

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

2000 NOTTC 4

HER MAJESTY THE QUEEN

- v -

W.H.W.

(A Young Person)



---

Transcript of the Reasons for Judgement of The Honourable  
Judge R.M. Bourassa, sitting in Yellowknife, in the  
Northwest Territories, on the 24th day of March, A.D. 2000.

---

APPEARANCES:

Mr. J. O'Halloran:

Counsel for the Crown

Ms. K. Payne:

Counsel for the Defence

1 THE COURT: Okay, thank you. Well, the law is  
2 quite clear in terms of how a Court is to dispose of  
3 a case.

4 First of all, if I believe the evidence of the  
5 accused, that means his evidence and other defence  
6 evidence, then that's the end of the case because the  
7 accused said it was consensual sex.

8 Even if I don't believe the accused, I have to  
9 ask myself if his evidence raises a reasonable doubt.  
10 If it does, I have to acquit.

11 Even if his evidence doesn't raise a reasonable  
12 doubt, I have to ask myself, Has the Crown proven its  
13 case beyond a reasonable doubt. If the Crown hasn't,  
14 I have to acquit. The law is quite clear. Better  
15 guilty men go free than one innocent man be  
16 imprisoned.

17 The obligation is totally on the Crown to prove  
18 its case beyond a reasonable doubt. However, the  
19 Crown does not have to prove every single minute  
20 detail beyond a reasonable doubt. My obligation is  
21 to find, on all of the evidence, whether or not the  
22 case has been proven.

23 I have evidence from Crown and defence. The  
24 evidence from the various witnesses is problematic in  
25 different ways.

26 The issue before me is very simply put: Was  
27 there consensual sex or was there not? It was

1 admitted at the opening of the trial that sexual  
2 activity described in the evidence as attempted or  
3 full intercourse took place between both boys and  
4 this victim. Was it consensual or not, that's the  
5 issue, it's not complicated.

6 There are discrepancies here and there but I  
7 don't think they amount to much and I don't think  
8 anything turns on them regarding what transpired up  
9 until the time the party broke out.

10 Essentially what happened is this, in my view.

11 The accused and his roommate, after playing  
12 pool, getting snacks, going to the bank, walked by  
13 the alleged victim and her girlfriend, both of whom  
14 who had been drinking. There was flirting. They  
15 struck up a conversation. There was repartee back  
16 and forth. The girls were interested in more  
17 alcohol, the boys were interested in providing it.  
18 So they went back to W 's apartment to "party."

19 They were smoking. At one point the windows  
20 were opened because there was too much smoke. They  
21 were closed - too cold. There was chit-chat going on  
22 and they played cards: Uno and another game; and  
23 then the girls decided, on their own, that it was  
24 time to go and they left.

25 The two girls, more intoxicated now than they  
26 were when they first went to the apartment, met up  
27 with three other girls, one of whom is looking for a

1 "party."

2 Looking for a party at 3 o'clock in the morning  
3 is nothing new in this jurisdiction.

4 So the five girls decided they'll go back to the  
5 W apartment because the two occupants that they're  
6 aware of are ready and willing to "party," so they  
7 went back. They threw stones on the windows, the two  
8 boys come down, although there is a contradiction in  
9 their evidence there, and they let them in. The five  
10 girls go up and help themselves to C 's beer or  
11 W 's beer and party on.

12 The party gets boisterous, and at least one  
13 neighbor comes to the door and complains. The  
14 windows are opened and shut for smoke. One of the  
15 girls ends up with a jacket on - one of the boy's  
16 jacket - because it's cold in the room. The girls  
17 are drunk.

18 W has no respect for these two girls, the  
19 first two. Looked at in a variety of ways, not  
20 exclusively, but one can understand his lack of  
21 respect. Two girls, very young, on the streets of  
22 Yellowknife, late at night, early in the morning,  
23 half-drunk looking to party with strangers, he has no  
24 respect for them.

