

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

MYRINE JAMES KAKFWI

Transcript of the Reasons for Judgment delivered by The Honourable Justice J.W. Williams, sitting in Fort Smith, in the Northwest Territories, on the 24th day of August, 2018.

APPEARANCES:

Mr. B. Green: Counsel for the Crown
Ms. A. Vogt: Counsel for the Accused

(Charges under s. 271 of the *Criminal Code*)

No information shall be published in any document or broadcast or transmitted in any way which could identify the victim or a witness in these proceedings pursuant to s . 486 . 4 of the *Criminal Code*

1 THE COURT: Myrine James Kakfwi is before
2 this Court charged that on or about the 2nd day
3 of December 2016, at or near the town of
4 Fort Smith in the Northwest Territories, he did
5 commit a sexual assault on B.G. contrary to
6 Section 271 of the *Criminal Code*.

7 This trial proceeded over two days. The
8 Crown called five witnesses: the complainant,
9 two police officers, and two civilians. At the
10 conclusion of the Crown's case, the defendant
11 elected to call no evidence. I have heard and
12 considered the submissions of both the Crown and
13 the defence.

14 These are the Court's reasons for judgment.
15 I am delivering these reasons orally. In the
16 event a transcript is required, I will reserve
17 the right to make minor editorial adjustments and
18 corrections. I will not change the substance of
19 these reasons.

20 I will commence with a brief overview of the
21 Crown case. The prosecution alleges that the
22 complainant, the defendant, and a number of other
23 persons were at a house party which took place at
24 a private residence on Field Street in
25 Fort Smith, Northwest Territories, in the early
26 morning hours of December 2nd, 2016. The Crown
27 says that at some point, the complainant, who had

1 been drinking and was quite intoxicated, found
2 herself in a bedroom on the upper story of the
3 house, alone in a bed with the defendant. The
4 Crown alleges that the defendant there had sexual
5 relations, vaginal intercourse and anal
6 intercourse, with the complainant and that she
7 did not consent to that activity and, further,
8 that the defendant knew that she did not consent.

9 In the submission of the defence, the Crown
10 case, and particularly the evidence of the
11 complainant, is so questionable, of such dubious
12 reliability, that this Court must necessarily
13 have serious doubts as to the proof that has been
14 adduced, and the charge must be dismissed. The
15 Crown contends that the evidence, when examined
16 carefully is sound and reliable, notwithstanding
17 some discrepancies, and that it does support a
18 conviction.

19 A principal focus of this Court's analysis
20 will be to examine and assess the evidence in
21 order to determine whether the Crown has proven
22 beyond a reasonable doubt that there was sexual
23 contact between the complainant and the defendant
24 and, if so proven, that the complainant did not
25 consent to the sexual contact and that the
26 defendant knew that she did not consent.

27 I will commence with a brief description of

1 the evidence at trial.

2 The Crown called two police witnesses who
3 were involved in the investigation, that involved
4 taking some statements. One of the officers took
5 photos of the complainant. Those photos are in
6 evidence as Exhibit 2.

7 The centerpiece of the prosecution's case is
8 the testimony of the complainant. She is 30
9 years of age. On the night of December 1st,
10 2016, she went to a bar in Fort Smith and then,
11 after the bar closed, to a residence on Field
12 Street. The evidence makes clear that she became
13 quite intoxicated. She drank prior to going to
14 the bar -- she said four beer. At the bar, she
15 had four beers and three shots of liquor. At the
16 residence on her arrival, she had three or four
17 shots of vodka.

18 At the residence, she describes some contact
19 with the defendant. She said she noticed him
20 there; she said he spoke to her and complimented
21 her appearance. She did not warm to him. She
22 described that he came on "creepy", and she felt
23 that he was in her space. She said he touched
24 her arm, and she said she told him to leave her
25 alone. She described that as occurring in the
26 basement of the residence.

27 The complainant has no recollection or

1 memory of what occurred for a period of time
2 after that. Her testimony is that her next
3 memory is that she was on her back in a bed,
4 naked, and that the defendant was on top of her.
5 He was naked as well, and he was having vaginal
6 intercourse with her. She said she cried and
7 told him to stop. He did not, and at some point,
8 she described that he began to have anal
9 intercourse with her. She said that was painful,
10 and she yelled and screamed.

