Citation: *R.* v. *Townsend,* 2011 YKTC 63

Date: 20110929
Docket: 10-00305
Registry: Whitehorse

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

REGINA

v.

JOSEPH TOWNSEND
ALSO KNOWN AS JOSEPH DESJARLAIS

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 and 486.5 of the *Criminal Code.*

Publication of evidence taken at preliminary inquiry has been prohibited by court order pursuant to section 539(1) of the *Criminal Code.*

Appearances:
Eric Marcoux — Counsel for the Crown
Emily Hill — Counsel for the Defence

RULING ON VOIR DIRE

Overview

[1] Joseph Townsend has been charged with the offence of sexual assault contrary to s. 271 of the *Criminal Code*.

[2] Crown counsel applies pursuant to s. 540(7) of the *Code* for an order that the audio-recorded statement of the complainant, G.S., be received as evidence for the purposes of the preliminary inquiry. Defence counsel opposes the Crown application. In the event that the Crown application is granted, defence counsel applies pursuant to

s. 540(9) for the right to cross-examine G.S. Crown counsel is opposed to defence counsel's application.

[3] The preliminary inquiry commenced on November 30, 2010 for the purpose of entering into a voir dire to hear the Crown application.

[4] At the conclusion of the voir dire I granted both the Crown and Defence applications with reasons to follow. These are my reasons for judgment.

Evidence on the Voir Dire

[5] The only witness to testify on the Crown's application was Cst. Whiles. Filed as Exhibits were a copy of the transcript of the audio-recorded statement he took from G.S. on July 24, 2010, and a CD copy of the audio-recording itself. There were technical difficulties which prevented the audio recording from being played in Court during the *voir dire*, but counsel agreed that the application could proceed and I could listen to the audio-recording outside of the courtroom prior to rendering my decision. I confirm that I have listened to it in its entirety.

[6] Cst. Whiles testified that he attended the nursing station in Pelly Crossing at approximately 12:48 p.m. on July 24, 2010, in response to a complaint that G.S. had been sexually assaulted. G.S. advised him that she had woken up with her pants and underwear off and believed she had been sexually assaulted by either Mr. Townsend or another individual, Johnson Edwards.

[7] Cst. Whiles took a statement from G.S.' cousin, D.M., at the nursing station and then drove G.S. to the RCMP detachment in Pelly Crossing where he took an audio- and video-recorded statement from her. Unfortunately, the video portion of the recording was inadvertently recorded over and is no longer available.

[8] [Redacted]

[9] Cst. Whiles made no special preparations for the interview and utilized no special techniques. He did not provide G.S. any warning, and did not advise her of the importance of telling the truth. G.S. was not under oath. Cst. Whiles testified that it was his opinion that G.S. was tired and hung over at the time of the interview. While she appeared to be sober to him, it was evident that she did not want to be there. That said, she appeared to him to understand the questions he asked and either answered them or attempted to do so to the best of her recollection.

[10] Cst. Whiles testified that from his subsequent discussions with G.S., it was his opinion that she was prepared to testify regarding this matter, although he thought that she was a little worried about doing so.

[11] Cst. Whiles testified that, through follow-up investigation, Mr. Townsend provided a voluntary DNA sample. This sample appears to be a match with samples obtained from G.S. at the nursing station. Cst. Whiles also learned that Mr. Townsend had previously been convicted of sexually assaulting G.S., and had served time in custody as a result.

Statement

[12] In the statement G.S. says that she started drinking alcohol in the afternoon. At first she was drinking alone, then she was drinking with some others at the ballpark until approximately 3:00 p.m. After walking around, G.S. went to her Aunt's residence until shortly before 6:00 p.m. She was walking to the store when she encountered Mr. Townsend, her cousin D. M., and Johnson Edwards. They all went to Mr. Edwards' residence where they continued to drink. At one point she was tired and not feeling well so she went into a bedroom to lie down and she passed out. She told D.M. to watch over her and make sure no one came in. When she woke up a little later, she was alone in the bedroom and her pants and underwear were off. She put on some jeans that were lying on the floor and came out of the bedroom. Mr. Townsend, D.M. and Mr. Edwards were still in the residence and awake. A Mr. Thomas Harper was passed out in the residence on the couch. G.S. did not recall seeing him there before she went to sleep in the bedroom.