25 By this time I'm convinced on the evidence that  
26 A N is quite drunk. She goes into the bathroom  
27 and she can't get out. It appears that it's a

1 straightforward knob with either a push button or a  
2 push and twist button on the inside. Those door  
3 locks have a hole on the outside through which you  
4 can push a nail or a pin of sufficient strength and  
5 pop the lock. Y knew that, and she knew how to  
6 get her out. It may take some jiggling because one  
7 has to hit the inside mechanism right on-end. It  
8 doesn't just pop open automatically.

9 In any event, by this time the two boys are  
10 getting disenchanted with the girls. They are  
11 drinking their beer, they are causing trouble with  
12 the tenants, they are kicking on the bathroom door,  
13 one is locked in the bathroom. For some reason, one  
14 picks up a T-shirt, puts it in a bag, and the two  
15 boys decide "that's it, party is over," and start  
16 shepherding the girls out.

17 N said to the three girls they met on the  
18 street that the guys looked like "rapists." I don't  
19 think that that was a momentous statement or that  
20 much turns on it. I think it's another way of her  
21 saying, They look like creeps or they look weird.  
22 It was a detrimental negative reference to the two  
23 boys, but more important to her and her friends was  
24 they had alcohol and they were willing to party.

25 She said in her own evidence, "There was five of  
26 us, what have I got to be afraid of?"

27 I'm convinced on the evidence that when N was

1 in the bathroom, she was too drunk to open the door.  
2 It's as simple as that. The door was openable, I  
3 don't know why we spent so much time on the door. I  
4 don't think there is any plan by either of the boys  
5 to coral and rape anyone at this stage or anything  
6 similar. She got locked in because she was too drunk  
7 to unlock it. The girls on the outside were banging  
8 around and everything came to a head and it was at  
9 that point the boys said, That's it, out you go and  
10 they left.

11 Yvonne, at the last minute, thrusts a hair pin  
12 or a bobby pin, I'm not sure which, into C 's hands  
13 and tries to explain to him how to open the door so  
14 her friend can get out.

15 The sad thing about it is that the girls are so  
16 drunk that when they get to the Corner Mart, I think  
17 it was, or Country Corner, they phone the police to  
18 say that their girlfriend is locked in a bathroom  
19 somewhere, they don't know the address, they don't  
20 know where it is, and they don't have the presence of  
21 mind to stay wherever they were so the police could  
22 come find out where the girls were and then locate  
23 where N was locked up.

24 Now, what happens after this, in my view, is  
25 what's critical. I find it peculiar that neither  
26 C nor W were in the least concerned or took any  
27 steps to get this girl out of their bathroom. She is

1        silent in the bathroom. Perhaps she's passed out.  
2        She indicated that she might have slept or blacked  
3        out. She's in there for the 45 minutes approximately  
4        it took them to clean up the apartment, and they  
5        write her off. I just find that surprising. Perhaps  
6        it's a reflection of the little respect they had for  
7        her, I don't know.

8                In any event, the two boys decide they're going  
9        to bed and that's it, and when she's sober she can  
10       get out and do her own thing and leave.

11               Now, this is where, of course, everything  
12       changes. The issue is did she have sex with both of  
13       those boys on consent or not?

14               To try and answer that question I look at a  
15       variety of factors because clearly one is either  
16       lying or very very seriously mistaken because the  
17       stories diverge so dramatically.

18               I've already indicated that I believe, and I  
19       find, that A        N was drunk. She was in the  
20       bathroom for about an hour, an hour and 45 minutes.  
21       From drinking at the hotel her girlfriend's mother's  
22       beer, from drinking at her two visits to the  
23       apartment, she was drunker than when the night  
24       started. And, in my view, her drunkenness is what  
25       explains her lack of recall on a lot of particular  
26       points.

27               Her evidence is that she was taken to the

1 bedroom, she was held down, and both boys had  
2 intercourse with her. Saranwrap was used as some  
3 kind of condom to protect her. Then she was taken to  
4 the shower, told to shower and watched, and then  
5 allowed to leave. What she says or her evidence, in  
6 my view, is not something that's, on its face,  
7 incredible. Looking at the photographs, a twin-sized  
8 bed which is big enough for two adults, I suppose,  
9 who are well acquainted with each other, but barely.

10 If she's on the bed with two boys, I can't help  
11 but believe that there would be a tangle of arms,  
12 hands, and legs. It may very well be that she  
13 perceived some of the tangles as holding her down and  
14 it may very well have happened.

