

Citation: *R. v. Torres*, 2013 YKTC 4

Date: 20121001
Docket: 11-00618

Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Cozens

REGINA

v.

RODRIGO MORENO TORRES

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

Appearances:
Keith Parkkari
Robert Dick

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS C.J.T.C. (Oral): Rodrigo Torres has been charged with sexually assaulting L.W. on December 3, 2011. The trial commenced before me on July 30, 2012.

[2] On that date, L.W. testified and was cross-examined by counsel for Mr. Torres. Crown counsel then brought an application to have certain statements that the complainant provided to the RCMP admitted in evidence for the truth of their contents as being her past recollection recorded or, alternatively, through the principled

exception to the hearsay rule. In an oral decision pronounced August 2, 2012, I ruled that Crown counsel could recall L.W. and attempt to refresh her memory from prior statements she had made to the RCMP. After this step, I said I would reconsider the Crown's application to enter into a *voir dire* regarding the admissibility of the statements.

[3] On September 19, 2012, on the agreement of counsel, the evidence of both Constable MacQuarrie and L.W. was heard within a *voir dire*. At the conclusion of the *voir dire*, Crown counsel withdrew his application to have the complainant's statements admitted into evidence. Further, upon the agreement of counsel, the evidence of Constable MacQuarrie with respect to her actions and observations were admitted into evidence at trial.

TESTIMONY

[4] The evidence of L.W. was that she had been drinking alcohol at several locations on the evening of December 2, 2011, and on into the morning hours of December 3rd. She asked a friend to call her a cab and she took one driven by Mr. Torres. She asked him to take her to her home where she lived with her parents in a mobile park. L.W.'s recollection of the detail of the events that took place after she got into the taxi is somewhat unclear. She does remember, however, that during the cab ride home she spoke to a friend on her cellphone. She testified that Mr. Torres took her home where she paid for the \$18 fare with a \$20 bill. Mr. Torres then drove her to a bus turnaround near her residence and had sexual intercourse with her without her consent. L.W. testified that Mr. Torres parked the taxi, walked around to her side of the van, opened the front passenger door where she was seated, and reclined the seat. He then

took off his pants, got on top of her, and had intercourse. She does not remember how her pants were removed or whether she said anything to Mr. Torres or attempted to stop him in any way. She remembers that she did not want this to happen.

[5] She does not recall how she arrived home, only that she went into the house and went to the bathroom. She does not remember talking to her mother at that point in time, although her mother gave evidence of a limited conversation. L.W. recalls a female police officer being in the residence, but only remembers crying while the officer was trying to talk to her. She recalls talking to the female police officer later while in the police cruiser when she was being taken to the hospital and while at the hospital. L.W. testified that she had some bruising on her arms and legs that she did not believe came from anything other than the sexual assault. She did not say when she noticed this bruising.

[6] L.W. testified that at some points in the evening and morning she blacked out from excessive alcohol consumption. She attributed her inability to recall how she arrived home after being at the bus turnaround to her being drunk. She also testified that she had blocked out many of the details of the sexual assault, referring to having done the same with respect to a prior sexual assault she was the victim of in the Northwest Territories.

[7] L.W. agreed in cross-examination that she had made several statements to the RCMP contemporaneous to the sexual assault and had told the truth at the time she made those statements. She agreed that what she told the RCMP officer at the time, but does not now remember at trial, eludes her memory as a result of her having

blocked it out. L.W. stated that she partially remembers the sexual assault and that she could not entirely block it out, saying that it would be with her forever. She agreed with the suggestion put to her by defence counsel that she blocked out portions of the events because she could not deal with it. She further agreed with defence counsel's suggestion that despite being drunk, she knew what was going on at the time and had simply since blocked it out.

[8] Defence counsel suggested to L.W. that she consented to having sex with Mr. Torres and reacted as she did because she felt bad afterwards. When her mom confronted her, L.W. made up the story about the sexual assault because she was ashamed. Counsel suggested that this is why she has since blocked it out. L.W. denied this, saying, "I don't think I would do that. I wouldn't have sex with some random man, drunk or not." When asked if this might have been the only time she had done so, L.W. stated, "No. I would remember that."

