

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. DeYoung*, 2019 NSSC 401

Date: 20191220

Docket: CRH 473586

Registry: Halifax

Between:

Her Majesty the Queen

v.

Jeffrey William DeYoung

TRIAL DECISION

PUBLICATION BAN: s. 486.4, s. 486.5 and s. 539(1) of the *Criminal Code*

Judge: The Honourable Justice Jamie Campbell

Heard: December 5 and 20, 2019, in Halifax, Nova Scotia

**Oral
Decision:** December 20, 2019

**Written
Decision:** February 21, 2020

Counsel: Robert Fetterly, for the Crown
Patrick MacEwen, for the Defence

By the Court (orally):

[1] Jeffrey DeYoung has been charged with sexually assaulting Ms. H.J.

[2] The incident is alleged to have taken place in the early morning hours of March 5, 2017. The basic narrative of what took place during the late afternoon and evening hours of March 4, 2017 is not in question. The case is about what happened when Mr. DeYoung was alone with H.J. in her home. It is about a discrete moment in time and only two people know what happened.

[3] H.J. and her friend, A.T. went out for the evening in Dartmouth. First, they went to the Thirsty Turtle on Waverley Road. They met some acquaintances there. Mr. DeYoung was there. H.J. had met Mr. DeYoung through her boyfriend, with whom she had what she referred to as an on and off or complicated relationship.

[4] She had a few drinks at the Thirsty Turtle. She recalled having 3 or 4 draft beer over the space of a couple of hours. She allowed it might have been more like 5. She and A.T. then left to go to A.T.'s place. It was within walking distance of the bar, but H.J. could not recall if A.T. drove or if they walked. She knew she hadn't driven and had left her car at the bar. She said that they stayed at A.T.'s place for as little as 20 minutes or as long as perhaps 40 minutes. She couldn't remember eating anything there. They just freshened up to go out.

[5] A.T. recalled that they were at her place for about a couple of hours. She made dinner for her husband and son and she and H.J. each had dinner before going out again.

[6] Then they went to another bar called Monte's, which is located in the same mall but below the Thirsty Turtle. They met H.J.'s friend J.M. and his girlfriend J.L., and G.C. Mr. DeYoung came downstairs from the Thirsty Turtle. H.J. said that she texted him to ask him to come down and Mr. DeYoung confirmed that. While at Monte's H.J. said that she switched from drinking beer to drinking red wine. She recalled having 3 to 5 glasses of red wine while there. Again, she agreed when showed her previous statements that it might have been as many as 6 glasses of red wine.

[7] J.M. and his girlfriend left before the others. The rest of the group, J.L., G.C., Jeffrey DeYoung, A.T., and H.J. later left Monte's and went to J.M.'s house. H.J. recalled that it was close to closing time because J.M.'s girlfriend had got off work, though she may have finished up early. J.M.'s place was close-by. While

there H.J. recalled drinking 2 or 3, or perhaps 4 vodka-based drinks. She agreed it may have been as many as 5. She was not counting her drinks and A.T. was not watching to see how many her friend was consuming.

[8] In the morning hours of March 5, 2017, the group left. G.C. was driving his extended cab truck. In the truck with him were J.L., Jeff DeYoung, A.T., and H.J. A.T. was dropped off first. That was the last that she saw of H.J. that morning. She observed that H.J. was certainly impaired after a night of drinking, but she was not any more impaired than A.T. herself.

[9] H.J. was the next one to be dropped off. She said that she invited the men up to her apartment for drinks. She was friends with J.L. and G.C. and the invitation was directed to them primarily, but she knew that if they came up it was likely that Jeff DeYoung would come as well. Both J.L. and G.C. declined the offer. H.J. said that when she got out of the truck Jeff DeYoung was standing on the sidewalk. She said that she then felt obliged to ask him up as well. Mr. DeYoung testified that there was a discussion about him coming up to have drinks and he accepted the specific offer. There is no issue about either H.J. showing a romantic or sexual interest in Mr. DeYoung or of him showing any interest of that kind in her. There was none on either side.

[10] H.J. said that through the evening she had some brief discussions with Mr. DeYoung but at no point that night or at any other time had they had any kind of romantic interaction. At that time, she did not think to have him call a cab. Mr. DeYoung agreed that throughout their interaction leading up to his coming up to H.J.'s apartment there were no romantic overtones.

[11] H.J. and Mr. DeYoung went into her apartment. They had some drinks, and she recalled having one glass of wine and perhaps two. Mr. DeYoung had one beer that she could recall. That accords with his recollection. They talked for a while and listened to some music. Again, they both agree that during the time they were sitting in H.J.'s apartment there was no romantic or sexual interaction. There would then have been no suggestive talk or innuendo and no physical contact of a sexual kind. That was the distinct impression left by the evidence of both of them.