[13] G.S. found her pants and underwear in another bedroom in the residence, put them on, and then she and D.M. began to argue with Mr. Townsend and Mr. Edwards. G.S. was asking who went into the bedroom and touched her. G.S. did not receive any answers to her questions. G.S. then left the residence to go into a tent to try to sleep. She told D.M. that she was going to the tent. There was no evidence adduced as to the location of the tent.

[14] G.S. fell asleep in the tent and woke up in the morning to hear her mother and Mr. Townsend arguing outside. Her mother came into the tent and pulled the blanket off her. G.S. then noticed that her pants and underwear were down around her ankles.

[15] D.M. showed up at the tent and he and G.S. left the area. D.M. told G.S. she should report what happened.

[16] G.S. felt like she had been sexually assaulted both in the residence and the tent because her pants and underwear were off in each location. When asked by Cst. Whiles whether it felt like she had had sex, G.S. responded “Yeah”. G.S. was unable to say who she believed had had sex with her.

[17] G.S. was unclear about times in regard to when she arrived at Mr. Edwards’ residence, when she left it, and when she woke up in the tent. Her recollection was that she arrived at the residence in the early evening, but she recalls little with respect to times after that. At one point she stated that she went to sleep in the bedroom at around 7:00 to 7:30 p.m., but at another point does not disagree with the suggestion put to her by Cst. Whiles that she arrived at Mr. Edwards’ residence at approximately 8:00 p.m. G.S. also stated that she thought that she had been ‘drinking at’ Mr. Edwards’ residence for about four to five hours, although it is not clear whether she was referring to the entirety of the time she was there, or whether this was prior to her going to sleep. At a later point in the interview, Cst. Whiles suggested to G.S. that she first arrived at Mr. Edwards’ residence at approximately 2:45 a.m. G.S. did not disagree with this suggestion either.

[18] G.S. stated at one point that she and D.M. had left the residence together after arguing with Mr. Townsend and Mr. Edwards and it was then that D.M. told her she should report what happened. This is a different, although not necessarily irreconcilable, version of events from her other narrative about leaving the residence alone and going to sleep in the tent.

[19] G.S. also said at one point in the statement that she walked alone with Mr. Townsend to Mr. Edwards' residence, which differs from her earlier recollection that the four of them walked there together.

Law and Analysis

Application under s. 540(7)

[20] Section 540(7) reads as follows:

> A justice acting under this Part may receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case, including a statement that is made by a witness in writing or otherwise recorded.

[21] The test for determining whether a statement is sufficiently credible or trustworthy to be admissible under s. 540(7) is less stringent than that for the admissibility of a statement at trial under the principled exception to the hearsay rule. The test is more akin to that for the admissibility of evidence at a judicial interim release hearing. In saying this, I recognize that at a bail hearing the outcome invariably leaves the accused still facing the charge against him or her, while at the conclusion of the preliminary hearing the trial judge can either commit or discharge an accused of a criminal charge.

(See ***R.*** v. ***Morgan*** 2006 YKTC 79 at paras. 10, 11; ***R.*** v. ***Vaughn*** 2009 BCPC 142 at para. 26).

[22] Cst. Whiles testified and, in doing so, provided the context in which the recorded statement was taken. This is a necessary step in assessing whether the evidence is credible or trustworthy in the circumstances. Although I did not have the benefit of the videotape of the interview, due to it inadvertently being erased, I note that Cst. Whiles did make efforts to capture a video recording.

[23] While G.S. was not administered a warning, an oath or affirmation, or advised of the importance of telling the truth, this is not necessarily fatal to admissibility, as it is the entirety of the circumstances that must be considered. Certainly, it does not appear that G.S.' physical condition and apparent reluctance to give a statement would have been a bar to Cst. Whiles taking such additional steps in an attempt to enhance the credibility or trustworthiness of the statement. It may have been beneficial to do so. I keep in mind, however, that police officers often are required to make a fairly quick assessment of the circumstances before determining how to proceed with respect to the taking of statements. In small communities in the Yukon, police officers often have some familiarity with the individuals being interviewed, as was the case here. While this does not lessen in any way the legal obligations placed on police officers taking statements, it provides a context for considering the exercise of their discretion as to how to best conduct their investigation. As such, I do not want to be viewed as criticizing Cst. Whiles' actions in this case with respect to the taking of the statement.