[9] L.W.'s mother, K.W., testified that L.W. came home after 8:00 a.m. in a taxi. K.W. had just woken up. K.W. did not see the taxi until it was pulling away. She heard the taxi door close and observed L.W. come into the residence. She could tell that L.W. was upset and crying. L.W. went straight into the bathroom and stayed there for 10 to 15 minutes. K.W. attempted to find out what was bothering L.W. but the only response was crying and a statement that something happened. L.W. then went into her bedroom and shut the door, not allowing K.W. in for approximately 10 to 15 minutes. L.W. continued to cry hysterically but was able to provide some information to K.W. which resulted in K.W. becoming scared and concerned and contacting the RCMP. K.W. also contacted the cab company to learn who had been driving the taxi. She

learned that it was Mr. Torres, who she knew through her involvement with the company.

[10] L.W. lay on the living room couch for approximately 45 minutes waiting for the RCMP to arrive. K.W. testified that L.W. was pretty drunk, assessing her as a 9 on a scale of 1 to 10, with 10 being the worst. She stated that she had only seen L.W. that intoxicated once before, on her 19th birthday. L.W. was 23 years old on December 3, 2011. That said, K.W. testified that L.W. spoke clearly and was understandable. She said that L.W. provided her with the cab number, which she provided to the RCMP.

[11] Constable MacQuarrie testified that the RCMP received a complaint in this matter at approximately 9:00 a.m. and that she arrived at the residence of L.W. between 9:30 and 9:40 a.m. L.W. was sleeping on the couch. Constable MacQuarrie shook her awake, stating that it took a few minutes before L.W. was fully coherent. Constable MacQuarrie testified that L.W. was quite upset, crying, sobbing, and shaking. She could tell that L.W. had been drinking but considered her to appear sober. She did not observe any physical injuries. While en route to the hospital, Constable MacQuarrie observed L.W. to not be upset but more matter of fact in her discussion with her. While at the hospital, however, Constable MacQuarrie noted L.W. to be crying, upset, and angry. Constable MacQuarrie had had no prior dealings with L.W.

[12] Mr. Torres testified in his defence. He stated that he was near the end of a shift when he picked up L.W., whom he knew from two or as many as six to seven prior occasions when she had been a fare. He stated that L.W. got into the front seat of the vehicle, which was unusual in his experience, as most fares got into the rear seat. He

reached over and moved the seat back to provide more room for her. He denied touching her at this time or reclining her seat. Mr. Torres stated that L.W. was swearing and very upset, and that this was in regard to an issue with her boyfriend. She did not appear to be very drunk to him and he felt that she was acting normally and speaking properly, including during her conversation with someone on her cellphone while he was driving her home. He stated that her demeanor was consistent with how he had observed her on the prior occasions he had provided her cab rides, other than her being upset this time.

[13] L.W. directed him to drive her to her parent's house, which he did. She paid him \$20 at her home but then said she wanted to be with another hot cab driver and asked Mr. Torres to drive her to see him. When he said he could not, she said she wanted to have sex with him; touching him as she said this. While initially resistant, he ended up driving to the bus turnaround where he went around to her side of the vehicle, opened her door, and had consensual sex with her in the taxi. He testified that he took off his pants and she took off hers. He denied having sexual intercourse with L.W. without her consent. He testified that after he ejaculated, L.W. wanted more sex but he was concerned as having sex in a car is illegal in Mexico, where he previously lived. Mr. Torres told L.W. that he had to go home, so he closed the doors and drove her to her residence. He testified that L.W. was not crying or anything and that she told him she would probably not remember anything tomorrow because she would black out. He stated that L.W. was not upset or crying when he dropped her off at home. L.W. asked him for the cab number and he told it to her.

[14] Mr. Torres stated that he dropped L.W. off at her residence between 8:15 to

8:30, after which he drove around for 15 minutes, waiting for a possible fare. He said that he then received a call from his dispatcher regarding a complaint they received from K.W. about his interaction with L.W. He tried to phone K.W. to speak with her but L.W. answered the phone and told him not to call there.

[15] The RCMP contacted him and he went straight to the RCMP detachment, which was only a few minutes away. Mr. Torres stated that when he arrived at the RCMP detachment, he was not aware of any complaint that he had done something sexual to L.W. Mr. Torres was questioned by the RCMP and provided a statement in which he denied that anything had happened between himself and L.W. He said that he is sorry that he was untruthful at the time he gave his statement, but that he did so because he was recently married and did not like to talk about having sex with a woman. When asked whether he ever went back to the police station to tell them that he had consensual sex with L.W., Mr. Torres stated that he told them when an RCMP officer came to take his blood and said they should talk to her and push her to tell the truth. When Crown counsel suggested to him that this was the first time he admitted to having sex with L.W., Mr. Torres stated that it was not and that when he was in custody for five days and appreciated that this was a real situation, he decided that he was going to tell the police the truth. He admitted, however, that he did not do so until sometime after that, when his wife became aware that he had sex with L.W.