15 She says that one of the two boys put his hand  
16 in her mouth, which would explain the blood at the  
17 corner of her mouth that she described.

18 Two young men taking advantage of a drunk girl,  
19 it is not unheard of. I only say that to mean that  
20 it's not beyond the realms of possibility.

21 The use of Saranwrap: It's so peculiar I have  
22 difficulty in understanding how someone could make  
23 that up. And, in my view, I can't understand how two  
24 young men picking two girls up off the street,  
25 drunks, without one of them at least having a  
26 particular positive view of them, would be content to  
27 have intercourse without a thought to AIDS,



1        chlamydia, and who knows what else is around these  
2        days.

3                Now, I look at the evidence of the two young men  
4        and I have to look at both their evidence because  
5        they're both describing the same situation,  
6        particularly the witness C     . I'd comment that I  
7        found him to be very careful, very precise,  
8        calculating even, artful in his evidence. Everything  
9        was done through a translator on -- and yet I was  
10       intrigued to see C     correcting the translator on  
11       his translations when the translator was speaking in  
12       English.

13               The room in which this activity took place is,  
14       by any of our standards, small. Looking at the  
15       photographs, there is a bed, there is a desk, and  
16       that's it. The bed, width-wise, and the desk take up  
17       all of one wall. I don't know how anything could go  
18       on in that room without everybody in the room  
19       knowing. It's just too small.

20               Essentially W     says, "I was sleeping." He  
21       heard her footsteps. The photographs show a rug  
22       floor and she's bare naked according to the evidence.  
23       "I could hear her foot steps," he said. "I realize  
24       that she's naked." She woke him up. So if they're  
25       both there at the same place at the same time, C  
26       has had intercourse with her, both him on the top and  
27       her on the top and back and forth and cuddling and

1       necking and taking clothes off, all the time W       is  
2       asleep on the floor. She gets up and she goes down  
3       and wakes him up, yet he says he never heard a thing.

4       When pressed he said he heard a little bit of  
5       their conversation, even though he said he was asleep  
6       and didn't know what they were saying.

7       In cross-examination, he went on and then backed  
8       up and said that she only woke him up after she went  
9       to C   's bed. Well, it appears his evidence is  
10      essentially that he woke up when she walked down the  
11      hallway. He fell asleep. He woke up again when she  
12      was talking on the bed, fell asleep, and then woke up  
13      again when she tapped him on the shoulder.

14      C       testifies that the three of them were lying  
15      down like three sardines in a can, and he's lying  
16      there while his friend and roommate is attempting to  
17      have intercourse with her. He sees nothing,  
18      essentially hears nothing other than to mumble, "You  
19      know, You're a man, you know what to do."

20      I just find it extraordinary and very difficult  
21      to believe that all of this could be going on in such  
22      a short time frame, 15, 20 minutes and they're not  
23      both wide awake and knowing what's going on.

24      This business of in and out of consciousness and  
25      being totally blank and ignorant as to what's going  
26      on in the rest of the room is very hard to conceive.

27      And, of course, C       I think said that he

1        went -- there is all this traffic over W        who's at  
2        one point asleep at the foot -- on the floor at the  
3        foot of the bed. Again, looking at the photographs  
4        of the room, I have to admit it's probably possible  
5        by some great means, but the light of the bathroom is  
6        on. There is light coming through the blinds. There  
7        is N. and C        stepping over W        , and everybody is  
8        in their own little reality watching their own TV  
9        screen, as it were, and not aware of anything else  
10       that is going on. I really find that difficult to  
11       accept.

12            Defence, in discussion with the Court, was asked  
13        defence to comment about the Saranwrap. Defence  
14        says, Well the Saranwrap wasn't seized. I can see  
15        that from the exhibits but that doesn't assist me.  
16        Kitchen plates weren't seized either and I'm sure  
17        there is kitchen plates in that apartment.

18            I come to the conclusion that the evidence of  
19        C        is unreliable and I don't believe him. I come  
20        to the conclusion that W        's evidence, once we come  
21        to the morning -- the end of the party and he goes to  
22        bed is unreliable, I don't believe him.

