

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

S.E.L.

REASONS FOR DECISION

of the

HONOURABLE JUDGE DONOVAN MOLLOY

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.

Heard at: Yellowknife, Northwest Territories

Date of Decision: May 30, 2019

Counsel for the Crown: Andreas Kuntz

Counsel for the Accused: Baljindar Rattan

[Section 271 of the *Criminal Code*]

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

S.E.L.

REASONS FOR DECISION

of the

HONOURABLE JUDGE DONOVAN MOLLOY

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.

A. INTRODUCTION:

[1] S.E.L. is charged with the offence of sexual assault, contrary to section 271 of the *Criminal Code of Canada*, R.S.C. 1985. In the decision that follows, all section numbers references are to the *Criminal Code*.

The Issues:

[2] If you get into the bed of an unconscious person who you know is incapacitated by alcohol, how is consent to any subsequent sexual activity assessed? What impact does your own impairment by alcohol have on your belief in consent? The issues that must be decided in this case include:

- Whether there was consent to the sexual activity in question, within the meaning of section of section 273.1; and,
- If there was no consent, whether the accused's mistaken belief in consent is barred as a defence pursuant to the provisions of section 273.2.

B. THE EVIDENCE PRESENTED AT THE TRIAL

[3] The Crown called four witnesses, the complainant (J.M.), her mother (B.M.), her cousin (J.L.M.) and the investigator, Corporal David Greene. S.E.L. testified on his own behalf. The only point of divergence in the evidence is whether there was consent to the sexual activity in question or whether the accused had a mistaken belief in consent, otherwise none of the other elements of the offence are in issue.

[4] In terms of the evidence, it was generally agreed that:

- On the night of August 3, 2018 many different groups of people were 'partying' and consuming significant amounts of alcohol in the community of Lutselk'e;
- Separate parties were occurring at different houses and other places in the community and they continued well into August 4, 2018, ending only because all of the alcohol was consumed and efforts to find other sources of alcohol were unsuccessful;
- The groups of people partying at each location varied, with different groups constituting and reconstituting themselves as the evening rolled on. J.M. described it as, *Everybody went places to places, houses to house. Everybody was drinking here and there. It's a small community. Everybody fucking parties here and there. Everybody meets up with people;*
- At different points in the evening, J.M., J.L.M. and S.E.L. partied together as part of various groups. S.E.L. described it as, *Well, there -- like, certain destinations, like, all over around town. We would be at something like a house party, and then we would be drinking outside, somewhere up the road, up the river, down by the -- the waterfront out over here. We were, like, all -- all over town;*
- J.M., J.L.M. and S.E.L. consumed significant amounts of alcohol while partying and each at various points 'blacked out' (have no memories of

activities during the blackouts) and ‘passed out’ (lost consciousness entirely);

- J.M. and S.E.L. are cousins, have known each other most of their lives and had a very positive relationship prior to the incident in question;
- At some point on August 4, after exhausting all known potential sources of additional alcohol, J.M. and S.E.L. ended up at her apartment, which she shared with her long-term boyfriend, S.C., who was absent from the community attending a spiritual retreat;
- J.M. and S.E.L. were alone and S.E.L. passed out on the couch on the main floor of the apartment. J.M. went upstairs to her bedroom where she passed out on her bed, fully clothed in what she had been wearing while partying;
- Prior to going upstairs to pass out, J.M. called her mother, B.M. to get her a package of cigarettes. This led to a visit by B.M. to get money from J.M. From the porch area of J.M.’s apartment, B.M. observed S.E.L. sleeping on the couch. On asking J.M. whether she was alright with S.E.L. being there, J.M. said he was passed out;
- B.M. returned about 45 minutes later in a vehicle, in the company of S.E.L.’s father, and two other persons who she encountered at the store. S.E.L.’s father went with them as he was looking for S.E.L. to get the keys to the quad (4 wheeled all-terrain vehicle) that S.E.L. was driving;
- On arrival at J.M.’s apartment, B.M. waited in the vehicle while S.E.L.’s father banged on or *bothered* the door for about 15 minutes before S.E.L. came to the door and gave him the keys to the quad. S.E.L.’s father left on the quad and B.M. drove off in the vehicle driven by her acquaintance; and,
- Sometime later, J.L.M. went to J.M.’s apartment. He met S.E.L. as he was leaving the apartment but other than acknowledging each other, there was no conversation. On entering the apartment, J.L.M. found J.M. in a distraught manner, crying and barely able to catch her breath.