[12] At this point H.J. had been drinking and was feeling the effects of the alcohol. Mr. DeYoung had been drinking as well. Mr. DeYoung did not indicate in his evidence that H.J. was so impaired that they could not carry on a conversation. There was a fair bit of attention paid at the trial on the amount of alcohol consumed. H.J. was impaired, but she was not incapacitated. She had recollection

of most of the events of the evening to the degree that one might expect of things that were routine and otherwise unremarkable.

[13] Neither of H.J.'s sons were at home. They have a bedroom in her apartment that they sometimes use. She said that she didn't want Mr. DeYoung to sleep in her sons' bed in case one of them came home during the night.

[14] It is at this point that the respective narratives diverge.

[15] H.J. said that she told Jeffrey DeYoung that he could sleep on the sofa. She said that she got him a pillow and blanket from her sons' bedroom and went off to bed. She could not specifically recall getting ready for bed but remembered being in bed to go to sleep. She did not invite Jeffrey DeYoung to sleep in her bed with her. She said that when she went to bed he was on the couch.

[16] Mr. DeYoung agreed that H.J. did not want him to sleep in her sons' bed. But he said that she told him he could sleep in her bed with her and said words to the effect of "Nothing is going to happen anyway." He said that she got undressed to her underwear and a tank top. He got undressed except for his underwear and socks and they went to bed and fell asleep.

[17] So, at this point, on H.J.'s evidence she is in her bed and he is on the couch. On Mr. DeYoung's evidence they are both sleeping in her bed.

[18] H.J. said that she was lying on her left side. At some point during the night she said that she was awakened. She could feel Jeffrey DeYoung's penis inside her anus. Her back was turned to him, so she did not see either him or his penis but based her conclusion on what she felt. The penis was inserted about a centimeter into her anus.

[19] She turned around and hit him. She then saw Jeffrey DeYoung in the bed with her. She could not tell what he was wearing. He was under the sheet.

[20] She said that she was surprised and confused. H.J. said that she yelled at Jeffrey DeYoung words to the effect of "Oh my God, what are you doing? Get the fuck out." She said that Jeffrey DeYoung responded by saying something like "rub me so I don't get blue balls". She said she told him that she had not heard that term since high school. He started to rub his own penis. She could not see his penis but could see the sheet moving up and down in that motion.

[21] When she told him to stop he stopped. He complied when she told him to leave.

[22] Mr. DeYoung denied touching her in that way. He said that he was wakened when he was struck by H.J. at around 9:00 or 9:30 am and she said, "I hate you, get the fuck out." There was no apparent reason for that reaction. Mr. DeYoung assumed that it was because she had realized that she had just spent the night in bed with him and was regretting that decision.

[23] He said that he did not masturbate or ask her to touch him. His choice of language was noted by the Crown. His initial denial was somewhat equivocal in that he said that he could not remember doing or saying the things that H.J. related. When questioned on it again he was more definitive.

[24] At this point the narratives begin to converge again.

[25] H.J. said that Mr. DeYoung said words to the effect of "this never happened". He agreed that he said that. She said that she agreed with him and told him that if anyone saw him leaving, he should say he was at the place across the hall. The person who lived in that place was a person known to them both. Mr. DeYoung reported the same conversation. He said that no one would believe the story about his being at the place across the hall because he and the guy who lived there didn't get along.

[26] He then walked out of the apartment.

[27] At the time H.J. was going through what she described as a rocky spot in her relationship with her boyfriend. He was not happy that she was out with other people drinking that night and would not be happy at all that she had another man in her apartment alone with her. She said that she was traumatized by what had happened with Jeffrey DeYoung. She began to have problems with intimacy with her boyfriend and then told him what had happened.

[28] On March 10, 2017 Mr. DeYoung messaged H.J. on Facebook messenger. The message said, "Hey bud what's up hope all is well".

[29] On March 13, 2017 H.J. reported the matter to the police.

[30] There is no issue of consent here. The issue is whether the Crown has proven beyond a reasonable doubt that Mr. DeYoung inserted his penis into H.J.'s anus.

She said that she did not consent, and he did not say that she had. He said that he didn't do that so there was nothing for her to consent to.

[31] Like any criminal charge, a sexual assault must be proven beyond a reasonable doubt. It is not enough to prove that an event is likely to have happened in the way described by the complainant. The Crown must prove the case beyond a reasonable doubt. It is not for the accused to disprove what is alleged. It is flawed legal reasoning to operate on the presumption that people do not make up sexual assaults, so that it is for the accused person to show that the complainant is lying. That is as flawed as the assumption that people are inclined to fabricate such stories. There is no presumption of truth or fabrication. But there is a presumption of innocence.

[32] When evidence is given by the accused, as it has been here, it is important that the analysis not be reduced to a contest of credibility. It is not a matter of whether H.J. is more believable or more reliable or more worthy of belief than Mr. DeYoung. It is whether the evidence raises a reasonable doubt. That reasonable doubt may arise from what Mr. DeYoung said. That can be the case whether all of his evidence is believed, whether some of it is believed or whether none of it is believed. It may arise from any of the other evidence. It may arise from a lack of evidence or an absence of evidence.

