

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

PETER TSETTA

Transcript of the Reasons for Decision delivered by The Honourable Judge B.A. Bruser, sitting in Yellowknife, in the Northwest Territories, on the 28th day of August, A.D. 2003.

APPEARANCES:

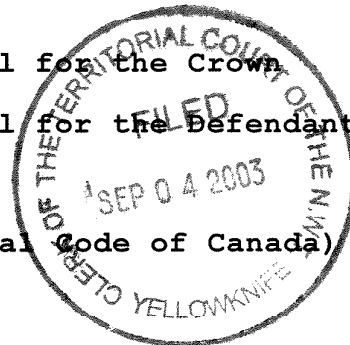
Mr. M. Ewenson:

Counsel for the Crown

Ms. K. Payne:

Counsel for the Defendant

(Charge under s. 271 of the Criminal Code of Canada)



1 THE COURT: The test at a preliminary inquiry
2 has been well established by the common law over many
3 years. The test is set out in Section 548 of the
4 *Criminal Code* and in the leading case of *U.S.A. v.*
5 *Sheppard*. It comes down to whether or not there is
6 sufficient evidence within the meaning of Section 548
7 upon which a reasonable jury, properly instructed,
8 could find the accused guilty. One might add after
9 the word guilty "beyond a reasonable doubt" because it
10 is a test of beyond a reasonable doubt which governs
11 at trial. The onus is on the prosecution to prove its
12 case to that standard. The onus is not on the accused
13 to prove anything, although in some cases, such as
14 assault and sexual assault, there can be an
15 evidentiary burden; for example, subsection 265(4).
16 This does not mean the accused has to prove his
17 innocence.

18 At a preliminary inquiry, the justice is not
19 allowed to draw inferences, nor is the justice
20 permitted to weigh the evidence other than in a very
21 limited context, and the justice is not permitted to
22 test the reliability of evidence.

23 There is a limited weighing as the assessment of
24 the evidence is happening. It is in the nature of a
25 probing. Without the limited weighing, as the Supreme
26 Court of Canada has approved of recently, it would be
27 very difficult to determine if the evidence is

1 sufficient.

2 The RCMP officer testified that he attended in
3 response to a call to an alley behind the Gold Range,
4 which I take to be the Gold Range bar in the City of
5 Yellowknife. He attended shortly after 10 p.m. As he
6 went down the alley, he saw out of his peripheral
7 vision what appeared to be a naked person, or
8 partially naked person. He immediately attended upon
9 that scene and discovered the following. The female,
10 Diane Cluett, was lying on the ground; her pants were
11 down to her ankles, as were her underpants; her
12 brassiere was up in the area of her neck. The accused
13 was lying on top of her. His head was in the area of
14 her waist. His pants and his underwear were down to
15 his ankles. She appeared to be unconscious, he was
16 not. His hands were in the area of her vagina. He
17 appeared to be trying to insert his fingers into her
18 vagina. His penis was not erect, but it was exposed.
19 The officer interrupted this scene.

20 The police had difficulty in getting the
21 complainant to awaken. She didn't respond to verbal
22 directions, nor to being shaken, nor to a sternum rub.
23 The trier of fact could, from this evidence, find that
24 she was in a heavy state of intoxication and not
25 likely asleep and that she was deeply unconscious.

26 The accused was highly intoxicated.

27 This essentially completes the evidence of the

1 relationship at that moment in time between the
2 complainant and the accused.

3 It is evident from this that a trier of fact
4 could find that the two were in sexual proximity to
5 each other and that the actions by the accused toward
6 the complainant were sexual.

7 In cross-examination, the officer said that the
8 fingers of the accused were actually touching the area
9 of the vagina and the accused "was laying on top of
10 her...as if he was being intimate with her. He was
11 concentrating on the lady in front of him. She was
12 non-responsive."

13 The next witness called by the prosecutor did not
14 give her age. She asked the Crown prosecutor why she
15 should have to provide her age. The Crown backed off
16 from pursuing this. I think it obvious why she would
17 be asked her age at a preliminary inquiry, but I will
18 fill in the gaps because I did have the opportunity to
19 see her and hear her. She does appear to be an adult
20 over the age of 18.

21 This witness was under the influence of alcohol
22 at the time of the incident but had not been drinking
23 very much. She stumbled upon what was happening
24 between the accused and the complainant.

25 The event she was talking about could be found by
26 the jury to be the same event that Constable Pittman
27 testified about. The defence is not raising an issue

1 in that regard, in any event, and I will proceed on
2 the basis that the evidence is sufficient that this
3 is, in fact, the same event. Although I use the word
4 "sufficient", in fact, I mean, and I hope I'm clear,
5 sufficient within the meaning of the test - there is
6 enough in the way of facts for a jury to find this to
7 be so.