[5] What happened after the departure of S.E.L.’s father and the arrival of J.L.M. is where the evidence diverges. The evidence on this point is set out below as given by the complainant and the accused, the only persons present during that time. Addressing their evidence in this manner does not mean that this is a credibility contest or that I must accept either version. The law requires a not guilty

verdict if I am unable to conclude, for any reason, that guilt has not been established by the prosecution on the beyond a reasonable doubt standard.

[6] J.M. testified that:

- After going upstairs she closed her bedroom door, passed out due to the significant amount of alcohol she consumed and that on getting on her bed, S.E.L. was downstairs, passed out;
- She did not wake up when S.E.L.'s father was banging on the apartment door;
- She woke up when she felt S.E.L. rubbing her vagina with his fingers, inside her pants and underwear (no digital penetration occurred). S.E.L. asked her to take off her pants;
- She reacted immediately telling S.E.L. *to get the hell out of my house*, upon which S.E.L. left her bedroom, went downstairs and left;
- On S.E.L. leaving she started puking, partly from the alcohol and partly from being disgusted with S.E.L.;
- J.L.M. arrived very shortly thereafter, at which point she broke down and cried and told him what happened;
- She called RCMP Corporal David Greene to report what S.E.L. did to her.

[7] Prior to outlining S.E.L.'s testimony regarding that same period, S.E.L. testified that rather than returning alone with J.M. to her apartment, other persons were present. Those persons all left one by one, some of whom were still there when he passed out. In terms of the intervening period, S.E.L. testified that:

- He awoke to smoke in the apartment, which he believed was caused by someone leaving food in the oven while it was still turned on;
- After turning off the oven, he opened the door to let the apartment air out. After receiving no response to his yelling, he went upstairs to J.M.'s bedroom to check on her;
- Other than saying the word *what*, and some grunting, J.M. was non-responsive;

- That as he was then upstairs, instead of going downstairs, it was *just more convenient, more closer* to lay down on the bed next to J.M. and pass out again;
- That he lied to Corporal Greene in his cautioned statement when he said that J.M. called out to him to come upstairs to her bedroom;
- He did not have J.M.'s permission to lie down on her bed;
- He woke up on feeling the complainant's hand rubbing his genital/penis area, outside of his pants;
- He then commenced touching the complainant in the manner she described;
- That as the complainant initiated the sexual activity, she consented to it;
- If she did not consent, as she initiated the sexual activity, he believed the complainant was consenting to the sexual activity; and,
- After several minutes of mutual touching, the complainant demanded that he stop and she told him to leave, and he immediately complied.

[8] On cross-examination, S.E.L. acknowledged that after not receiving any intelligible response from J.M., he went downstairs again to lock the outside door.

[9] Having done so, he was in closer proximity to the couch where he had been passed out prior to smelling the smoke.

[10] In responding to the prosecutor's suggestion that J.M. was passed out throughout the incident, S.E.L. stated, *She was, yeah, like, looking at my general direction. But I don't think she was looking right at me.*

[11] Finally, the following exchange occurred on the prosecutor asking S.E.L. what changed in terms of going from what he described as consensual activity to J.M. kicking him out:

Q Okay. So everything -- you were rubbing her, and she was rubbing you, and everything seemed fine to you? And all of a sudden, she just said "stop"?

A Stop, yeah. Get off my bed.

Q Okay. And what changed?

A Probably the realization, what -- what we were doing probably.

Q Okay. So when you say "the realization", what --what -- what did she realize? What do you think she -- or what was being realized at that point?