[33] A person may be convicted on that standard of beyond a reasonable doubt when there are only two witnesses, the complainant and the accused. If the accused is believed, he must be acquitted. But, as I've noted, he doesn't have to be believed for a not guilty finding to result. A person can be convicted when only two people are present. Considering the evidence of one, in light of the evidence of the other is not to engage in that prohibited contest of credibility. The credibility of each is tested against the evidence of the other. The result is not based on which one is more credible in the balance, however. The evidence of the complainant must establish the guilt of the accused beyond a reasonable doubt. The accused's evidence, even if less credible than the complainant's evidence may still be enough to raise a reasonable doubt.

[34] It is important to note that the case is not a contest of credibility, but it is not a contest of memory either. A complainant must be able to recall what happened. Giving inconsistent versions of events suggests that at least one version is not reliable. But the ability to recall details of the hours leading up to the incident is not a good test of veracity. A person has no reason to recall what was discussed

with each person they encountered in the evening before an alleged sexual assault. A person has no reason to remember exactly or precisely how many drinks they consumed. There is no reason at the time to commit that to memory. A person may not remember the number of drinks that were consumed but would quite distinctly remember whether she had intimate sexual contact particularly with a person with whom she had no prior romantic or sexual encounters. In this case, for H.J., sexual contact with Jeff DeYoung was something that was remarkable and would have been memorable. She was not intoxicated to the point that her recollection was unreliable. It was, in relevant parts, consistent with the rest of the evidence including the evidence of Mr. DeYoung.

[35] The idea of two adults, with no romantic interest in each other staying together in the same apartment is not particularly remarkable. Mr. DeYoung might have taken a cab home but staying on the couch is an understandable option. With a couch available it is more than a bit odd that a person would suggest to another adult, in whom she has shown no romantic interest that he stay in the same bed with her. That is even more unusual when both are undressed down to their underwear. It is even more unusual if she had remarked that nothing is going to happen. That would suggest that she had in her mind that the potential was there that someone might think that something of a sexual nature could happen.

[36] Mr. DeYoung at no point said that H.J. showed any sexual interest in him at all. Yet on his evidence she had stripped down to her underwear and got in bed with him, while commenting that nothing was going to happen.

[37] Getting undressed and getting into bed with another adult in whom she had no romantic or sexual interest is a strange thing to do in that context.

[38] On Mr. DeYoung's evidence they slept together, and he was awakened by being struck and the words spoken by H.J. Again, that is a very strange turn of events. She had, for no apparent reason, become angry to the point of swearing at him to leave. She had, on his evidence, invited him into the bed and was now acting in a way that seemed rationally disconnected to that. He had done nothing to justify the statement that she hated him. It was entirely random.

[39] Then, rather than ask what she meant, or why she had all of a sudden turned on him, he assumed that she had just regretted spending the night with him in that way. Presumably that was the case despite the fact that nothing whatsoever had happened between them and no one had observed any kind of romantic interaction

between them before going to her apartment. Her sudden outburst makes no sense and his response doesn't either.

[40] He didn't ask why she had hit him or why she was angry. He said, "I wasn't here right?" He said he was concerned about her jealous boyfriend, even though there was no way that he would have known that Mr. DeYoung had stayed overnight unless H.J. chose to tell him. The words are consistent with someone having done something that they regret.

[41] They then agreed to the alibi about his being at the place across the hall. And Mr. DeYoung left. He later texted H.J. to ask how she was doing but does not seem to have made any inquiry about that sudden violent reaction on the morning of March 5. If a person were going to communicate with someone who had seemingly arbitrarily reacted in that way, asking in a rather nonchalant way days later how they were doing seems an odd way to do it.

[42] The pivotal time period in this case is from the time Mr. DeYoung decided to stay for the night until he was struck by H.J. in the morning. H.J. at the time was intoxicated but on no one's evidence was she so drunk that she would have no reliable memory of sexual contact with Mr. DeYoung. That is the kind of thing that is seared into a person's memory and sometimes efforts have to be made to get rid of it. Her reaction at the time of the incident is entirely consistent with what she said happened. She responded to the unwanted sexual contact. I believe what she said.

[43] Again, the issue is not whether her version is more believable. It is whether Mr. DeYoung's narrative is believable enough to raise a reasonable doubt. It does not hold together based on logic, common sense and human experience. There was no reason for the two people to share a bed when a couch was available, especially if H.J. had, as Mr. DeYoung said, alluded to something not happening.

[44] There was no reason for H.J. to react in the way she did simply to the realization that they were in the same bed. If things had happened as Mr. DeYoung says, she would have known that when they went to bed together the night before. There is nothing to suggest that she had a dream or was operating under a delusion of some kind.

[45] There is nothing to suggest that she created a narrative to protect her relationship with her boyfriend. Having Mr. DeYoung leave with nothing said about it might have done that. Going through this process would not.

[46] Mr. DeYoung's version of events is not reliable and is not sufficiently reliable or credible to raise a reasonable doubt as to his guilt.

[47] I find Jeffrey DeYoung guilty of the offence as charged.

Campbell, J.