[16] I infer from the evidence that Mr. Torres acknowledged having sex with L.W. at the time the blood demand was made. Crown counsel suggested to Mr. Torres that the only reason he told the police officer at this time that he and L.W. had had consensual sex was because he knew his DNA would be on her. Mr. Torres testified that he was

not sure about that as it felt to him that she may have had relations with someone else previously as she was “so wet” when he had intercourse with her. Mr. Torres stated that he is in Canada on a work visa and if he is convicted of this offence he will be deported from Canada.

LAW AND ANALYSIS

[17] The resolution of this case falls squarely within the analysis set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, and the case law that has since developed. At page 78 (para. 28 in Quicklaw), the Court set out an analytical structure for assessing credibility when an accused testifies:

...First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[18] The *W. (D.)* analysis is not a formulaic approach which must be strictly adhered to, as stated in *R v. J.H.S*, 2008 SCC 30, starting at para. 10:

The precise formulation of the *W. (D.)* questions has been criticized. As to the first question, the jury may believe inculpatory elements of the statements of an accused but reject the exculpatory explanation. In *R. v. Latimer* [2001] 1 S.C.R 3, 2001 SCC 1, the accused did not testify, but his description of the killing of his daughter was put into evidence by way of statements to the police. His description of the event itself was obviously believed. The exculpatory explanation did not amount to a defence at law. He was convicted. The principle that a jury may believe some, none, or all of the testimony of any witness, including that of an accused,

suggests to some critics that the first *W. (D.)* question is something of an oversimplification.

As to the second question, some jurors may wonder how, if they believe *none* of the evidence of the accused, such rejected evidence may nevertheless of *itself* raise a reasonable doubt. Of course, some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.

The third question, again, is taken by some critics as failing to contemplate a jury's acceptance of inculpatory bits of the evidence of an accused but not the exculpatory elements. In light of these possible sources of difficulty, Wood J.A. in *H. (C.W.)* suggested an addition instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit." [p. 155]

In short, the *W. (D.)* question should not have attributed to them a level of sanctity or immutable perfection that their author never claimed for them. *W. (D.)*'s message that it must be made crystal clear to the jury that the burden *never* shifts from the Crown to prove *every* element of the offence beyond a reasonable doubt is of fundamental importance, but its application should not result in a triumph of form over substance. In *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, Cory J. reiterated that the *W. (D.)* instructions need not be given "word for word as some magic incantation" (p. 533). In *R. v. Avetyan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

[19] It is the obligation of the Crown in this case to prove beyond a reasonable doubt that Mr. Torres sexually assaulted L.W. The burden at no time shifts to Mr. Torres to prove that he did not do so. It is clear that I am not to examine and choose between the

evidence of Mr. Torres and L.W. in order to determine whether the Crown has met its burden of proving the guilt of Mr. Torres. I am required to consider and assess the evidence of Mr. Torres in light of the entirety of the evidence. Per *R. v. Hall*, [2006] O.J. No. 3177 (C.A.), if on a consideration of the whole of the evidence I am left in a reasonable doubt about whether Mr. Torres committed the offence of sexual assault, I must acquit him. If I am not, then he will be convicted.

EVIDENCE OF MR. TORRES

[20] I find that the testimony of Mr. Torres at times strained credulity to the point that his evidence, insofar as his evidence is exculpatory, is incapable of belief, and, accordingly, I reject his evidence and further find that it is not capable of raising a reasonable doubt. While there was no one point or aspect of his evidence that taken in isolation is ultimately damning with respect to his credibility, his testimony taken in its entirety and assessed against all of the evidence, including the evidence of the complainant, does not have the ring of truth. As a general comment, I find his evidence to have been somewhat conveniently presented and not at all persuasive. I am aware of the limited value of an assessment in demeanor, in particular when dealing with a witness of a different cultural background and language, and the potential for error if undue weight is assigned to demeanor assessment. This said, I find that Mr. Torres' demeanor did not assist me in leading me towards finding his evidence credible and believable.

