

Citation: *R. v. Smarch*, 2004 YKTC 56

Date: 20040723
Docket: T.C. 03-00322
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Lilles

R e g i n a

v.

Jack William Smarch

Appearances:
Samantha Wellman
Gord Coffin

Counsel for Crown
Counsel for Defence

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

REASONS FOR JUDGMENT

The Charge

[1] Jack William Smarch has been charged with an offence contrary to s. 271 of the *Criminal Code*, namely, that he committed a sexual assault on C.C. on August 25, 2003.

The Facts

[2] C.C. testified that she started sipping beer at 10:30 a.m. on August 24, 2003. Two female friends came over later and they too were drinking until they left around 2:00 p.m.

[3] The accused, Mr. Smarch, arrived at C.C.'s house around 8:00 p.m., and sat around socializing with C.C. He was not drinking initially, but did start drinking later. E.D., the man with whom C.C. was living, was in and out of the house during the evening. Another individual, T.D., an elder in the Teslin community, also joined them that evening.

[4] C.C. retired to a bedroom and went to sleep fully clothed. T.D. went to bed in another bedroom. E.D. went to sleep on a couch in the living room, as did Mr. Smarch.

[5] Around 6:30 a.m., C.C. was wakened by what she described as great pressure on her shoulder. Mr. Smarch was on her bed, his face above hers and his hand was pressing on her shoulder. She was startled and started yelling obscenities at him. Mr. Smarch got off the bed and ran out of the room.

[6] C.C. stated that her pants, which fit snugly, had been pulled to her knees. Obviously concerned about what had been done to her, she checked her tampon and found it in place.

[7] As I understood her evidence, C.C. concluded that she had not been vaginally penetrated. She pulled up her pants and went into the living room. She saw Mr. Smarch laying on the floor with a cushion from the couch, "pretending to be asleep".

[8] C.C. went into the living room and woke her partner, E.D. by shaking him aggressively. When she told him "your cousin tried to rape me", he responded, "(that is) not my business". C.C. went back to her bedroom and E.D. and T.D. came into the bedroom. She tried to get E.D. to stay, but he left the house. When she went back into the living room, Mr. Smarch had left.

[9] That same morning, C.C. went to Mr. Smarch's mother's house and told her what happened. Mr. Smarch's mother told C.C. not to mention it to anyone. Later, when C.C. told E.D.'s sister what happened, she encouraged C.C. to report the matter to the police. E.D.'s sister supported C.C. by accompanying her to the police detachment.

[10] After reporting the incident to the police, C.C. saw Mr. Smarch walking along the street. Upset with him, C.C. threw several stones at him. Mr. Smarch responded by telling her that he was sorry.

[11] C.C. was the only witness called by the Crown. The defence did not call any evidence.

The Issues

[12] Although C.C. had been drinking all day, and acknowledged consuming as many as 24 beer, her memory of the days events was very good, including details such as "Jackie Smarch started drinking Wisers rye later". C.C. was able to give a reasonable chronological account of the relevant events. When awakened by Mr. Smarch, C.C.'s description of what she saw and did was detailed and largely unchallenged by the defence.

[13] In cross-examination, the defence suggested that Mr. Smarch was not on the bed when C.C. woke up, but rather that he was beside the bed. The defence also suggested that Mr. Smarch had only pushed on C.C.'s shoulder in order to wake her up. C.C. was not shaken in her evidence. C.C. was clear that Mr. Smarch was on the bed, not beside it and that the weight on her shoulder was more like Mr. Smarch was supporting himself with his hands.

[14] Mr. Smarch also urged the court to find that the Crown's case was based on assumptions. C.C. woke up with her pants down to her knees, but she could

not say who pulled them down. Since C.C. went to bed around 3:00 a.m. and was awoken by Mr. Smarch around 6:30 a.m., she could only say that whoever pulled them down did so sometime between 3:00 a.m. and 6:30 a.m.

[15] Finally, I was urged to find that the apology to C.C. (when she saw Mr. Smarch on the street after making the report to the police) was equivocal. It was only obvious that Mr. Smarch had done something to upset C.C. Mr. Smarch was merely saying, whatever I did to upset you, I am sorry. The apology did not necessarily relate to the sexual assault as alleged by C.C.

Conclusions

1. Although C.C. had been drinking throughout the day and was intoxicated when she went to bed, I find her evidence to be credible. C.C. recounted detailed observations of the events prior to going to bed and of what occurred when she woke up. C.C. was not shaken in cross-examination. In particular, I accept her evidence that Mr. Smarch was on the bed, not beside it, when C.C. was awakened by the weight of his hand pushing on her shoulder.
2. The evidence as it relates to the sexual assault, more specifically, who pulled down C.C.'s pants, is circumstantial. That circumstantial evidence includes the following:
 - a. When C.C. woke up, Mr. Smarch was on the bed and his face was above hers.
 - b. Mr. Smarch's hand was pushing hard on C.C.'s shoulder, causing her to wake up. This action would be consistent with Mr. Smarch attempting to get on top of C.C.
 - c. It is possible that C.C.'s pants were pulled down by T.D. or E.D. prior to Mr. Smarch entering the bedroom. T.D. is an

elder in the Teslin community. E.D. was then C.C.'s partner. There was no suggestion by Mr. Smarch that either of these two individuals had done so. There was no suggestion of any reason for them to have entered C.C.'s room, pulled down her pants to her knees and then leave the room to go back to sleep. I find it extremely unlikely that a person other than Mr. Smarch pulled down C.C.'s pants.

- d. Mr. Smarch's action after C.C. woke up were consistent with a guilty mind:
 - i. C.C. said that Mr. Smarch "ran" out of the bedroom when she woke up and yelled at him.
 - ii. When C.C. came out of the bedroom, she said he was "pretending" to be asleep on a cushion on the floor.
 - iii. A little while later, when C.C., E.D. and T.D. came out of her bedroom, Mr. Smarch had left the house.
 - iv. When C.C. encountered Mr. Smarch later that day and threw stones at him, he told her that he was sorry.

[16] Based on all of the evidence, I am satisfied beyond a reasonable doubt that Mr. Smarch entered C.C.'s bedroom for a sexual purpose, that he pulled down her pants and was in the process of getting on top of her when, as a result of his hand pushing on her shoulder, C.C. woke up.

[17] The evidence satisfies me beyond a reasonable doubt that Mr. Smarch is guilty of sexually assaulting C.C., as charged.