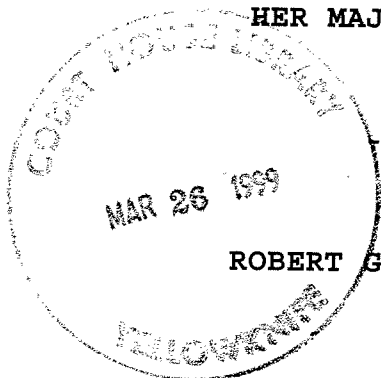


IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES
IN THE MATTER OF:

HER MAJESTY THE QUEEN

and -

ROBERT GEORGE McCALLUM



Transcript of the Reasons for Judgment delivered by The Honourable Judge B.A. Bruser, sitting at Rae-Edzo, in the Northwest Territories, on Wednesday, February 24, A.D. 1999.

APPEARANCES:

Ms. E. Bellerose: On behalf of the Crown
Mr. P. Fuglsang: On behalf of the Defence

(Charge under ss. 348(1)(b), 271 of the Criminal Code)

1 THE COURT: This accused is charged with
2 sexual assault. The complainant is an adult. She is
3 the next-door neighbour of the accused, or was at the
4 material time - the accused is now living with his
5 spouse in Hay River.

6 I have assessed and weighed all the admissible
7 evidence. There has been some evidence which is not,
8 in law, properly before the Court, and I have discarded
9 it without assigning any weight to it whatsoever. I
10 need not go over all of it.

11 The issue in this trial comes down to
12 credibility. Some people might call it a case of "she
13 says, he says". The complainant says that the accused
14 touched her in a sexual way on two occasions while she
15 was in her home during the early morning hours in
16 question. On one occasion she was on a couch in her
17 living room, and on the later occasion, about two hours
18 later, she was in bed, which she was sharing with her
19 daughter.

20 He says that he was over at the home at the
21 relevant time but that in no way did he touch the
22 complainant. He says he would not do such a thing.

23 The events are almost two years old. They
24 occurred March 8th, 1997. Memories which are about two
25 years old tend to dim with the passage of time;
26 therefore, I am cautious about assessing and weighing
27 the memory of the witnesses given this passage of

1 time. This does not mean that because of the passage
2 of time witnesses are not to be disbelieved. I simply
3 say that I am cautious in weighing, and in my
4 assessment of, the memory at this late date. The
5 passage of time goes some way to help to explain what
6 might otherwise be significant inconsistencies and
7 contradictions.

8 The test in law that I am directed to apply to the
9 issue of credibility is this: if I believe the
10 accused, I have to find him not guilty. If I do not
11 believe him, but if his evidence leaves me with a
12 reasonable doubt, I still have to, according to the
13 Supreme Court, find him not guilty. If I do not
14 believe the accused and if his evidence does not leave
15 me with a reasonable doubt, I still have to look at all
16 the evidence in the trial, for the Crown and for the
17 prosecution, to determine whether or not the
18 prosecution has fulfilled its obligation to prove the
19 case beyond a reasonable doubt. Beyond a reasonable
20 doubt does not mean to an absolute certainty. It means
21 that it has to be beyond a doubt based on reason. Any
22 such reason has to be founded in the evidence.

23 The Court is not allowed to guess. For example,
24 the Court should not be guessing why the complainant
25 might make up a story or why the accused might be
26 making up a story.

27 The Court is also allowed to accept all the

1 evidence of a witness, reject it all, or accept part of
2 it and reject other parts.

3 These are some of the key principles that I have
4 in mind at arriving at the verdict.

5 The evidence of the complainant is largely
6 unshaken with respect to what happened in the home.
7 There are contradictions of her evidence which have
8 emerged from the defence case and which I do not
9 totally reject. But even if she had been at the Right
10 Spot Bar in Yellowknife before she went back to Edzo
11 and before the event happened, does this mean that she
12 should not be believed with respect to what happened in
13 the home?

14 The accused gave evidence. Before I comment upon
15 his testimony, one aspect of the testimony of any
16 witness that a court is allowed to take into account is
17 their demeanour. That is, how they appear in the
18 witness stand, how they deliver their evidence, how
19 they respond to questions, and so forth.

20 I have long been of the view that demeanour can be
21 dangerous because judges are not supposed to be tied to
22 any party before the Court. If the Court does not know
23 the witnesses, how can the Court determine whether or
24 not, from the demeanour, the witness is being honest?
25 The accused, by way of example, seemed to be smirking
26 throughout much of his testimony. But does this mean
27 that he thinks the whole thing is a joke or he was

1 merely nervous, or for some other reason? I don't
2 know. I tend not to read too much into demeanour
3 unless it is blatantly apparent to anyone in the
4 courtroom. The complainant, on the other hand, was
5 poker-faced and delivered her evidence in that manner
6 throughout. What does that mean? I don't know. Is
7 she usually that way? Is she usually not that way? I
8 don't know.

