IC QC-13 018

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

VS

B K C

Transcript of the Reasons for Judgment of the Honourable Judge B. A. Bruser, sitting at Yellowknife in the Northwest Territories, on Wednesday, March 1st, A.D., 1995.

APPEARANCES:

MS. M. NIGHTINGALE: Counsel for the Crown

MS. S. KAYE: Counsel for the Defence

THE CLERK: B K C .

THE COURT: This is set for judgment. Is there anything more from the Crown?

MS. NIGHTINGALE: No, there is not, Your Honour.

THE COURT: Anything more from the Defence?

MS. KAYE: No, sir.

THE COURT: Then I will now deliver the reasons for judgment.

The accused is charged in a single count information. He is charged with sexually assaulting his sister who is now 30 years of age. The Crown elected to proceed by indictment. The accused elected to be tried in this court on November 15, 1994, and on the same date he pled not guilty.

The alleged incident relates to the period on or between February 1, 1992, and the 28th day of February of that year. The incident, it is said, arose in Inuvik. The trial evidence occurred in Inuvik. Submissions were heard there. The matter was adjourned to Yellowknife for the reasons for judgment in order to accommodate the accused.

The first witness for the Crown was the complainant whose mental capacity was challenged by the Defence. The challenge was made pursuant to Section 16 of the Canada Evidence Act. Upon being advised of the challenge, the court conducted an inquiry to determine whether the complainant

understood the nature of an oath or solemn affirmation, and whether she was able to communicate the evidence.

I concluded that the complainant did not understand the nature of an oath or a solemn affirimation by reason of being mentally challenged. However, I permitted her to testify on promising to tell the truth. I did so because I decided that the complainant was able to communicate the evidence. The concept of a promise was carefully explained to her. She appeared to understand what this meant following the explanation and she appeared in my view to comprehend the concept of telling the truth.

The mere fact that the complainant testified on promising to tell the truth instead of under oath does not mean that for this reason alone her testimony should be afforded less weight. Nevertheless, I have assessed and weighed her evidence with extreme caution given her mental difficulties.

The difficulty she had translated into difficulties by counsel in their examination and cross-examination of her. This is part of the reason why I have felt obligated to assess and weigh her evidence with extreme caution.

The complainant says that the accused had sexual intercourse with her during the month of February, 1992, at the home of her parents in Inuvik. She says

that she was in her bedroom at the time and that she awakened to find the accused on top of her. He had pulled her pants and panties down and his pants and his underpants were down. She testified that the accused was drunk.

The manner in which the complainant described what happened to her was partly through the use of the language "he had sex with me", and, quote: "he fucked me".

The balance of the evidence respecting the sexual activity was communicated by means of anatomically correct dolls used for demonstration purposes. This occurred during the case for the Crown.

The complainant repeated many times the words "he had sex with me". However, she could not despite many questions explain what this meant. I conclude that she could not do so because of her mental difficulties and her limitations.

It was for this reason that the court permitted the Crown to use the male doll and the female doll. It was after the demonstration that the complainant said "he fucked me".

I noticed that when given the dolls the complainant rapidly and without any hesitation whatsoever partially undressed them, and that she positioned the male doll on top of the female doll. The dolls were then by her positioning and with no

leading questions lying down and facing each other. The complainant showed how the accused had sexual intercourse with her by moving the pelvic area and the buttocks of the male doll up and down. The panties of the female doll were down and the genitals of the male doll were exposed.

The female doll was dressed differently from the way the complainant testified she was dressed at the material time. I don't know if there is anything of tremendous significance in this given the state of the underwear as demonstrated by the complainant.

After the demonstration the complainant testified that she did not want her brother to do this to her. She testified that she told him to get away from her, and that at some point in the bedroom, he told her not to call out to their parents. At around the time he was beginning to have the act with her, he said, according to her, "have sex with me". She said that after he used those words, and after he got on top of her, she told him to get off. When she told him that, he held onto her.

After the intercourse she says she wanted to go to the bathroom but could not do so immediately because the accused locked the door of her bedroom.

Cross-examination of the complainant did not reveal anything of significance in the way of inconsistencies or inherent contradictions. She

remained at the end of her testimony steadfast that the events occurred during the month of February, 1992, and not during any other month, and that the events did occur as she described.

During early 1992, the complainant was living at the home of V R . This was in Inuvik, and as the court can take judicial notice of, the distances in Inuvik are close, and one can readily walk from any part of Inuvik to any other part of the community.

The accused was living at his parents' home in Inuvik where the complainant said the sexual intercourse against her will occurred.