A Well, I'm not really an expert or anything, but she probably thought I was her boyfriend.

Q Okay. Did you think it was strange that she was touching you?

A Yeah.

Q Okay. Why did you reciprocate? Why -- why did you -- since you thought it was strange, why did you touch her as well?

A Because I thought we were going to exchange, you know...

Q Why do you think that she might've thought you were her boyfriend? Well, that's actually --never mind. That's -- well, at the same time, we've seen Mr. C. today. He's -- it's fair to say he's smaller than you, right?

A Yeah.

Q So why do you -- why do you think that she believed that you would be her --

A You know, I think --

Q -- or him.

A -- we were all drinking the night before, right?

So that's probably why.

Q Yeah. So she was -- she was too intoxicated?

A Same as I.

Q So she was maybe too intoxicated to recognize who she was with?

A She said she was puking out of her thing, so yeah. I'm assuming, yeah.

C. THE LAW

[12] Like all persons charged with an offence, S.E.L. is cloaked with the presumption of innocence until such time as the Crown proves his guilt. Assessing whether guilt is proven requires consideration of the whole of the evidence, as opposed to scrutinizing individual items on a piecemeal basis (*R. v. Kennedy*, 2015 NLCA 14; *R. v. Abramoff*, 2018 SKCA 21).

[13] While the beyond a reasonable doubt standard does not require proof to an absolute certainty, it is much closer to that standard than it is to the balance of probabilities (*R. v. Lifchus*, [1997] 3 S.C.R. 320).

[14] As S.E.L. chose to testify, I must also engage in a three step analysis when assessing his credibility (*R. v. W.(D.)*, [1991] 1 S.C.R. 742).

[15] As only S.E.L. and J.M. were present at the time of the alleged offence, the analysis of their evidence cannot devolve into a credibility contest (*R. v. Morillo*, 2018 ONCA 582). Similarly, their respective demeanors are of limited utility (*R. v. Dyce*, 2017 ONCA 123). Finally, stereotypes play no role, especially where allegations of sexual assault are involved (*R. v. A.R.D.*, 2017 ABCA 237).

[16] Reliability must be considered in assessing the evidence in this case. With the exception of the police officer and J.M.'s mother, the consumption of large quantities of alcohol diminished the witnesses' ability to observe and remember. While there is agreement that S.E.L. and J.M. ended up in her bedroom, both were still substantially under the influence of alcohol at that time, with J.M. being 'passed out' when S.E.L. laid down on her bed. The inconsistency with respect to whether they returned to J.M.'s apartment either alone or with others illustrates the reliability issues. While not a material inconsistency, it highlights the need to consider not only the truthfulness but also the accuracy of the witnesses' testimonies.

[17] J.M.'s impairment is relevant pursuant to section 273.1(2)(b), a potential limiting factor on obtaining her consent:

273.1(2) For the purpose of subsection (1), no consent is obtained if

(b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1).

[18] S.E.L.'s impairment is relevant pursuant to sections 273.2(a)(i), (a)(ii) and (b), potential bars to the defence of mistaken belief in consent:

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from

(i) the accused's self-induced intoxication,

(ii) the accused's recklessness or wilful blindness, or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

D. THE POSITIONS OF THE PARTIES

[19] The parties agree that the only matters in issue are either the existence of consent or a mistaken belief in the existence of consent.

[20] The Defence maintains that while something happened in J.M.'s bedroom that was traumatic for J.M., based on the evidence, it cannot be determined what happened and therefore an acquittal should be entered. Defence counsel specifically referenced *W.(D.)*. On being asked about the Defence position, if any, with respect to section 273.1 and 273.2, the Defence submitted that S.E.L.'s evidence about J.M. confusing him with her boyfriend was his present interpretation and this was not necessarily in his mind at the time of the incident.

[21] The Crown maintains that J.M. lacked the capacity to consent to sexual activity. It argues that S.E.L.'s evidence that J.M. might have confused him for her boyfriend demonstrates recklessness on his part.