23            That still leaves me with the issue of whether  
24        or not their evidence raises a reasonable doubt? And  
25        the issue following that is whether or not the Crown  
26        has proven its case beyond a reasonable doubt.

27            I don't believe their version of the events. I

1 don't believe that that girl, on the evidence that's  
2 before me, voluntarily got into bed and had  
3 intercourse with both those boys. Any doubt that is  
4 to be raised has to surround that issue.

5 I have difficulties with her evidence. As the  
6 Crown says, no witness is perfect and everyone has to  
7 come to court with their own personalities and their  
8 own attitudes. I found her less than articulate, but  
9 that's part of her character, she can't be faulted.  
10 I can only rely on the evidence and I can't fault  
11 someone for being inarticulate unless their inability  
12 to articulate leaves gaps in the evidence.

13 I find the way this all ended up curious. She  
14 says -- the two boys made her have a shower and  
15 watched her. She got dressed. She left, and got  
16 their phone number. I don't know what to make of  
17 that, if anything.

18 I'm going to recess for ten minutes.

19 **(ADJOURNMENT)**

20 THE COURT: Thank you, counsel, I just wanted to  
21 review some of the evidence.

22 Well, in answer to the question does the  
23 evidence raise a reasonable doubt? The issue is sex  
24 with or without consent and the circumstances  
25 surrounding the sexual activity, and I'm of the view  
26 that their evidence does not raise a reasonable  
27 doubt.

1 I still have to be satisfied on the Crown  
2 evidence that the case is proven beyond a reasonable  
3 doubt. I've come to the conclusion, as I indicated  
4 earlier, that A N was drunk. She blacked out,  
5 passed out, or slept however -- whatever word we want  
6 to use while she was in the bathroom.

7 I make no finding as to how she got out of the  
8 bathroom. I don't think it's critical for where I'll  
9 go. Whether she opened the door herself or whether  
10 C opened the door, sexual activity between her and  
11 both boys took place and she was drunk.

12 Her evidence is that she did not consent. Her  
13 evidence is that she, as best she could, resisted.  
14 Her evidence is that C put his hand in her mouth  
15 and that's what cut -- or the inside of her mouth or  
16 the edge of her mouth which resulted in blood at the  
17 corner of her mouth.

18 They told her you have to have a shower and then  
19 she collected her clothes and was free to go. She  
20 said, I asked for the phone number because I was  
21 afraid they wouldn't let me go. She said, I didn't  
22 leave when Chan went for the Saranwrap because I was  
23 scared.

24 On all of the evidence before me, I come to the  
25 conclusion that the sexual activity between W and  
26 the victim did not take place with her consent. Thus  
27 a conviction follows.

1 I take it you're going to want a predisposition  
2 report, Ms. Payne?

3 MS. PAYNE: Yes, Sir, and a transcript, Madam  
4 reporter.

5 THE COURT: I'll direct the preparation of a  
6 predisposition report, and set the matter over until  
7 April 17th or no, April -- no April 17th might be too  
8 soon. Well, April 17 at 1:30.

9 MR. O'HALLORAN: Just a moment, please. I would like  
10 to be here if that's possible, I'm just checking my  
11 schedule, Sir. I see that I'm in Fort Providence and  
12 Hay River that week, but available the next week.

13 THE COURT: That's fine. April -- well, the 24th  
14 is Easter Monday. April 25 at 1:30, the Tuesday?

15 MR. O'HALLORAN: Thank you.

16 MS. PAYNE: Sorry, Sir, what date is that?

17 THE COURT: Tuesday, the 25th of April.

18 MR. O'HALLORAN: All right. At 1:30 p.m.?

19 THE COURT: Yes.

20 MR. O'HALLORAN: Thank you.

21 THE COURT: Thank you, counsel.

22 **(COURT ADJOURNS TO APRIL 25, 2000 AT 1:30)**

23 -----  
24  
25  
26  
27

1 Certified pursuant to Practice Direction #20  
2 dated December 28, 1987.

3 

4 Sandra Burns C.S.R. (A), R.P.R.  
5 Court Reporter  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27