11 Around that time, she said that a friend of
12 hers, Dakota Lizotte, was at the door of the
13 room. She did not see him, but she heard his
14 voice. She said he asked if everything was okay.
15 She said that at that point, the defendant put
16 his hand over her mouth so she could not speak,
17 and the defendant told Dakota to leave. She
18 testified that Dakota was only there for a moment
19 and that he then left. She said the defendant
20 then resumed the vaginal intercourse and finished
21 with her.

22 The complainant's testimony is that, in the
23 course of events, the defendant pinned or held
24 her outer arms down. At the conclusion of these
25 events, she said she got up, looked for her
26 clothes on the floor, put on some garments and
27 then went downstairs. She testified that she was

1 crying and upset, and she said she told
2 Dakota that she had to go home. The complainant
3 testified that others were asking her what was
4 wrong and that the defendant was among those
5 asking. She said that as he did so, he came
6 close and she punched him multiple times. She
7 then took a cab from the party to her home.

8 She arrived at her residence. Her children
9 were being cared for by B.B., a man with whom she
10 had over the years been in an on-again-off-again
11 relationship. At the time of these events, they
12 were not together; they were not a couple. The
13 complainant testified that she told him that she
14 had been raped, but she gave him no details at
15 the time. She said he told her that she was
16 drunk and she should go to sleep. Sometime
17 later, about a week later, the complainant told
18 B.B. the details of the event. She said he
19 recommended that she go to the police, which she
20 did.

21 In terms of injuries, the complainant said
22 that for a number of days, it was painful to
23 urinate and that she had a swollen anus with some
24 bleeding. She said her arm was bruised, and she
25 had bruises on her inner thighs and a sore back.
26 Her testimony was that she did not consent to the
27 sexual interaction with the defendant and that

1 she protested and told him so.

2 There were two other witnesses called in the
3 Crown case. One of those was Dakota Lizotte. He
4 is a friend of the complainant. He was present
5 at the party on Field Street, and he had dealings
6 with her there. This witness described seeing
7 the complainant at that residence. He described
8 her as being in the main floor kitchen/living
9 room area. He said that he observed some
10 interaction between those two, that is, the
11 complainant and the defendant. His testimony was
12 that the defendant was trying to talk to the
13 complainant, but she was refusing to do so. He
14 said at some point, he saw the defendant slap the
15 complainant's rear end, and he also saw the
16 complainant slap the defendant.

17 At some point, evidently because the
18 complainant was so intoxicated, he escorted her
19 upstairs where there are bedrooms -- at least two
20 bedrooms. He took her into a room, sat her on a
21 bed and expressed his concern that she was quite
22 drunk; he seems to have persuaded her to lie
23 down. He remained with her for a while. He said
24 he left after a half hour or so, and when he did
25 so, she was on the bed, she had fallen asleep and
26 she was clothed.

27 Mr. Lizotte returned to the upstairs

1 later -- he estimated approximately an hour
2 later. He had left the house for a time in order
3 to get some more liquor. When he went upstairs,
4 the complainant was not in the room where he had
5 last seen her. Across the hall, he noticed a
6 bedroom door slightly ajar. Wondering where she
7 was, he looked into that room. He described
8 seeing the defendant on the complainant. He said
9 the defendant was naked, but he said they were
10 both covered to some extent by a sheet. His
11 testimony was that he believed they did not
12 notice him. He looked in briefly, just seconds.
13 He closed the door and returned to the party. He
14 did not describe any interaction with the two
15 persons in the bedroom.

16 A short while later, he said the complainant
17 came downstairs. She was crying. In
18 cross-examination, he said that at that time, the
19 complainant said that the defendant had "forced
20 himself on her." Those words I have noted were
21 as formulated by counsel in the
22 cross-examination, and he accepted that to be so.

23 The witness does not recall the defendant
24 coming downstairs. A short time later, he said
25 the complainant left by cab. Subsequently, some
26 day or so later, he exchanged text messages with
27 the complainant.