[22] As S.E.L. admitted, on cross-examination, that he went downstairs to secure the door, and then went back up to J.M.'s bedroom, the Crown views this as going to S.E.L.'s credibility in general, and specifically undermines his testimony that lying down on J.M.'s bed was simply a matter of convenience or proximity.

[23] The Crown points to J.L.M.'s evidence of J.M. being distraught in the immediate aftermath of the incident as corroborative of S.E.L. committing a sexual assault. During the Crown's submissions, the Court noted that there were other possible inferences and that the Crown did not lead any evidence on that point. The Crown stated that it avoided this line of questioning as it would have been hearsay. While absent a *voir dire* it is not possible to assess whether what J.M. said to

J.L.M. was admissible, it was an arguable point potentially falling within the *res gestae* exception to the hearsay rule.

[24] Ultimately, the Crown's position is that S.E.L.'s evidence is incredible and that there was no consent, however if I am in doubt regarding J.M. first touching S.E.L., then notwithstanding same, S.E.L. was reckless in proceeding to touch J.M. in a sexual manner without making an inquiry as to whether she was consenting and/or whether she was aware that she was engaging in sexual activity with S.E.L., as opposed to Mr. C.

E. ANALYSIS

[25] In terms of *W.(D.)*, I neither believe nor am I left in doubt after considering S.E.L.'s evidence. S.E.L.'s evidence that lying down on J.M.'s bed was simply a matter of convenience that spared him from having to navigate his way downstairs again is inconsistent with his admission that he had actually gone downstairs again prior to returning upstairs again to J.M.'s bedroom. It is also inconsistent with the probabilities one would expect to prevail in the circumstances, including:

- They were relatives;
- They were good friends and associated a great deal without any romantic interactions or any other overtures outside of simply being good friends and cousins; and,
- They had never shared a bed before, either platonically or otherwise.

[26] The Defence maintains that the lie S.E.L. told Corporal Green about J.M. inviting him to her room was a panicked reaction to being questioned after his arrest. I accept that it was a stressful situation, however the lie was tailored to account for one of the central questions, namely how S.E.L. went from being passed out on the couch to J.M.'s bed. If the events were as S.E.L. testified to, there was no need to invent such a specific lie.

[27] Not being left in doubt by S.E.L.'s testimony does not lead to a conviction. As recently described by Paciocco J.A. (*R. v. Morillo*, 2018 ONCA 582), the third step of *W.(D.)* involves evaluating the evidence as a whole to assess whether guilt is proven:

Credibility contests are not properly resolved by choosing one side after carefully giving the other side fair consideration in the context of all of the

evidence. They are resolved by ensuring that, even if the evidence inconsistent with guilt is not believed or does not raise a reasonable doubt, no conviction will occur unless the evidence that is accepted proves the guilt of the accused beyond a reasonable doubt.

[28] As with the other witnesses, J.M. was unsure of the specifics of the party to party migrations that occurred prior to the incident. J.M. was unwavering however in her account of what occurred in her bedroom, her prior relationship with S.E.L. and what was for her a traumatic event aggravated by the fact that she and S.E.L. were good friends and relatives. Her emotional state at the time of J.M.L's arrival, as S.E.L. was just leaving her apartment, is consistent with her account of what transpired in her bedroom. While other inferences might be drawn, based on the whole of the evidence I am satisfied that she was distraught because she was sexually assaulted by S.E.L.

[29] People can consent to engage in sexual activity despite self-induced impairment by alcohol or other substances. People who are passed out cannot consent to sexual activity. Section 273.1(2)(b), in its iteration at the time of this incident, stated that no consent is obtained where the complainant is incapable of consenting to the activity.

[30] J.M.'s lack of any intelligible reaction to being advised of a fire in her apartment, supports a finding that she was incapable of consenting to sexual activity. She was passed out and did not regain consciousness in the sense of having an *operating mind*. Her status in that regard was observed by S.E.L.