[21] Mr. Torres' evidence has L.W. in the cab, angry at her boyfriend and saying men are scum, talking to a friend on her phone, wanting to go to one place and then

changing her mind, directing him to take her home, which was in an entirely different direction, paying for the cab ride, asking Mr. Torres to take her to another cab driver for her to have sex before starting to touch Mr. Torres, inviting him to have sex with her, and then going a couple of minutes away to have consensual sex in a bus turnaround at approximately 8:00 a.m. L.W. wanted more sex but Mr. Torres became concerned and took her home with her in no apparent emotional distress, in fact acting fairly normally. Her last words were to ask for the cab number and to say that she probably would not remember this the next day because she would black out.

[22] Mr. Torres received phone calls from dispatch from the RCMP shortly afterwards but did not know what they were about. He went to the RCMP detachment and even after being asked about sexual contact with L.W. denied anything happened.

[23] The testimony of K.W., whose evidence was essentially unchallenged and which I accept, has L.W. entering the house, after the taxi door is shut and it pulls away, in an extremely emotionally upset condition.

[24] The testimony of Constable MacQuarrie, which I also accept, is consistent with the evidence of K.W. with respect to L.W.'s distressed emotional state. Although not entirely impossible, I find it an extreme stretch to believe that L.W.'s demeanor would so abruptly shift between leaving the taxi and entering her house because she was suddenly overcome with regret or shame for her actions.

[25] Mr. Torres testified that L.W. answered the telephone shortly after she returned home and spoke to him. There is no other evidence that such a phone call was ever made, and it appears inconsistent with the evidence of K.W. and the emotional

condition and actions of L.W. as described by K.W. and Constable MacQuarrie. Again, while ultimately not impossible and of a minor point, it is a factor which I do not place much weight on. It simply remains one consideration. Mr. Torres testified that he contacted the dispatcher to inquire about the location of the black cab driver, A.J., that L.W. was interested in meeting that morning. It would perhaps have been helpful to have confirmatory evidence from the dispatcher Mr. Torres spoke to but such evidence was not before the Court and no explanation proffered for this. Again, this is a minor point but it is still a consideration in my assessment of Mr. Torres' overall credibility. Mr. Torres certainly had ample opportunity to tell the RCMP officer who questioned him on December 3rd that he had consensual sex with L.W. He did not. In fact, it appears that he did not do so until an RCMP came to take a blood sample from him for DNA testing. Even though he knew that he had had sexual intercourse with L.W., he testified that he was not sure his DNA would be present because he thought L.W. may have had sexual relations with someone else earlier. Mr. Torres' explanations for not telling the truth right away are not outside of the realm of possibility but his failing to take the opportunity to do so, even after he had been arrested and placed in custody, remain nonetheless a factor to be considered within the entirety of the evidence. Again, I simply find the evidence of Mr. Torres implausible and reject it.

[26] Even after rejecting the exculpatory evidence of Mr. Torres and finding it does not raise a reasonable doubt, I must nonetheless consider whether the evidence which I do accept is sufficient to sustain a conviction against Mr. Torres for having committed the offence of sexual assault.

THE EVIDENCE OF L.W.

[27] L.W. is a 23-year-old First Nations woman. There is no question that her evidence presents some problems. There are considerable gaps in her recollection due either to her not remembering because of intoxication or due to her blocking out details which she does not want to remember. L.W. does remember getting into a Quality Taxi, talking to her friend on her phone, and being driven to her home in [redacted], where she paid Mr. Torres with a \$20 bill for the \$18 fare. Regarding the sexual encounter, she states that Mr. Torres drove her to the bus turnaround, came to her side of the vehicle and opened the door; reclined her seat, took off his pants and had sexual intercourse with her in the front seat of the cab. L.W. does not know how her pants were removed.

[28] She testified that she did not ask to go to the bus turnaround and she did not want the sexual intercourse with Mr. Torres to happen. She does not have any recollection of saying anything to him or trying to stop him from having sex with her. L.W. testified that she blocked out all the details of what took place in the cab after Mr. Torres' penis was inside her and any details about him touching her in any other way. The next thing she remembers is being home and going to the bathroom. L.W. does not know how she got home, i.e. whether she walked through the bush or was driven there. She denied the assertion that she was making up the sexual assault story after being confronted by her mom because she was ashamed and felt bad. She denied blocking out many of the details on the basis of the same reason. L.W. stated in her testimony that she did not think she would do that or have sex with some random man, drunk or not.