1 The second civilian witness called was B.B.,
2 the man who had been, over several years, in what
3 I have described as an on-again-off-again
4 relationship with the complainant. The two of
5 them have two children together. At the time of
6 these events, they were not a couple. B.B. had
7 been at the complainant's residence caring for
8 the children while the complainant went out to
9 party.

10 B.B. said that the complainant returned to
11 her residence shortly after 11 AM. Specifically,
12 he said it was 11:10 AM. He said she was
13 intoxicated and crying and told him that she had
14 been raped. There were no further details
15 provided at that time. About a week later, he
16 said she disclosed the specific details of the
17 event to him. This witness was asked about the
18 complainant's condition when she arrived home.
19 He said that he observed no injuries.

20 In addition to the five witnesses, there
21 were two agreed statements of fact filed. Those
22 are Exhibits 1 and 3.

23 Analysis:

24 I commence by instructing myself the basic
25 principles to be applied. The first is with
26 respect to the presumption of innocence. This
27 defendant is presumed to be innocent. That

1 presumption remains with him unless and until the
2 Court determines otherwise. Secondly, the onus
3 is on the Crown to prove all elements of the
4 offence beyond a reasonable doubt. Thirdly,
5 there is no obligation on the defendant to prove
6 his innocence. Fourth, any reasonable doubt is
7 to be resolved in the defendant's favour.

8 The Court must consider all the evidence and
9 the lack of evidence where that lack of evidence
10 would be relevant to decide whether it
11 establishes proof beyond a reasonable doubt that
12 the elements of the offence are made out.

13 The elements in this matter are these. The
14 Crown must show, Number 1, that Mr. Kakfwi
15 intentionally applied force to B.G.; Number 2,
16 that B.G. did not consent to the force that
17 Mr. Kakfwi intentionally applied; Number 3, that
18 Mr. Kakfwi knew that B.G. did not consent to the
19 force that he, Mr. Kakfwi, intentionally applied;
20 and, Number 4, that the force that Mr. Kakfwi
21 intentionally applied took place in circumstances
22 of a sexual nature.

23 The matter of the credibility of the
24 complainant is central to the determination this
25 Court is required to make. The Crown urges the
26 Court to find the complainant to be an
27 essentially truthful witness, compelling, honest,

1 and careful. At the same time, the Crown
2 acknowledges that there are issues of concern
3 with her testimony; namely, her intoxication and
4 the fact that there are certain points on which
5 her testimony conflicts with other evidence.

6 The core of the defence submission is
7 focused on the credibility and reliability of the
8 complainant's evidence as well. In Mr. Kakfwi's
9 submission, the problems with the evidence of the
10 complainant are so serious and so fundamental
11 that it would be wrong and dangerous for this
12 Court to find that the elements of the offence
13 are made out. Additionally, the defendant says
14 that the situation is made more challenging
15 because there is no other confirmatory evidence
16 such as DNA or medical evidence.

17 My assessment of the testimonial evidence in
18 this case causes me to make two observations.
19 The first is this: Intoxication is a factor. It
20 can result in witnesses seeing and remembering
21 events differently. It can result in faulty
22 observation and recollection and recount. The
23 fact-finding process must recognize that. The
24 Court cannot require a standard of perfection of
25 proof, but at the same time, intoxication cannot
26 be used to explain away or excuse significant
27 problems and discrepancies.

1 Secondly, perspective is important. Even
2 attentive and sober witnesses may have quite
3 different descriptions and recollections of
4 events. That is neither surprising nor is it
5 such as to automatically render evidence of no
6 value. In both regards, it is for the trier of
7 fact to carefully examine the evidence to decide
8 what effect it can properly and safely be given.

9 I will begin with the testimony of the
10 complainant. I had an opportunity to observe her
11 here in court as she gave her evidence. In my
12 view, she appeared to be thoughtful and careful.
13 She seemed to me to make a sincere effort to be
14 truthful. The matter of her intoxication is
15 undoubtedly a factor.

