Citation: *R.* v. *W.A.S.*, 2013 YKYC 1

Date: 20121024
Docket: 12-10707
Registry: Watson Lake

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

REGINA

v.

W.A.S.

Publication of identifying information is prohibited by ss. 110(1) and 111(1) of the *Youth Criminal Justice Act*.

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

Appearances:

Terri Nguyen — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR JUDGMENT

[1] LILLES T.C.J. (Oral): This is the matter of R. v. W.A.S. Mr. S. is before the Court facing two charges involving sexual misconduct, a charge contrary to s. 151 of the *Criminal Code*, and a charge contrary to s. 271 of the *Criminal Code*. Both charges arise out of the same incident alleged to have occurred between December 30, 2001, and December 30, 2003, in Watson Lake, Yukon Territory.

[2] Mr. S. is currently 26 years old. During the relevant time of the alleged offence he was 15, 16 and 17 years of age, and a young person within the meaning of the

Young Offenders Act and the *Youth Criminal Justice Act*. The complainant is K.P., a female person who, at the time of trial, is a few months short of her 16th birthday. During the relevant time of the alleged offences she would have been five, six, and possibly seven years of age.

The Evidence of K.P.

[3] K.P. is 15 years old and is in Grade 10. Her favourite subject at school is science and, according to her mother, K.P. is an honour student. Mr. S. is a cousin of K.P. On the day as described by K.P., she went with her father to the S.'s house to visit. The accused, his mother and his younger brother, T., were also present. K.P. remembers going downstairs to a finished basement to the accused's bedroom. No one else was there. She mentioned a room with white walls, one window, no lights on, a bed with bedding, closets, and a cement floor that had not been painted.

[4] Now, although I have summarized this evidence in one short paragraph, I estimate that it took K.P. at least one hour to give the same evidence. Right from the beginning, she was emotionally distraught and wept. Her head was down, her hair covered her face and although Crown counsel posed brief, simple questions requiring short answers, she was unable to provide responses for many long minutes and then, usually, her answer consisted only of several words. It was also very difficult to hear her answers. Initial responses to repeated questions, such as, "What happened next?" were usually, after several minutes of weeping, "I don't know." Crown counsel then tried to rephrase the question, eventually resulting in a brief answer. She declined numerous offers to stand down to give her a chance to compose herself. Her emotional

demeanour and delayed responses to counsel's gentle questioning continued throughout the examination in chief. Nevertheless, Crown counsel was able to elicit the following additional information which, again, I have summarized. The accused touched her with his hand above the waist at first, over the clothes that she was wearing. Then he touched her at the waist level. He then pulled her pants down and bent her over the side of the bed so that her front was on the bed and her knees were on the ground.

[5] It may be helpful to provide more detail at this stage to illustrate the difficulty faced by Crown counsel in extracting critical information from K.P. She asked whether anything happened when she was bent over the bed. K.P.'s response was, "Nothing happened," and later, that she does not remember the last thing that happened. Crown then approached the questioning from a different perspective, getting K.P. to agree that she was touched by the accused below the waist, but not below the knees. K.P. was finally able to say that she was touched by the accused's penis, but was unable to say where she was touched.

[6] At this point, I allowed Crown counsel to lead the witness somewhat. She asked K.P. if she knew what an anus was and what did K.P. call that part of her anatomy. K.P. responded, "Buttocks." She was then asked what word she used to refer to her vagina. K.P. responded, "Vagina." And then, when asked where she was touched, she said, "Vagina." When asked whether she was touched more than a minute, or 15 to ten minutes, she responded "I don't really know."

[7] K.P. also stated that she does not remember whether anyone else was in the house or how long she stayed after the incident. She said she told her cousin A., the

accused's older sister, about the incident, but A. is now deceased. This past April she told her boyfriend, A.M., and his mother about the incident, and then she reported it to the police.

[8] Throughout the examination in chief, K.P. wept, and as I indicated earlier, the intervals between Crown counsel's questions and K.P.'s brief responses were lengthy. In contrast, she did not cry during cross-examination by defence counsel. Her composure I would describe as adequate, and she was responsive to his questions. She indicated that she had been living with her boyfriend until recently. Other witnesses indicated that she had lived at home prior to Easter, and then moved into her boyfriend's room for several weeks. Her boyfriend, A.M., is 17 years old. According to A.M.'s mother, K.P., while now living with her grandmother, still stays with A.M. at her residence for short periods of time.

[9] During cross-examination, K.P. could not remember any of the details before and after the incident. While she said she never plays with the accused, she had no explanation as to how she ended up in the basement with him. She could not say whether there were others in the house at the time, although she did testify that her father, her Aunt B. and cousin T. were present when she arrived.

