

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

M.S.

Transcript of the Oral Reasons for Judgment delivered
by the Honourable Justice A.M. Mahar, sitting at
Yellowknife, in the Northwest Territories, on
June 23rd, A.D. 2016.

APPEARANCES:

Mr. M. Lecorre: Counsel for the Crown

Ms. C. Wawzonek: Counsel for the Accused

(Charge under s. 271 Criminal Code)

BAN ON PUBLICATION OF COMPLAINANT/WITNESS
PURSUANT TO SECTION 486.4 OF THE CRIMINAL CODE

This transcript has been altered to protect the identity of
witnesses, victim, or young person pursuant to the direction of
the presiding Judge

1 THE COURT: Mr. S. is facing a single
2 count of sexual assault which dates back
3 approximately 13 years. The complaint in this
4 matter was made approximately 10 years after the
5 alleged incident.

6 Mr. S. has chosen to testify in his own
7 defence. This engages what is commonly referred
8 to as the W.(D.) analysis. The W.(D.) analysis
9 has traditionally been taken as follows: I am to
10 begin with the evidence of the accused. If I
11 believe the evidence of the accused, that is the
12 end of the matter and I must find him not guilty.

13 If I do not accept all of the evidence of
14 the accused or if I do not fully believe him,
15 then I must ask myself if his evidence raises a
16 reasonable doubt.

17 Even if his evidence does not raise a
18 reasonable doubt, I must then go on to consider
19 the evidence as a whole and determine whether or
20 not the Crown has proven the case beyond a
21 reasonable doubt on the basis of that evidence.

22 There is a final caveat: At the end of the
23 day, if I am not sure who to believe, then I must
24 also find the accused not guilty.

25 This analysis would seem to suggest that the
26 Court need do nothing further than look at the
27 evidence of the accused, look at its internal

1 integrity, and if I was to find that there were
2 no internal inconsistencies or there was no
3 damage done in cross-examination and I was unable
4 to articulate a reason to disbelieve the accused,
5 then I must find him not guilty. This would
6 suggest that any time anyone is facing a criminal
7 charge of this nature, all they need to do is
8 testify in a consistent manner to avoid a
9 conviction on the charge. This cannot be the
10 case, because it would ignore progress in the
11 criminal law and essentially would lead us back
12 to a situation where corroboration was required
13 on sexual offences.

14 So I take the position that I should look at
15 the evidence as a whole before I assess the
16 evidence of the accused. I will say that neither
17 one of the witnesses was particularly damaged in
18 cross-examination, and both counsel in their
19 submissions appear to concede this point.

20 There is a further consideration that I must
21 have in dealing with an accused person facing a
22 charge which only came to light approximately 10
23 years after the alleged incident. A Court must
24 be careful not to expect too much of an accused
25 person when faced with this sort of situation.
26 It is clear that the Court should not take any
27 adverse inference from the fact that a witness

1 chooses to come forward a long time after an
2 alleged incident. There are innumerable reasons
3 why a witness could choose to do this, especially
4 a witness or a complainant or a victim in a
5 sexual matter, and, even more particularly, a
6 sexual matter within a relationship. So I do not
7 take any adverse inference from the timing of
8 Ms. C.'s complaint.

9 That said, it is unreasonable to expect an
10 accused person to have an accurate recollection
11 of every moment in their lives. I would have
12 been highly suspicious if Mr. S. had been able to
13 say that on April the 1st, 2003 this occurred and
14 that occurred and that occurred. That would have
15 caused me significant difficulty with his
16 evidence. All that could be expected of him is
17 essentially what he did. He testified that these
18 events were perfectly commonplace, that he would
19 get into bed with his wife, sometimes when she
20 had a sinus infection, sometimes when she was
21 napping. He would snuggle up behind her, he
22 would often remove his clothes first, and
23 occasionally these events would lead to sex.
24 Occasionally they would not. On that much, they
25 both agree.

26 Turning now to Ms. C.'s testimony: The
27 Defence makes some compelling submissions.

1 However, I did not find Ms. C.'s testimony
2 contrary to common sense or unbelievable. We are
3 all different, and to suggest that someone's
4 demeanour, someone's way of remembering,
5 someone's way of dealing with the world is,
6 essentially, contrary to common sense would
7 ignore that diversity.

8 I found Ms. C. to be a very interesting
9 witness. She had an encyclopedic memory of
10 concrete events, although I will say that I found
11 her memory with respect to emotional states more
12 problematic. She described, essentially, an
13 incident of attempted forced sexual intercourse
14 which occurred during the course of a long
15 marriage.

16 She said that she had stayed home during the
17 day because she was not feeling well. She was
18 having a lie-down in the afternoon in her
19 husband's bed in the big bedroom; that he came
20 in, took his clothes off, basically, got in
21 behind her in a spooning position, put his arm
22 around her, hiked up her nightdress, at which
23 point she says she said no, that she was not
24 interested. He continued to persist, tightened
25 his arm around her, attempting to force his penis
26 into her. She struggled, kicked, and was able to
27 extricate herself. That is her evidence.

1 I do not find anything internally
2 inconsistent about that. Given her testimony and
3 given her apparent way of dealing with the world,
4 I do not find the way that she dealt with this
5 incident particularly troubling in assessing her
6 evidence. So that is to say, I find her
7 evidence, standing alone, without anything else,
8 believable. I am not suggesting that I believe
9 it in any absolute sort of way, but there is an
10 internal coherence to what she suggests. It is
11 not a far-fetched or outrageous scenario. The
12 timing of her complaint, precipitated as it was
13 by an ugly development within the family with
14 respect to other charges - which I heard about
15 very briefly - is an understandable precipitating
16 event. It is also somewhat troubling in terms of
17 motive, but I do not find any concrete issue of
18 malice in this case.

19 Mr. S. has chosen to testify. His testimony
20 was clear. It was forthright. He was not at all
21 damaged on cross-examination. His version of
22 events, such as it is, and such as could be
23 expected, given the passage of time, is also
24 believable.

25 I will say at this point, I do not actually
26 believe, in the sense of certainty, either one of
27 the two witnesses. To suggest that I believe

1 Mr. S. would be to categorically reject the
2 evidence of Ms. C., which I see no reason to do.
3 To suggest that I believe Ms. C. would be to
4 categorically reject the evidence of Mr. S.,
5 which I also see no reason to do.

6 In the end, then, I am left in a situation
7 where I am not sure who to believe. Mr. S.'s
8 evidence must, therefore, have raised a
9 reasonable doubt. I find him not guilty.

10 THE COURT CLERK: An acquittal to be entered,
11 Sir?

12 THE COURT: Yes, please.

13 THE COURT CLERK: Thank you.

14 THE COURT: I want to thank you both for
15 your very complete and fair submissions and your
16 carriage of the case.

17 MS. WAWZONEK: Thank you, Your Honour.

18 MR. LECORRE: Thank you.

19 THE COURT: Close court.

20 (PROCEEDINGS CONCLUDED)

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Certified to be a true and
accurate transcript pursuant
to Rules 723 and 724 of the
Supreme Court Rules.

Jill MacDonald, RMR-RPR
Court Reporter

(transcribed from the stenographic
notes of Joel Bowker)