16 I am now going to deal with a number of
17 specific issues arising from her testimony. The
18 first is where she was located in the house other
19 than in the bedroom. She testified that she
20 spent her time in the basement of the home. In
21 that regard, I believe she is mistaken. I am
22 satisfied that it is more likely that she was on
23 the main floor; that is, the living room/kitchen
24 area of the residence. With respect to events
25 between her arrival and the point she went
26 upstairs, this witness cannot recall everything
27 that happened. Her testimony is that she was

1 downstairs in the basement and she has no recall
2 of going to the upstairs area. However, I am
3 satisfied that the evidence of Dakota Lizotte is
4 reliable and correct when he describes taking her
5 to the upstairs bedroom and that she was drunk
6 and that he spent time with her there. I am
7 satisfied as well and accept his evidence that
8 when he left, she was sleeping there, she was
9 clothed, and she was drunk.

10 As for discrepancies between what
11 Mr. Lizotte says occurred between the complainant
12 and the defendant prior to going upstairs and
13 what the complainant recalls, I take into account
14 that Mr. Lizotte did not see all that occurred
15 because he arrived later, that is, sometime after
16 the complainant; and the complainant does not
17 recall everything that occurred in that timespan
18 because of her state of intoxication. In fact, I
19 do not see that anything of critical importance
20 transpired at that stage other than that I accept
21 there was some interaction between the
22 complainant and the defendant and it was not of a
23 positive type. There was nothing of a romantic
24 tone about it and, as I say, when the complainant
25 went upstairs, she was highly intoxicated and in
26 the care of Mr. Lizotte.

27 With respect to events upstairs, there is no

1 direct evidence of everything that occurred. It
2 is apparent that at one point, the complainant
3 was sleeping by herself, clothed, in one of the
4 bedrooms, and then subsequently she was in the
5 bedroom across the hall, which I understand to be
6 the defendant's bedroom, in bed with him. Both
7 of them were naked, and the defendant was engaged
8 in sexual intercourse with her. In fact, I am
9 satisfied on the evidence that is what occurred.

10 The defendant raises certain specific points
11 with respect to this aspect of the events. The
12 defendant says the Crown evidence is Mr. Lizotte
13 went upstairs to check on the complainant. He
14 looked into the room where he left her. She was
15 not there. He noticed the door to the bedroom
16 across the hall to be open a crack. He looked in
17 and saw two persons, the defendant and the
18 complainant, on the bed unclothed and partially
19 covered by a sheet. He said the defendant was on
20 top of her, by which I take he means they were
21 having sex. I infer he was unimpressed or
22 disappointed. He left, and his evidence is that
23 he said nothing and believes they did not notice
24 him.

25 The testimony of the complainant is that at
26 around that time, she had awoken to find the
27 defendant having sex with her. She said her

1 response was to cry and tell him to stop. The
2 defendant did not stop but rather began to have
3 anal sex with her. She said she was yelling and
4 screaming because of the pain, and at that point,
5 Mr. Lizotte walked in the room because he heard
6 her and asked if everything was okay. She
7 described that the defendant put his hand over
8 her mouth and told Mr. Lizotte to get out.

9 Obviously there are significant differences
10 between these two versions of events. With
11 respect, I am not of the view that this
12 represents a particularly critical discrepancy.
13 First, I am not prepared to find that she did not
14 cry out or yell. However, her conclusion that
15 Mr. Lizotte heard her and for that reason opened
16 the door is just that, her conclusion, and I
17 believe a mistaken conclusion.

18 One aspect of the scenario that warrants
19 clarification is with respect to Mr. Lizotte's
20 time in that room. My understanding of the
21 evidence is this: He pushed the door open and
22 made his observations from the doorway. He was
23 there only for a very short time, and he did not
24 go in. After a glance, he turned and left. It
25 is important to recognize that the complainant
26 did not at any time see Mr. Lizotte in the room;
27 she only heard him. Accordingly, any submission

1 that he should have or would have been fully
2 appreciative of what was going on in the room
3 because he came into the room is necessarily
4 undermined by that fact.