[10] It is evident that K.P. is sexually active and, according to her mother, has gone to the doctor by herself to arrange for a prescription for birth control pills. I mention this solely for one reason only, because it appears to me to contrast with her apparent reluctance to mention parts of her body, like vagina, without some coaching from Crown counsel.

[11] E.P. is K.P.'s mother. It is apparent that E.P. and her husband are close friends with the accused's family. The accused's sisters often babysat K.P. when she was younger. E.P. was not and is not supportive of K.P.'s relationship with A.M. In fact, there are continuing arguments between E.P. and K.P. about the relationship, and I infer that E.P.'s disapproval was a factor, if not the main factor, resulting in K.P. moving out of the family home. E.P. admitted that she was extremely critical of the relationship, mainly because A.M. is a "partyer". E.P. first heard of K.P.'s allegation in June. At that point, she stopped haranguing K.P. about the relationship because she wanted to be a support for her.

[12] Mr. S. testified on his own behalf. He acknowledged that when he was growing up he saw K.P. at his house, as her family was related to his family. On occasion, he would go to K.P.'s house, but never alone. He said K.P. was never at his house as a child alone, and that he never played with her or the younger children. This was confirmed by Mr. S.'s mother's evidence. He denied ever being in the bedroom with K.P. Initially, his immediate response was, "Not to my knowledge," but then he immediately added that "It never happened". He denied the incident described by K.P.

[13] I discussed the timing of these responses with Crown counsel during submissions. I can confirm from having listened to the tape that the statement that "It never happened" occurred immediately after he said, "Not to my knowledge." Mr. S. also stated that during the day he was seldom at home, and was involved in sports and other activities in the community. As I mentioned earlier, this was confirmed by his mother. I interpreted these statements not as meaning that he was never at home,

because obviously he was, but that he was away from the house a lot of the time during the day.

[14] His mother also testified that the children were never home alone; either she was home or her husband was home. On the other hand, she also indicated that both of them worked regular daytime hours during the week. I infer that during working hours she would not always know who was at home. In addition, as she had six children, it is self-evident that she could not have an eye on all of them even when they were all at home.

The Law

[15] The complainant, K.P., age 15, is a teenager testifying in relation to an historical event that took place nine, ten or 11 years ago. At the time, K.P. was five, six or seven years of age and the accused was 15, 16 or 17 years of age. The facts of the case at bar raise an issue as to how the Court should evaluate the credibility of the evidence given by a teenager with respect to what happened when she was a young child.

[16] This issue was addressed by the Supreme Court of Canada in the case of *R.* v. *W.(R.)*, [1992] 2 S.C.R. 122, a case also involving allegations of sexual misbehaviour. The Court stated at para 23:

> Before turning to the particular errors alleged, I pause to consider the general question of how courts should approach the evidence of young children. The law affecting the evidence of children has undergone two major changes in recent years. The first is removal of the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution. Thus, for example, the requirement that a child's evidence be corroborated has been removed...

Later, in the same paragraph, the Court continued:

> The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults. So if a court proceeds to discount a child's evidence automatically, without regard to the circumstances of the particular case, it will have fallen into an error.

The Court then continued in para. 24:

> The second change in the attitude of the law towards the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection.

And at para. 25:

> As Wilson J. emphasized in *B.(G.)*, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspectives of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.

And para. 26:

> It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child standards" to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. 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. But I would add this. In general, [when] an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to [the] criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of any inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[17] On the facts of this case I have directed myself to consider the evidence of K.P. as that of a teenager, albeit a bright 15-year-old who is emancipated from her parents and who is sexually aware and experienced. Describing the events that occurred when she was five, six or seven years old, her evidence should be considered in the context of the age of a witness at the time of the events to which she was testifying.

[18] In this case, as in most cases of sexual misconduct, there are only two principal witnesses, the complainant and the accused. Invariably, the credibility of the witnesses must be assessed by the trier of fact. In *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742, the Supreme Court of Canada offered a guideline for assessing credibility in such situations:

> 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 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.

[19] While this instruction appears to be a formula, its application cannot be mechanical or mathematical. Mr. Justice Cory in *R.* v. *R.D.S.*, [1997] 3 S.C.R. 484, at para. 128, recognized this when he stated:

> It is, of course, true that the assessment of credibility of a witness is more of an "art than a science."

[20] In *R.* v. *C.W.H.,* (1991), 68 C.C.C. (3d) 146, a decision of the British Columbia Court of Appeal, Mr. Justice Wood added the following observation to Mr. Justice Cory's instruction in the *W.(D.)* case:

> I would add one more instruction in such cases, which logically ought to be second in the order, namely: if, after careful consideration of all the evidence, the trier of fact is unable to decide whom to believe, there must be an acquittal.

That guideline has also been adopted and applied by Yukon courts.