[31] While section 273.1(2) has since been amended to specifically address a lack of consent where a compliant is unconscious, I am confident in relying on case law (including *R. v. J.A.*, [2011] 2 SCR 440) to conclude that J.M. could not consent to sexual activity with S.E.L.

[32] Even if I was in doubt as to whether J.M. first touched S.E.L. in his groin area, section 273.2 precludes S.E.L. from relying upon mistaken belief in consent. That determination is based on a number of factors, including:

- His observations of J.M. upon alerting her to the fire/smoke in her apartment; and,
- His evidence that she was not looking at him, *She was, yeah, like, looking at my general direction. But I don't think she was looking right at me.*

[33] Again, while I find that J.M. did not initiate any sexual activity, if she had, in the circumstances of S.E.L. putting himself in her bed, knowing she was incapacitated and that Mr. C. was out of town, he was reckless or willfully blind in proceeding to touch J.M. sexually. I am satisfied that S.E.L. was alive to the possibility of J.M. confusing him for Mr. C. If he was not alive to that possibility at the time of the incident, he would have been but for his self-induced impairment. The identity of the person one is engaged in sexual activity with is a critical element of consent. Where, as here, reasonable steps were required to determine whether J.M. knew that it was S.E.L, he cannot rely on her conduct as communicating consent even if she did touch him first.

[34] On cross-examination, after agreeing that J.M. was too intoxicated, S.E.L. stated, *Same as I*. The distinction, is that S.E.L., uninvited and without J.M.'s knowledge, joined her in her bed. To endorse his position of being equivalent to J.M. in terms of impairment would, on the facts of this case, ignore his responsibility to exercise due diligence before he engaged in sexual activity with J.M. Section 273.2(a) and (b) bar the defence of honest but mistaken belief in consent to engage in sexual activity where the belief arises from impairment, recklessness or wilful blindness.

[35] Being in a similar state of impairment as a complainant does absolve the instigator of sexual activity from being reckless or wilfully blind to whether there is consent to that sexual activity. While the instigator of the sexual activity is not required to identify all relevant circumstances, he cannot ignore the circumstances that he is subjectively aware of at the time.

[36] Even if a complainant initiates sexual activity, in circumstances where it is apparent that the complainant either does not know what they are doing or who they doing it with, reciprocating is reckless without first taking reasonable steps to ensure that there is consent within the meaning of section 273.1.

[37] The fact that a complainant's lack of consent, or lack of capacity to consent, would be obvious to all except those who are impaired, reckless and/or wilfully blind founds the bar to relying on honest but mistaken belief in consent. This rationale was addressed by McLachlin J. in **R. v. Esau**, [1997] 2 S.C.R. 777:

Consent, as noted above, involves "capable, deliberate and voluntary agreement or concurrence" (Webster's). A person who is unconscious or unable to communicate is incapable of indicating deliberate voluntary agreement. At issue, as elsewhere in dealing with consent, is the social act of

communicating consent, not the internal state of mind of the complainant. The accused is not expected to look into the complainant's mind and make judgments about her uncommunicated thoughts. But neither is he entitled to presume consent in the absence of communicative ability. The complainant in this category lacks the capacity to communicate a voluntary decision to consent. Such lack of capacity would be obvious to all who see her, except the wilfully blind. This makes any suggestion of honest mistake as to consent implausible.

F. CONCLUSION

[38] For the reasons provided, S.E.L. is convicted on the charge of sexual assault.

[39] Judgment accordingly.

DONOVAN MOLLOY, T.C.J.

Dated at Lutselk'e, Northwest Territories,
this 30th day of May, 2019.

R. v. S.E.L., 2019 NWTC 07

Date: 2019 05 30

File: T-1-CR-2018-001709

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

S.E.L.

**REASONS FOR DECISION
OF THE
HONOURABLE JUDGE
DONOVAN MOLLOY**

[Section 271 of the *Criminal Code*]

Restriction on Publication

This decision is subject to a ban on publication pursuant to s. 486.4 CC with respect to the name of the victim as well as information that may identify this person. Some details may have been edited to ensure that the victim may not be identified.