5 Another point that has been raised has to do
6 with statements made by both the complainant and
7 Mr. Lizotte that they were able to see something
8 of what was occurring in the bedroom because
9 there was some light. Each seemed to believe
10 that there was light coming in from outside. The
11 defendant raises this issue, quite sensibly
12 saying that if these events were taking place in
13 the early morning hours, say around 5 AM, then at
14 that time of year, it would be dark outside. I
15 have considered the matter, and I suspect the
16 answer may be that these particular events did
17 not take place at or around that time but rather
18 sometime later. My view is informed by the fact
19 that neither the complainant nor Mr. Lizotte
20 pretended to have any accurate sense of the time.
21 Mr. Lizotte stated in re-examination that he had
22 no watch nor did he have any particular concern
23 for the time.

24 Importantly, the one reference to time that
25 I believe is reliable was that of B.B.. he was
26 at the complainant's residence in the morning
27 after looking after the children and waiting for

1 her to return so he could leave and get on with
2 his day. He said he had a lot to do that day and
3 he was anxious to leave. His testimony was that
4 she arrived home at 11:10 AM. I have no reason
5 to doubt the accuracy of that evidence. Using
6 that time as a reference point, I would therefore
7 estimate that the complainant left the
8 Field Street residence at around 11 AM, and so it
9 is reasonable to find that the events in the
10 bedroom took place around midmorning. On that
11 analysis, the evidence of the complainant and
12 Mr. Lizotte is entirely plausible. It certainly
13 does not cause me to fundamentally believe that
14 they are in error on the point. Put another way,
15 it certainly does not in my view provide a basis
16 to doubt their evidence with respect to events at
17 the bedroom.

18 Another issue raised by the defendant is, as
19 I understand, that there is good reason to
20 suspect or conclude that there was no
21 nonconsensual sexual contact because, in fact,
22 the complainant did not allege a sexual assault
23 until sometime later, days or up to approximately
24 a week, and that she did so because she did not
25 want to admit or for anyone to know that she had,
26 to use the vernacular, "hooked up with" or
27 engaged in consensual relations with the

1 defendant.

2 In support of that argument, the defendant
3 says that even though Mr. Lizotte testified that
4 when she came downstairs she was crying and upset
5 and she told him that the defendant had forced
6 her to have sex or words to that effect, he
7 should not be believed. The basis of that
8 submission is that a day or two later, he sent
9 her a text to the effect of, "So you hooked up
10 with Myrine?" The implication, as I understand,
11 is that the text would seem inconsistent with
12 having been told earlier that the contact had
13 been a rape.

14 The witness was confronted with that, and he
15 said that he sent the message because he was
16 trying to get to the bottom of the matter.

17 A similar tack was pursued with B.B..
18 although he said that the complainant told him
19 when she arrived home that morning that she had
20 been raped, the complainant accepted in
21 cross-examination that B.B. had said to her
22 several days after the event, "Why didn't you say
23 anything before?" However, that was not the
24 evidence of B.B.. he was asked if he had said
25 that to her. He said, "No, that's not what
26 happened."

27 I have examined this evidence carefully. I

1 am satisfied that the complainant told each of
2 these witnesses at the first opportunity she had
3 been raped. I reject the suggestion that she
4 only made the complaint later.

5 Now, let me make clear, I have looked at
6 this issue of the immediacy of the complaint for
7 the sole purpose of considering the submission of
8 the defendant that there is reason to believe
9 that this was a fabrication made by the
10 complainant sometime after the event for a
11 dishonest or improper purpose and is therefore
12 suspect. I have not considered it for any other
13 purpose -- specifically to buttress her complaint
14 of sexual assault.

15 There are two further points I wish to make.
16 I am satisfied that when the complainant attended
17 at the police detachment on December 12th, the
18 photos that were taken, which are Exhibit 2,
19 depict a bruising injury to her left arm. That
20 is consistent with her description of being
21 forcibly held down by the defendant. She also
22 testified as to other injuries to her vaginal and
23 anal regions in the days after the event. Her
24 testimony in that regard was not challenged on
25 cross-examination.