[24] In the statement G.S. appears to be attempting to recall events to the best of her ability and to relate them to Cst. Whiles. She clearly struggles at times with her recall and is provided additional information from Cst. Whiles that was gained from other sources, which appears to trigger her recollection. Her unprompted version of events is not by any means entirely clear, and her story takes shape to some extent based upon Cst. Whiles' input.

[25] Despite this observation, and after reviewing the audio-recording, I am satisfied from a consideration of the circumstances leading up to the taking of the statement, the manner in which the statement was taken, and the content of the statement, that, in all the circumstances, G.S.' statement is sufficiently credible or trustworthy to be admitted into evidence at the preliminary inquiry.

Application under s. 540(9)

[26] Section 540(9) reads as follows:

> The justice shall, on application of a party, require any person whom the justice considers appropriate to appear for examination or cross-examination with respect to information intended to be tendered as evidence under subsection (7).

[27] The test is that the trial judge considers it 'appropriate' for a witness to be cross-examined. Considerable latitude is given to a trial judge's exercise of discretion in this regard.

[28] It is a fundamental principle of criminal law that an accused is entitled to make full answer and defence to a charge against him or her. The legislative changes to the

preliminary hearing procedure do not derogate in any way from this principle. The exploratory role of the preliminary inquiry in enabling an accused to adequately prepare for his or her trial has not been diminished by these amendments. (See ***R.*** v. ***P.M.*** 2007 QCCA 414 at paras. 78-80; leave to appeal refused, [2007] C.S.C.R. no. 287).

[29] It is true that it is not the role of the judge presiding at the preliminary inquiry to assess the credibility of witnesses. That is a matter for trial. However, it remains part of the role of defence counsel in providing advice to a client, to assess the strength of the Crown's case and this may, in certain circumstances, require an assessment of the credibility of a particular witness in order to adequately prepare to make full answer and defence at trial.

[30] This does not mean, however, that there is an automatic or even presumed right to cross-examine a witness at the preliminary inquiry stage of a proceeding. Obviously, criminal trials that proceed without a preliminary inquiry are presumed to be fair in the sense that an accused can still adequately prepare and make full answer and defence. Therefore the inability to cross-examine a witness or complainant at the preliminary inquiry stage does not necessarily attenuate an accused's ability to make full answer and defence. The desire to test the credibility of a witness, by itself, does not provide sufficient reason to allow cross-examination at the preliminary inquiry.

[31] Where, however, the accused has legitimate reasons for wanting to cross-examine a witness, for example, in order to allow them to assess the quality of the evidence and understand the case to be met, cross-examination of the witness should

be ordered. That an assessment of the credibility of the witness by defence counsel may also be an ancillary benefit of cross-examination does not prevent an order under s. 540(9) from being made. As stated in ***P.M.*** at para. 84:

> Let us recall, moreover, that the usual rules applicable to preliminary inquiries allow the accused to cross-examine the witnesses presented by the prosecution (s. 540(1) Cr.C.) and to examine the witnesses the accused calls himself or herself (s. 541 Cr.C.) Parliament thus explicitly allows the accused to test the credibility of witnesses during the preliminary inquiry. So, that exercise cannot be characterized as irrelevant or inappropriate in the framework of subsection 540(9) Cr.C.

[32] In the present case, I find that these legitimate reasons exist. I find that the statement of G.S. is somewhat unclear with respect to the nature and sequence of the events that transpired. This is not a case where a witness has no memory of events, but rather a fragmented memory. Some of G.S.' recall was assisted by information provided to her by Cst. Whiles. Cross-examination of G.S. may clarify critical details with respect to the circumstances surrounding the allegation of sexual assault and, in doing so, assist Mr. Townsend in making full answer and defence to the charge against him.

[33] I recognize that there is a balancing of interests at play here that includes both the right to make full answer and defence and the societal interest in ensuring that justice is pursued and truth brought out. In this case, I find that the appropriate balancing of these interests requires that the defence application to cross-examine under s. 540(9) be granted.

COZENS C.J.T.C.