9 I have trouble with aspects of the evidence of the
10 accused. He testified that he went to bed with his
11 wife, Carol Buggins, after a night of drinking. He
12 agreed that he had had about 11 beer. It could have
13 been more, it could have been less. He was clearly
14 intoxicated by the time the alleged event happened, or,
15 if you take the accused's version, by the time he ended
16 his drinking at the home of the complainant. He had
17 been at her home, and I'll say something about that in
18 a moment.

19 In any event, he and his wife left their partying
20 and went home. They went to bed. She went to sleep
21 according to him. He was intoxicated but was not so
22 intoxicated as to feel like sleeping. He was restless
23 and left the room.

24 According to his spouse, whom he has been married
25 to for about 20 years, they fell asleep at about the
26 same time. She became less clear as to who fell asleep
27 first as questioning went on. But what is clear is

1 that when she awakened in the morning, he was not
2 there.

3 He admitted, after he could not get to sleep, that
4 he went to the home of the complainant and Raymond let
5 him in. Raymond is not the spouse of the complainant.
6 The spouse is Howard. Howard, by this time, had passed
7 out at the party. The accused says that when he
8 arrived at the home, the events were, to use his words,
9 "kind of vague". He said the next thing he knew, he
10 woke up beside the couch, on the floor, after having
11 passed out and the time then was about six to seven in
12 the morning. He had arrived there some hours earlier.
13 He said that when he arrived the complainant was in the
14 home. He testified: "I believe I might have gone into
15 the bedroom to get beer" and for no other reason. When
16 he said so in the witness chair, he was not obviously
17 sure whether he did or not; he believed he might have
18 done something. This is not the remark of a witness
19 who recalls what he did or did not do. He testified
20 that he did not know if anybody else was in the
21 bedroom. He said he saw the beer there from his
22 earlier drinking; and I accept on the evidence that,
23 from the living room, given the small size of the home,
24 one could see into that bedroom if it were light
25 enough. After saying that he believed he might have
26 gone into the bedroom to get a beer, he said all he did
27 was kneel down to get one. Suddenly he could remember

1 what moments before he believed he might have done.
2 Following the testimony of what he actually did do, he
3 said, "I'm sure I never touched her."

4 When he left the last party he had been at, at the
5 home of Lucy Kotchilea, the spouse of the complainant
6 was passed out there according to the accused's
7 recollection today. He says he went to the
8 complainant's to drink. He said he knew Raymond was
9 there. Then, in that same passage in his testimony, he
10 testified that he did not know if Howard was there or
11 not; that is, at the complainant's. But he had just
12 finished saying that Howard was passed out at Lucy's.

13 The accused said that by the time he had passed
14 out at the complainant's home, he had been too drunk to
15 make it to his place. I find that hard to believe.
16 Too drunk to make it next door?

17 The evidence of the accused does not fill me with
18 confidence. Either he is deliberately trying to
19 mislead this court or he was so drunk that he's
20 attempting, as best he can, to reconstruct events that
21 he cannot now remember accurately. I don't believe
22 him. That takes the Crown past the first hurdle.

23 Does his evidence raise a reasonable doubt? Does
24 it raise a reasonable doubt when I assess it and weigh
25 it along with other evidence in the trial? It does
26 not. I am not left with any reasonable doubt on the
27 evidence of the accused or on the totality of the

1 evidence altogether. I prefer the evidence of the
2 complainant. I find it has a ring of truth throughout
3 it despite some minor inconsistencies as to what
4 happened in Yellowknife which are not significant. The
5 evidence of the accused is unbelievable. I don't
6 believe it. There's no doubt arising from it or
7 elsewhere. Accordingly, I find the accused guilty as
8 charged.

9 Can the sentencing go ahead today or is it
10 proposed that it go over to another time? The Court
11 has time to do it today. I'm not trying to hurry
12 anyone.

13 MS. BELLEROSE: Crown is ready to proceed.

14 THE COURT: I would suspect the defence ought
15 to be ready to proceed because a guilty verdict is
16 always a possibility.