[29] I find that L.W. was fairly intoxicated when she was in the cab with Mr. Torres. I accept the evidence of L.W. in this regard. I also accept the evidence of K.W. that L.W. was significantly intoxicated. To the extent that Constable MacQuarrie's testimony as to the apparent sobriety of L.W. differs, I keep in mind that this was sometime after, albeit fairly briefly after, and Constable MacQuarrie had no prior dealings with L.W. Constable MacQuarrie's evidence as to L.W.'s only mildly intoxicated appearance nonetheless remains a factor to consider.

[30] I concur with Ducharme J. in *R. v. J.R.* (2006), 40 C.R. (6th) 97 (Ont. S.C.), where he states that the question is whether the complainant was able to make a voluntary and informed decision to engage in the sexual act complained of. See paras. 42 and 43.

[31] It is clear that L.W. recalled more detail on December 3rd than she does now. By her own evidence she was intoxicated but also aware of what was going on around her. So while I find L.W. to have been fairly intoxicated, I do not find that she was too intoxicated to consent to the sexual activity. The limited recollection of L.W. certainly made direct examination somewhat difficult and cross-examination even more so. There are a number of unanswered questions. L.W. had a cellphone in her possession but did not try to call anyone for help when she was driven to the bus turnaround. She had been taken home and had paid for the cab but did not get out of the vehicle, and there is no evidence that she tried to do so and no explanation for why she did not.

[32] Although there were gaps in her evidence, I have no concerns about the truthfulness of L.W. Her demeanor while testifying was consistent with the evidence

she provided and did not cause me any concerns about the credibility of her evidence. She was clear, steadfast, and unshaken on what she did remember. She candidly acknowledged the shortcomings in her evidence and readily admitted to blocking out details between the time of the assault and the time of the trial. The evidence she gave is consistent with the observations of her mother and Constable MacQuarrie. The only evidence not substantiated was with respect to the bruising that L.W. said she incurred, but there is no evidence about when the bruising would have been evident or any indication that anyone looked for bruising.

[33] The offence of sexual assault requires that there be a sexual touching committed without the consent of the complainant. The issue here is whether the sexual intercourse was without the consent of L.W. This is not a case where the defence of honest but mistaken belief has been raised or applies. Mr. Torres' evidence was that the consent given by L.W. was clear and unequivocal. There could be no honest mistake on the part of Mr. Torres that L.W. was consenting on these facts. Either she was consenting or she was not.

[34] Despite her limited recollection of the aspects of the event, L.W. remembers that she did not want the sexual contact to happen. There is no defence of implied consent available. Consent must be clear and unequivocal. It is not enough to establish consent that L.W. did not resist. Passive acquiescence does not establish consent. That is particularly so in the circumstances of this case.

[35] Given that I have rejected the evidence of Mr. Torres, the question is whether the evidence of L.W., K.W., and Constable MacQuarrie satisfy me beyond a reasonable

doubt that L.W. was sexually assaulted. Mr. Torres has admitted to having sexual intercourse with L.W.

[36] On the evidence I have heard I make the following findings. I find that Mr. Torres drove an intoxicated L.W. to her residence and was paid for the trip. He then decided to drive L.W. to the bus turnaround to have sexual intercourse with her. He did not use physical force against L.W. to do so outside of the force involved in the sexual act itself. He, somewhat spontaneously, took advantage of the situation that presented itself to him. He was faced with a young, intoxicated woman who, through the consumption of alcohol, was in his commercial vehicle in a vulnerable position. In such circumstances it was incumbent upon Mr. Torres to take reasonable steps to ensure that he had the consent of L.W. to have sex with him. I find that he did not do so. I accept the evidence of L.W. that she did not want to have sex with Mr. Torres, and that while she may have had the capacity to consent, she did not consent to Mr. Torres having sex with her.

[37] In making this finding I have considered the testimony of L.W. that she would not have chosen to have sex with Mr. Torres. While the evidence is somewhat slight in this regard it is nonetheless a factor, although not determinate of my finding. I simply accept L.W.'s evidence that she did not consent to having sexual intercourse with Mr. Torres. Therefore, I am satisfied that the Crown has proved its case beyond a reasonable doubt and find Mr. Torres guilty of the offence charged.