26 A point arose late in the trial, that
27 basically at the time of the police interview as

1 per Exhibit 3, the complainant was asked to
2 confirm if she had washed her clothing from the
3 night of the alleged assault and, if not, to
4 bring it to the RCMP for DNA testing. In fact,
5 the RCMP never received any articles of clothing
6 from the complainant. In my view, it is
7 difficult to conclude that has any meaningful
8 probative value in this case and my analysis of
9 it. That view is enhanced by the fact the
10 complainant was never confronted with that issue
11 at trial.

12 With all that said, I turn now to examining
13 whether proof of the elements has been made out
14 to the requisite standard: that is, proof beyond
15 a reasonable doubt.

16 Number 1: I am satisfied that on or about
17 December 2nd, 2016, at Fort Smith, Northwest
18 Territories, the defendant, Myrine James Kakfwi,
19 intentionally applied force to B.G. by having
20 sexual intercourse with her. That application of
21 force took place in circumstances of a sexual
22 nature. Specifically, I accept the testimony of
23 the complainant with respect to that event, and I
24 find meaningful confirmation in the testimony of
25 Mr. Lizotte. I note that the complainant was not
26 challenged in cross-examination as to her
27 assertion that the sexual activity actually

1 occurred.

2 Number 2: I find that the complainant,
3 B.G., did not consent to that sexual contact by
4 the defendant. In this regard, I accept the
5 testimony of B.G. and find no basis to doubt it.

6 Number 3: The final element to be addressed
7 is whether the defendant knew that B.G. did not
8 consent to the force he applied. Lack of consent
9 can be established in a number of ways. The
10 Crown can prove that the defendant actually knew
11 the complainant did not consent; that is, that he
12 was actually aware. Proof can also be
13 established on the basis of recklessness or
14 willful blindness. Recklessness is established
15 where the Crown proves beyond a reasonable doubt
16 that Mr. Kakfwi was aware that there was a risk
17 that B.G. was not consenting to the force that he
18 applied but he went ahead anyway, not caring
19 about whether B.G. consented or not. Willful
20 blindness is made out where the Crown establishes
21 beyond a reasonable doubt that the defendant knew
22 that he should inquire whether B.G. consented to
23 the force that he intentionally applied but did
24 not make the inquiry because he did not want to
25 know the truth about her consent.

26 In the matter at hand, there is no direct
27 evidence of his state of mind, but the

1 surrounding circumstances provide the necessary
2 evidence. I am satisfied that at the point
3 contact was initiated, the complainant was in a
4 state of advanced intoxication and had gone to
5 sleep. I accept her evidence that she has no
6 conscious recollection until she awoke; at which
7 time, the defendant was engaged in sexual
8 intercourse with her. I also accept that once
9 she became aware of what was happening, she told
10 the defendant to stop but he did not. In those
11 circumstances and on the evidence as it stands, I
12 find in a compelling conclusion that the
13 defendant must have known she did not consent.
14 There is no basis to think she communicated any
15 consent to him.

16 As regards the alternate route to liability,
17 recklessness, given her condition, I am satisfied
18 he must have been aware that there was a risk
19 that she was not consenting to the force he
20 applied, but he went ahead anyway, not caring
21 whether she consented or not.

22 Finally, with respect to willful blindness,
23 I am satisfied given B.G.'s condition that the
24 defendant knew he should inquire whether she
25 consented to the force he applied, but he did not
26 make that inquiry because he did not want to know
27 the truth about her consent.

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In these reasons, I have attempted to analyze and discuss the evidence in a thorough way and the issues that have arisen from that evidence. I may well have not explained all and every aspect of my analysis. I have, however, taken considerable time and effort to weigh and reflect upon all of the evidence and all of the submissions of counsel in coming to my verdict.

In the result, based upon the evidence before this Court and the submissions of counsel and in accordance with the forgoing analysis, I find that the Crown has proven beyond a reasonable doubt that the defendant, Myrine James Kakfwi, committed the sexual assault of B.G. as alleged in the indictment filed herein. I find Mr. Kakfwi guilty as charged.

ADJOURNED TO SEPTEMBER 17, 2018 9:30 A.M.

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CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 18th day of December, 2018.

Certified Pursuant to Rule 723
Of the Rules of Court



K. Cloutier
Court Reporter