17 MR. FUGLSANG: Could I have a couple of minutes?

18 THE COURT: Yes. We'll wait here for you if
19 you want talk to your client in private.

20 Mr. Fuglsang?

21 MR. FUGLSANG: I'm sorry, Sir. I'm just having a
22 little problem with instructions here. I know I'm
23 supposed to be ready, but I'm at a disadvantage here
24 and I don't want --

25 THE COURT: I don't want to rush you into
26 doing something that would cause you to forge ahead
27 without adequate instructions. I expected that you

1 would be prepared, but if there's a problem -- I
2 recognize that there can be problems in these cases
3 from time to time and also in the solicitor-client
4 relationship as events develop, sometimes unexpectedly
5 from an accused's point of view. So although I had
6 expected you to be ready, I'm not faulting you for not
7 being ready. Do you need more time?

8 MR. FUGLSANG: I would prefer more time, but I
9 honestly don't know. It's so late in the day that I --
10 I don't know that we can resolve this quickly.

11 THE COURT: We could put this over to
12 Yellowknife for sentencing or to March 30th. But if we
13 put it over to Yellowknife, I would have in mind
14 tomorrow or -- not Friday. We have to go to Wha Ti.
15 The next time I am in Yellowknife for court is the week
16 of March 22nd, but that's only a week before we come in
17 here. There has been some broad community interest in
18 what we have been doing and I'm hesitant to do the
19 sentencing anywhere other than here.

20 MR. FUGLSANG: If we're going to do it here, Sir,
21 can we do it on March 31st?

22 THE COURT: I have to confirm that I'm
23 scheduled to be here on March 30th.

24 I am. I'm assigned to be here for the next
25 circuit.

26 MR. FUGLSANG: I'm sorry?

27 THE COURT: I am assigned to be here for March

1 30th.

2 MR. FUGLSANG: If Your Lordship would consider
3 that, I'd would appreciate it. This has gone on an
4 awfully long time. I don't think justice would be
5 terribly damaged by taking another 30 days, Sir.

6 THE COURT: What does Crown have to say?

7 MS. BELLEROSE: If my friend isn't ready, I don't
8 think that the Crown can say much, except that I would
9 ask that perhaps if he's not already on some form of
10 release that he be put on a form of release until the
11 30th.

12 THE COURT: I think there has been evidence
13 that he's on a no-contact provision. Can I see the
14 other Information, please; the main one that started
15 this out? I'm not just sentencing him for breaking and
16 entering, but there is a break and enter matter from
17 which all of this originally sprung and it's been
18 changed to assault only by the Crown. There is a
19 recognizance of bail which is still in effect, and it
20 will be transferred to the new Information. In fact,
21 that should have been done already. We'll transfer it
22 now.

23 MS. BELLEROSE: Thank you.

24 THE COURT: On it, he posted an \$800 cash
25 deposit. But there are no conditions on it other than
26 having to come to court.

27 MS. BELLEROSE: I would ask that there be a

1 no-contact condition for the complainant and her
2 daughter, indirectly or directly.

3 THE COURT: We have an undertaking, too, but
4 it is dated March 1997. It seems to have been replaced
5 by the recognizance. The undertaking did have a
6 no-contact provision, but when the recognizance was
7 entered into, it was left out altogether. It seems to
8 me that should be on there, particularly given the
9 finding of guilt, and the victim should have the peace
10 of mind --

11 MR. FUGLSANG: We have no problem with that.

12 THE COURT: I'll add a no contact. I'll add
13 it on here right now. The accused will have to initial
14 it. No contact and no communication and not to attend
15 at the home of the victim. The accused can initial it
16 now and then I'll have some closing words.

17 This will go over to March 30th, at 10 o'clock, to
18 have priority after we call the docket.

19 Mr. Fuglsang, you will be here on that day?

20 MR. FUGLSANG: I believe so, Sir. I'll advise
21 the Court if not.

22 THE COURT: Some thoughts I have in mind and
23 which carry forward from the judgment and which I wish
24 to mention now because it's closely connected in time
25 to the judgment are these:


26 I make the further findings of fact that when the
27 accused went over to the home of the victim, he had

1 infidelity in mind. He knew his spouse was asleep; he
2 knew the complainant was at home; he knew she was mad
3 at her spouse and that, I infer, in her intoxicated
4 state, she might be receptive to him; and he knew that
5 her spouse, Howard, was passed out in a different
6 location. He breached a trust which was the trust of
7 friendship.

8 Those are some of the preliminary thoughts I have
9 in mind for the sentencing. I share them with counsel
10 now in case you want to prepare to address them, they
11 being some extra findings of fact.

12

13
14 Certified pursuant to Practice
15 Direction #20 dated December 28, 1987

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17 _____
18 Jane Romanowich
19 Court Reporter
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