There is evidence from the accused and from the mother of the accused and complainant that the complainant often visited at the home of her parents even though she was not allowed to do so. She was not allowed or permitted to do so because of a court proceeding against her father which was then pending. Suggestions became apparent during this trial that the matter involving her father involved an alleged incident in which the complainant was the victim.

There is nothing in the evidence of the complainant to show that anyone instilled fantasies in her about what her brother did. There is nothing in her evidence to show that she picked up on an idea for fabrication from television, movies, magazines, dreams or from discussions from others apart from perhaps her

boyfriend Walter, and I will have something shortly to say about her relationship with him.

On numerous occasions the complainant followed almost a ritual. She repeated that the accused had sex with her, that it was true, and that she remembered it. When she testified that she recalled the event, she would usually point to the right side of her head. This was, as should be apparent now, an unsophisticated witness. I would have thought that if she were fabricating a story, cross-examination would have either revealed it or would have revealed significant cracks and crevasses.

By the end of the testimony of the complainant, I could detect no animosity by her toward her brother apart from the reasonable indignation by her toward him about what he had done to her. This would only occur during her testimony from her demeanor and in the way of answering questions when she was asked about the actual act itself. There is no concrete evidence that I am prepared to accept or which raises a reasonable doubt that there was any other purpose for making up a story.

I was especially impressed by her evidence that the accused was not supposed to do what he did do her because of the brother-sister relationship. Her testimony, I conclude, is such that she honestly believed what she was telling the court.

However, the question remains: does this honest belief on her part translate into proof beyond a reasonable doubt bearing in mind that the Crown has the onus throughout to prove each and every material element of the charge?

The accused has no onus at all to establish his innocence. Where there are contradictory versions of what occurred, the court does not have to choose one over the other. At the end of the day after an assessment and weighing of all the evidence which the court accepts, if the court has on the totality of the evidence a reasonable doubt, the accused has to be found not guilty.

In arriving at a verdict, the court cannot engage in speculation or conjecture. The courts often make this remark. I now want to explore in more depth than is common what this means.

Speculation is the art of theorizing about a matter as to which the evidence is insufficient. Conjecture is where there is a slight degree of credence to be given a matter, but which arises from evidence too weak or too remote to cause belief. The latter is rather like a supposition or a surmise. In popular language, conjecture is guess work. The purpose of going on about speculation and conjecture will shortly become evident.

The difficulty with the testimony of the accused

is that he began his testimony by saying that nothing happened between himself and his sister. He appeared firm. He said that in 1992 he never had any problems with his sister. On cross-examination he testified that he did not have sexual intercourse with the complainant. He repeated his denial when pressed by Crown counsel.

Crown counsel did not end the cross-examination with this denial. Mr. MacDonald, who was Crown at the time, and who is not the Crown now before the court, drew upon his years of experience at the bar by pressing the accused. Upon being pressed further, the accused testified that he did not remember going into the room of his sister one night in 1992 and having sexual intercourse with her. When pressed further by Crown counsel he said that he did not know if the event occurred. Then he repeated that he did not remember. He also said during the cross-examination that he could not be sure whether or not he had sexual intercourse with his sister.

Crown counsel was understandably wondering how it could be that the accused could not remember and did not know and could not be sure, so he asked the accused if he had blackouts in the past when he had been drinking. The evidence of the accused was that from time to time he would black out to the point of not remembering events.

In my view it was very fair of Crown counsel to afford the accused an opportunity to explain how he could not remember and how he could not be sure. This is the type of cross-examination which this court commends and which the court encourages of Crown and Defence counsel.

The accused after the exchange with Crown counsel continued to testify that he could not be sure if the sexual intercourse occurred. The court permitted him to clarify his bad memory if he could with the court asking him why he could not be sure if he had intercourse with his sister. His answer: "I don't remember".

Intertwined with the defence of denial, which turned into lack of recollection and uncertainty, is the defence of alibi. The alibi is simple. The theory of the Defence was that the accused left Inuvik at the latest in early February, 1992. It is argued that if he was out of Inuvik when the complainant says the sexual intercourse occurred, then he could not have committed the crime if in fact any crime was commited.

The approach to alibi evidence in law is not complicated. The Ontario Court of Appeal set out the following principles in the well known case of the Crown against **Parrington**, 1985, 20 C.C.C. (3d), 184:

1. if the court believes an alibi, it has to acquit.

2. if the court does not believe an alibi, but has a reasonable doubt about it, the court must acquit. Finally, if the court does not have a reasonable doubt about alibi evidence, then the court must look at all the evidence of the Defence and of the Crown to determine if the Crown has proven its case beyond a reasonable doubt.