8 About two minutes before the police arrived, the
9 witness saw the complainant lying on her right side,
10 on her elbow; she recalls the accused to be facing
11 her, and "he was fingering her". When asked what was
12 meant by that, she testified that his finger was in
13 her vagina.

14 She was close, about four feet away. She just
15 stood there, amazed, because she thought this was the
16 kind of thing one would normally see in the movies,
17 but she did not regard it as any of her business.
18 When she saw the police arriving, she hid behind a
19 nearby piece of plywood. It was behind the plywood
20 where the police quickly discovered her. She
21 apparently did not come forward because she does not
22 like the police. Her reasons for not liking the
23 police are not something I need comment upon other
24 than to say it is without merit. She was also
25 embarrassed, regarding this as none of her business.

26 During her observations of the accused and the
27 complainant, including when she was behind the board

1 (from which location she could not see them but could
2 hear what was happening), it was evident that the
3 complainant was awake and that what the witness saw
4 and heard was consensual. The accused was moaning; he
5 appeared, to the witness, to be enjoying it while he
6 had his fingers in the complainant; the witness heard
7 her speak to the accused saying words to the effect
8 that she liked what he was doing. The witness had the
9 clear impression that there was nothing violent going
10 on; rather, that these were two people "fooling
11 around" or having an "affair"; she thought they knew
12 each other.

13 The complainant, who did not testify, may or may
14 not have been subpoenaed to be here today. Crown
15 counsel, at the end of the evidence of the second
16 witness, sought an adjournment. When I asked him to
17 produce the subpoena and proof of service, he was
18 unable to produce the document. He then withdrew the
19 application for an adjournment and closed his case.

20 This is not the sort of case where a complainant
21 testifies that she did not consent, but where there
22 may be other evidence that she did consent, nor is the
23 Court being asked from the evidence to find that the
24 accused had an honest but mistaken belief in consent.
25 This case is different. It is different because the
26 evidence is to the contrary regarding the first part
27 of this observation. The evidence of what occurred

1 chronologically is that the complainant was
2 consenting. There is no evidence at that point in
3 time that she was not consenting to this. Consent
4 would be an absolute defence to sexual assault as long
5 as it was not a consent that was vitiated.

6 The Crown says the consent was vitiated. The
7 Crown says that once the complainant became
8 unconscious at the second point in time, the consent
9 that was present earlier became invalid. The Crown
10 added, when I probed this submission, that once the
11 complainant became unconscious, it would have been
12 incumbent upon the accused to make an inquiry that the
13 consent was still alive. This is a strong point.
14 Where somebody provides consent and then slips into
15 unconsciousness, I am in agreement that an inquiry of
16 some sort ought to be made.

17 Who has the burden, though, on the inquiry issue?
18 Is it on the Crown to prove the absence of an inquiry,
19 or is the burden on the accused to show that he made
20 an inquiry and that the consent remained?

21 Subsection 265(4) provides that "Where an accused
22 alleges that he believed that the complainant
23 consented to the conduct that is the subject-matter of
24 the charge, a judge, if satisfied that there is
25 sufficient evidence and that, if believed by the jury,
26 the evidence would constitute a defence, shall
27 instruct the jury, when reviewing all the evidence

1 relating to the determination of the honesty of the
2 accused's belief, to consider the presence or absence
3 of reasonable grounds for that belief."

4 The issue here is whether that subsection is even
5 triggered. It seems to me that what the Crown is
6 arguing is that because the complainant became
7 unconscious, it is up to the accused to prove that he
8 made an inquiry and that consent flowed from the
9 inquiry.

10 I am not allowed at a preliminary inquiry to
11 engage in any speculation, conjecture, or any other
12 kind of guesswork, nor is the trier of fact.

13 If I were to find that slipping into
14 unconsciousness vitiated the consent and leave it at
15 that, there would have to be an order that the accused
16 stand trial. But the Crown is saying that the inquiry
17 would have to be made. This is what is causing me
18 difficulty. The accused is not alleging, pursuant to
19 subsection 265(4) that he believed the complainant
20 consented. The issue is the inquiry. If the evidence
21 which I have before me were to go to a jury and the
22 accused were not to testify; that is, if the evidence
23 were simply what I have before me, how could the Crown
24 ask the jury to find beyond a reasonable doubt that no
25 inquiry was made on this evidence? There is no basis,
26 as I see it, for the jury to infer an absence of
27 inquiry any more than there is for the jury to infer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

that an inquiry was made. The evidence is simply silent on that point. The jury would be required to speculate or engage in conjecture on this issue, and that, a jury should not be asked to do, and that is what a jury would be instructed by a Supreme Court justice not to do.

I find that the evidence is not sufficient because of this issue. The Crown has not led a sufficient body of evidence to show an absence of consent, this being a material element of this charge of sexual assault. For these reasons, I discharge the accused.

If he is not in custody on any other matter, he is free to go.

MS. PAYNE: Thank you, sir.

.....

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


Jane Romanowich,
Court Reporter