from April 24, 2019 and there is nothing in these notes in regard to admissions on the issue of identification. Neither did either counsel point to any notes, correspondence or anything else in regard to there having been something said on the issue of identity at that time.

[87] There was a second pre-trial conference held in court on May 22, 2019. This pre-trial conference was recorded, and a transcript was provided. The relevant portion of this transcript reads as follows on p. 4, lines 26 - 47:

- Mr. MacGillivray: I'm not too sure if we covered this at the first pre-trial conference. Just to make our position clear, we'd like to have admissions with regards to date, time, jurisdiction, identity of the accused, and the –and the young person. I'm happy to lead the young person through her age, of course, and heading up to those details, but it's probably just better to confirm that now while we have the time.
- The Court: Well, from what I understand, its not likely going to be an issue of jurisdiction.
- Mr. Larochelle: No, there's likely not going to be an issue with date, jurisdiction, and the fact that the complainant is a young person.
- The Court: Identity?
- Mr. Larochelle: I'd leave – I'd leave that open for now.
- Mr. MacGillivray: So when my friend says he leaves that open, is he talking about that he's not in a position to admit that Mr. Rowe is, in fact, Mr. Rowe; or if it was Mr. Rowe who was at the – at the alleged residence and committed the alleged offence?
- Mr. Larochelle: I don't have instructions on –
- Mr. MacGillivray: okay, fair enough.
- Mr. Larochelle: - on identity.
- The Court: Okay. But I think the admission Crown was looking for is that Mr. Rowe the client is Mr. Rowe the accused; right?
- Mr. MacGillivray: Yeah, and –

[88] I also reviewed the transcript of the first day of trial on May 30, 2019. The transcript of proceedings reads as follows on p. 9, lines 16 - 18:

- Mr. MacGillivray: We did – at the pre-trial conferences, we did confirm that identity, date, time and jurisdiction were at issue and, really, we're

intent on not asking [O.] many questions, and just playing the statements....

[89] I confirmed that the transcript from May 30, 2019 appears to be accurate in this regard by listening to the Digital Audio Recording System (“DARS”) several times. I say appears because, played back at the lowest speed possible it may have been that Mr. MacGillivray was saying that: “identity, date, time and jurisdiction weren’t at issue”. However, at normal speed, it does not appear that this is the case.

[90] Following Mr. MacGillivray’s comment, there was nothing stated by Mr. Larochelle in respect to any admissions.

[91] From the transcript of proceedings of May 30, it would appear that, if identity was at issue, date, time and jurisdiction were also not admitted. However, the transcript of proceedings of the pre-trial conference of May 22 makes it clear that date, jurisdiction and the age of the complainant were likely not going to be an issue.

[92] Crown counsel further submitted that, as a result of out-of-court conversations he had with counsel for Mr. Rowe, he believed that identity was being admitted at trial, and therefore would not need to be proved. Counsel for Mr. Rowe, however, disagreed that he had ever communicated to Crown counsel that identity was going to be admitted.

[93] There is clearly some ambiguity here.

[94] Despite this ambiguity, and setting aside the issues of date, time and jurisdiction for the moment, as well as any out-of-court discussions between counsel, it appears from the above review of the pre-trial conference notes, pre-trial conference transcript,

and the statements made at trial, that on its' face, identity of Mr. Rowe as the "George" O.E. and E.N. were testifying about was never agreed by counsel for Mr. Rowe to have been admitted.

[95] There is no issue that Mr. Larochelle's client is the George Rowe that the RCMP charged with having committed these offences, and that he is the individual who was compelled to appear in Court to answer to these charges.

[96] At no time, however, did E.N. or O.E., when testifying, identify Mr. Rowe as the "George" that they were testifying about. Neither at any time did O.E look at the photographs and identify from these photographs that this was the residence she alleges the sexual assault took place in.

[97] I indicated to counsel, that should the Crown consider it to be appropriate in the circumstances, an application to re-open the Crown's case to call evidence on the issue of identification could be brought before me for argument.