There is a major difficulty with the alibi evidence of B C . The Defence evidence in its totality allows for the departure of the accused from Inuvik during the early days of February, 1992. The Defence does not say exactly when in February he would have left, and it is evident from the testimony that at the end of the first week at the latest in February he did leave Inuvik. It cannot be said that he was away from Inuvik all of February or in Inuvik all of February.

I approach the matter on the basis that the accused was in Inuvik at the latest during the first few days of February, 1992. The complainant does not say exactly when in February the incident took place, but she testified that it was a Friday night at about 2:30 a.m. S said she went to bed on Friday night at 2:00 a.m. In my view, it is appropriate to draw an inference that she meant Saturday at 2:00 a.m. when she went to bed, and Saturday at 2:30 a.m. when the event occurred.

I say this because there really is no such time as 2:00 Friday night, or 2:30 Friday night. We have 2:00 and 2:30 in the afternoon seven days a week, and we have 2:00 in the morning and we have 2:30 in the morning seven days a week. But even though 2:00 a.m. and 2:30 a.m. are technically in the morning, because they are in the early a.m., many people would call that nighttime.

If according to the calendar the complainant went to bed on Friday night, i.e. Saturday morning at 2:00 a.m., the second or following inference that can be drawn, should the court choose to do so, is that the complainant meant Saturday morning, February 1, 1992. The evidence is very much alive that the accused was in Inuvik at least to that date, if not a few days longer.

There is evidence that the complainant began to go out with a man named W . The surname I believe is H . I referred to him briefly earlier in these reasons, and said I would have more to say about him later. I now turn to his involvement.

The complainant began to go out with him in April, 1994. The complainant talked to the police about the February 1992 matter in July 1994 which was after she began to go out with W . When she first spoke to the R.C.M. Police, they gave to her some paper on which to write out what happened. Oddly, they gave

her the paper to take away. She took the paper to her boyfriend who, it appears from the evidence, wrote down the details of the complaint. I gather the police became involved in more earnest at a later date. Therefore there was no police officer available when the complaint was first reduced to writing.

W H was not called as a witness. There is no evidence about his character. We do not know whether or not he took down the details accurately. We do not know if in some way he introduced thoughts into the mind of the complainant which were in the nature of suggestion, fantasy or exaggeration, or some combination of all three. We do not know why the police handled the initial complaint in the manner they did when it first came to their attention. Even if W H was required in the investigation in order that the complainant could be understood and keeping in mind that she is very difficult to understand, why would the complaint have not been done in the presence of a police officer? The evidence remains silent.

I do not draw any inference adverse to either the Crown or Defence by reason of the absence of W H . I do remark on the obvious. He may have had material evidence to give. I now tie this into the definitions of conjecture and speculation.

The court cannot engage in either. The court

therefore cannot engage in speculation or conjecture as to what the evidence of W H may or may not have been.

Crown counsel argued that it is not the statement which is on trial, the statement not being in evidence. This is a correct observation. Obviously it is the accused on trial, but does the explanation advance the case for the Crown in any way at all?

The Crown has the burden of proof as I have said two or three times already. Nevertheless, without any evidence showing that W H in some way did or did not influence the state of mind of the complainant to any degree, I am unable to do much in the assessment and weighing of the lack of W H 's evidence unless I engage in speculation or conjecture. I can't do so in law.

What emerges as significant at the end of the assessment and weighing process is the unshaken and solid testimony of the complainant that the accused had sexual intercourse with her in February 1992, and the evidence of the accused to the effect that he didn't do so, is not sure, and can't remember.

I am not prepared to find a reasonable doubt on the totality of the evidence, nor from the complainant's mental capacity alone with respect to her credibility, nor do I find a reasonable doubt on the alibi evidence alone or on the totality of the

evidence.

This leads the court to the logical conclusion that on the totality of the evidence which I accept (after having assessed and weighed it), I do not find a reasonable doubt. If the accused had remained firm in his denial, if Crown counsel had not pressed the accused as he did and elicited the answers which were given, I would most likely have acquitted him.

In this case, the cross-examination of Crown counsel was exemplary, and did shatter in my view any reasonable doubt arising from the testimony of the accused. I find the accused guilty as charged.

(AT WHICH TIME THESE PROCEEDINGS WERE CONCLUDED)

Certified correct to the best of my skill and ability, (Subject to Review by Presiding Judge)

Laurie Ann Young
Court Reporter