[21] It is important to emphasize that when applying the *W.(D.)* formula as it relates to credibility, the burden of proof never shifts from the Crown to the accused, and that burden of proof is a high one; proof beyond a reasonable doubt. On the other hand, that test is less than "proof beyond any doubt."

[22] It is also important to note that this is not an exercise in comparing and choosing the more believable, persuasive or credible witness. To do so would run the danger of shifting the burden of proof from the Crown to the accused.

Applying the Facts to the Law

[23] I have concluded that the determination of this case must be based almost entirely on the evidence of K.P. and that of the accused. There were no independent witnesses to the event, and while several other adults provided evidence, that evidence was general in nature and did not address the allegations specifically. I am satisfied with respect to the following facts:

1. K.P.'s family was related to the S. family, and they were close.
2. The S. girls often babysat K.P., usually at their home.
3. K.P.'s father often visited at the S.'s home and on occasion brought K.P. along. K.P.'s recollection of the incident before the Court was that she arrived with her father at the S. home, that her Aunt B. and her younger son, T., were also both at home.
4. The complainant stated that the incident occurred in the S. home on [street given]. The S.'s occupied that home for only a short period of time, a matter of months only. There was no direct evidence indicating the [residence] was or was not occupied by the S.'s during the relevant time period alleged by the complainant.
5. The accused's mother, B.S., was somewhat protective of her son in her evidence. She said that her son was almost always out of the house and never home, doing sports and "other stuff" in town. Mr. S. gave similar evidence. While I accept that Mr. S. was out of the home most days, he was obviously not away all of the time. This evidence does not preclude the incident as described by K.P.

6. B.S. said that when the children were in the house, she could keep an eye on them all the time. This suggested that the incident could not have happened in her house while she was home. I do not accept her evidence on this point. She might very well try to keep track of all six children and what they were doing, but it would not be possible to keep track of them every single minute. In any event, the alleged incident was only a few minutes in duration.

7. K.P. stated that when she arrived at the S. residence, Ms. S. and T., who is the accused's younger brother, and the accused, were home. She does not remember who was in the home when she came upstairs after the alleged incident.

8. K.P. provided some detail regarding the room downstairs where the alleged incident occurred. She said the room had white walls, an unpainted cement floor, and one window. No evidence contradicting this description was called. She also said that there was a bed with bedding in the room. The accused said there was no bed, only a futon. Crown counsel suggested that a five- or six-year-old child might not know the difference between a bed and a futon. I agree, but I would expect a 15-year-old mature girl to know the difference and, if she remembered the incident, to testify accordingly.

[24] Earlier, I described in some detail how the complainant gave her evidence. I would have expected that a mature, 15year-old young woman, who is reported to be an honour student, to have been able to give her evidence in a more responsive manner.

No rational explanation was given as to why she was weeping and unable to answer simple, straightforward questions. In the absence of expert evidence I am unable to accept that her behaviour was a result of a "regression" to age five or six as she was recounting what happened to her. I am not prepared to speculate as to other reasons for her emotional state on the stand. Yet, I am not prepared to give the complainant's evidence the weight I might have had she been more responsive to the questions posed by the Crown. Her answers were very brief and limited and, on occasion, had to be drawn out by suggestive questions posed by the Crown.

[25] The complainant, her mother and her boyfriend's mother testified as to where K.P. lived from April onwards. Superficially, there were inconsistencies between K.P.'s evidence and that of the other two adults. I place very little weight on these discrepancies. I am satisfied that there can be considerable ambiguity in the question, "Where were you living?" to include one's primary residence on the one hand, to include overnight visits on the other. In other words, that question is not necessarily a specific question with only one answer.

[26] I recognize that when allegations are made that one incident occurred during a lengthy period of time, and that occurred some time ago, that it is difficult to provide an alibi or other contradictory information by an accused. The accused is often left with nothing more than, "It didn't happen," or, "I didn't do it."

[27] With respect to the credibility of Mr. S., the accused, I have found that his evidence was neither impressive nor unimpressive, paraphrasing from *R.* v. *Jaura*, 2006 ONCJ 385. It seemed neither patently true nor patently false. He could do little more

than offer a general denial of the allegation. Such a denial invariably lacks detail. As the day and time of the allegation are not specified, he can do little more than deny the event. His demeanour while testifying was understandably a bit defensive, but, as I have said, unremarkable. He did not contradict himself in any significant way, although he made a statement to the effect that he was always away from home. I interpreted this statement as a general one similar to his mother's evidence indicating that he spent a lot of time during the day with his friends playing sports and on the town.

[28] I should hasten to add that I am not saying that I disbelieve the complainant. After careful consideration of all the evidence I am unable to decide whom to believe. As a result, based on all of the evidence, I am not satisfied beyond a reasonable doubt by the evidence of the guilt of the accused; therefore, I must find the accused not guilty on both counts.

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LILLES T.C.J.