[98] There was a further mid-trial conference held on June 12, 2019 to discuss the manner in which such an application would proceed. Both Mr. MacGillivray and Mr. Larochelle attended this pre-trial conference.

[99] Although at this pre-trial conference the initial indications were that Crown counsel was going to bring such an application, involving a different Crown and a different defence counsel, by correspondence dated July 26, 2019, the Crown indicated that it no longer intended to pursue that application.

[100] On August 14, 2019, Crown counsel, by e-mail communication, indicated that the Crown position was that closing submissions had been made and the matter was before me for decision as to whether Mr. Rowe was guilty as charged, or not.

[101] On August 20, 2019, counsel for Mr. Rowe sent e-mail communication to the trial coordinator indicating that he was in agreement with Crown counsel and all that was now required was a decision on the trial.

Analysis

In-Dock Identification

[102] It is not necessary for there to be in-dock identification of the accused in order to prove identity. In *R. v. Nicholson*, 1984 ABCA 88, Kerans J.A., speaking for the Court, stated in paras. 4-6 as follows:

4 The argument for the appellant before us proceeded on the assumption that a dock identification by an arresting officer is an integral part of the criminal process. This is a myth. That the Crown often relies upon such evidence should not permit us to think that a dock identification is a ritual as essential to a criminal trial as, say, the reading of the charge. The onus upon the Crown is to prove that the crime alleged has been committed and that the accused is the person who did it. This last, like any fact-in-issue, can be proved in many different ways.

5 Both counsel cited a large number of cases dealing with identification issues. There are conflicting decisions in Queen's Bench and Provincial Court, most of which are not reported. No useful purpose would be served by a lengthy review of these. Most are brief oral judgments in summary conviction cases. But the conflict indicates that certain essential propositions should be re-affirmed, and I have enlarged the scope of these reasons to that end.

6 One can speak of identification in several contexts. One question, for example, which seemed in argument here to be confused with others in this: precisely which member of the human race is charged with the offence? Another is in terms of a judge being satisfied that the accused is

actually before the Court for the purposes of a trial. Yet another arises when the Crown or defence seek to introduce certain documents which purport to relate to the accused. And, lastly, the Crown must, as I have said, prove beyond a reasonable doubt that it was the accused, and no other, who committed the crime charged. These four are quite separate questions, although often closely related. Problems which arise in one context cannot be permitted to cause confusion in another.

...

27 I take no exception to the authorities offered for the appellant which repeat the fundamental proposition that, for guilt, the Crown must prove that the person named in the information and before the court is beyond any reasonable doubt the person who committed the offence.

[103] In the case before me, the issue is whether there is sufficient evidence to establish beyond a reasonable doubt that the George Rowe before the Court is the “George” that O.E. states took her into his apartment and sexually assaulted, and that E.N. states gave O.E. a ride alone on the day that this incident is alleged to have occurred.

[104] In my opinion there is not.

[105] At the time that the search warrant was executed, George Rowe lived in a condo complex in the proximate area of Whitehorse that O.E. states the sexual assault took place in.

[106] I am aware that Cst. Smee used the RCMP PROS system to identify Mr. Rowe and, based upon this identification, the Yukon Motor Vehicles Branch system to ascertain where Mr. Rowe lived. He testified as to how he identified Mr. Rowe as follows:

So based on what the victim and witness told me and the description of them, I conducted police checks using a database, PROS we call it. And I located a male matching the description who lived at 22 Waterfront Way. I then cross-referenced that with Motor Vehicle branch system and we were able to get a picture, so the date of birth, name, what car they were driving registered, and a picture. And I compared that all to tally with what was being said. And I came to the determination that George Rowe was the person [O.] and [E.] were speaking about.

[107] Cst. Smee agreed in direct examination that Mr. Rowe lived at 22 Waterfront Place, Apartment 312. I note that this is a different address than 22 Waterfront Way. No explanation was offered for this discrepancy and I assume that, in the absence of an explanation, I am expected to presume that these are the same address and that one or the other of these addresses is an inadvertent error, and that they are the same place.

[108] Cst. Smee said that he was aware of that building because he had attended there before and: "so it all kind of aligned up based on what I was cross-referencing and my knowledge of the building".

[109] This is all fine but what do we actually know? We know that Cst. Smee's investigative process somehow led to Mr. Rowe as a suspect. But why? Based upon what? That he is an older male with white hair and beard who lives in an apartment/condo in the same area as O.E. testified he did (assuming that O.E. was in fact talking about Shipyards Park and not Rotary Park)? Was Mr. Rowe the only person who fit that description living in the area?

[110] There is no evidence that O.E. or E.N. identified the alleged assailant for Cst. Smee, not even from a photograph, as being George Rowe. There is no evidence that the vehicle registered to George Rowe was purple, blue, or was a four-door vehicle.

[111] As I said earlier, O.E. was never shown any of the photographs of Mr. Rowe's apartment and, as such, she did not testify that the apartment that the incident took place in was the same apartment that she saw in the photographs.

[112] There are a number of apartment/condo units in the area, some of which I expect are likely similar in floor design and layout to Mr. Rowe's.

[113] I note that the warrant was executed weeks after the alleged incident, so it is unlikely that the interior of the residence as depicted in the photographs was exactly the same as it was at a time proximate to the alleged incident, regardless of whether this is the same apartment or not that O.E. described being in.

[114] It became apparent in the course of the pre-trial conferences that Mr. Rowe provided a statement. There was discussion as to whether all or a portion of this statement would be adduced in evidence as part of the Crown's case. In the end, the Crown chose not to proffer this statement.

[115] Perhaps Mr. Rowe, in this statement, had it been admitted into evidence, would have placed himself in the position of the "George" that O.E. and E.N. were referring to. I understand from Crown counsel's submissions that, had he been aware that the identity of Mr. Rowe as the "George" O.E. and E.N. were speaking of was an issue, he would have sought to adduce the statement as part of his case.

[116] While this apparent misunderstanding, as expressed by Crown counsel, as to what he thought was being admitted by Mr. Rowe may well have been of some weight in an application to re-open the Crown's case, the simple reality is that, in the end, I am

limited to deciding this case based on the evidence that I have. I cannot treat the possibility of the existence of other evidence on the issue of identification, as actually being evidence and being of any probative value.

[117] In short, there is almost nothing in the way of evidence adduced at trial that links George Rowe to the “George” that E.N. and O.E. testified to as having given them rides and stayed at their residence, and that O.E. testified to as having sexually assaulted her.

[118] There may be more in the background of the investigation that could have made that connection apparent, but that is not in evidence before me in any way remotely sufficient to be of probative value on the issue of whether O.E. and E.N., when speaking of “George”, are speaking of George Rowe, the accused before the Court.

[119] Simply because Cst. Smee concluded on the basis of his investigation that George Rowe is the “George” that O.E. and E.N. were speaking of, does not mean conclusively that he was, or mean that the evidence adduced at trial establishes this as a fact.

[120] On the basis of the failure of the Crown to prove the identity of the accused as the individual O.E. states sexually assaulted her, I acquit Mr. Rowe of the charges he is facing.

[121] I wish to add the following. While the testimony of O.E. was not delivered as smoothly and without apparent contradictions, at least on more peripheral matters, as perhaps the evidence of an adult would be, I consider that her evidence as to having

been sexually assaulted by a “George” to be compelling and very capable of being believed. I find there to be a strong case that O.E. was sexually assaulted in the manner that she described. She was in my opinion, generally an honest, credible and, taking into account her age and other factors, a reliable witness, in particular with respect to her testimony regarding the incident.

[122] In stating this, I am not going so far as saying that if the identity of “George” as being George Rowe had been established, I would have convicted Mr. Rowe. The trial may well have proceeded in a different manner had the issue of the Crown failing to prove identity not arisen. As I am not required to decide this issue, I decline to do so.

[123] As part of its case, the Crown must prove beyond a reasonable doubt that Mr. Rowe is the individual that O.E. states sexually assaulted her. In the end, the testimony of the witnesses does not so identify Mr. Rowe and, as stated earlier, he must therefore be acquitted.

COZENS T.C.J