

IN THE YOUTH COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

C.M. (A Young Person)

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

Restriction on Publication

Identification Ban: Information that may identify the victim must not be published, broadcast, or transmitted in any way pursuant to s. 486.4 of the *Criminal Code*.

Publication Ban: Information contained herein is prohibited from publication pursuant to ss. 110 and 111 of the *Youth Criminal Justice Act*

Note: This decision is intended to comply with the identification and publication bans.

Heard at: Yellowknife, Northwest Territories

Date of Decision: July 9, 2021

Date of Trial: December 10, 2020 and June 25, 2021

Counsel for the Crown: Travis Weagant

Counsel for the Accused: Alyssa Peeler

[Sections 271 and 151 of the *Criminal Code*]

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A. INTRODUCTION

A.1 Issue

[1] C.M., a young person, is accused of sexually assaulting A.B. contrary to s. 271 of the *Criminal Code* and touching her for a sexual purpose with his hand contrary to s. 151 of the *Criminal Code*.

[2] The incident that gives rise to these charges occurred on or about May 14, 2017 at a time when C.M. was 16 and A.B. was 13. At the time of the trial, C.M. was 20 and A.B. was 16.

[3] There were two witnesses in the trial: A.B. and C.M.

[4] A.B. had given a statement to the RCMP on January 10, 2018. The audio/visual recording of the statement along with a transcript were entered as an exhibit pursuant to s. 715.1. A.B. adopted the contents of the video recording and was examined by the Crown and Defence.

[5] There were also two Agreed Statements of Facts. The first stated the following:

- (a) C.M. was born on [specified date]. A.B. was born on [specified date]. In May 2017, C.M. was 16 years old, and A.B. was 13 years old.
- (b) In May 2017, A.B.'s brother J.B. celebrated his birthday. C.M. attended J.B.'s birthday celebration. C.M. is A.B.'s and J.B.'s second cousin.
- (c) On the night of J.B.'s birthday celebration, C.M., J.B. and several other friends went out drinking. The group returned to J.B.'s and A.B.'s family residence after midnight. C.M. was intoxicated by alcohol.
- (d) A.B. was asleep in her bed at this time. C.M. entered A.B.'s bedroom, sat on the end of her bed, and placed his hand on her left thigh. This woke A.B.
- (e) C.M. asked A.B. to come downstairs with him. She told him "no." C.M. left her bedroom. The door remained ajar, and A.B. went back to sleep.

[6] In the decision that follows, reference to a section number in the absence of a specific act is a reference to the *Criminal Code*.

[7] Before dealing with whether or not the Crown has proved its case against the accused, I must first provide reasons for my decision on an application for a stay of proceedings. This application was initiated by the defence as a result of an incident which occurred after the Crown closed its case and before the defence called evidence. I heard and denied the application on April 16, 2021. The following are the reasons for my decision.

B. APPLICATION FOR STAY OF PROCEEDING

[8] After the complainant testified during the morning of December 10, 2020, the Crown closed its case and the Court broke for lunch. The intent was that the Defence would call its case after the lunch break.

B.2 Allegations

[9] The following are the allegations made by C.M. regarding what happened during the lunch break on December 10, 2020:

- (a) While A.B. was testifying, there was an order excluding witnesses and her father, C.B. remained outside the courtroom in the waiting area. C.B. did not end up being called as a Crown witness.
- (b) During a break in the complainant's testimony, C.M. and his parents left the courtroom and were in the waiting area. While in the waiting area, C.M.'s mother saw C.B. taking a photograph of C.M. When she asked C.B. what he was doing, C.B. began to intimidate them and threatened to fight.
- (c) After A.B. finished her testimony, the Court took the lunch break. During this period, C.M.'s mother received a screen shot of a Facebook post made by C.B. which identified C.M. by name, home community and the charge he was facing. In the comments to the post, C.B. posted a photograph of C.M. and his parents taken that day in the courthouse waiting area.
- (d) The screen shot shows the following post allegedly made by C.B.:

“Anyone in (name of community) be very careful if you have young daughters around C.M.. He’s a fucking piece of shit creep. I’m currently outside a courtroom as he’s charged for sexual assault against one of my daughters. It’s taken a long time to get to this point. Hopefully he will get what he deserves. I hope nobody else has to ever be a victim of C.M. ever again. I commend my daughter for having the courage to face her abuser in court.”
- (e) There are 15 “likes” to this post along with some comments. In response to one of the comments is a photograph of C.M. and his parents in the courthouse waiting area.

[10] For the purposes of the application, Defence filed an affidavit sworn by the mother of C.M. It indicated that as of the date the affidavit was sworn (March 15, 2021), C.B. had not been charged with any offence.

[11] If C.B. made the Facebook post as alleged, then it appears that he is in breach of two sections of the *Youth Criminal Justice Act* (“YCJA”):

- 110. (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
- 111. (2) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would

identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

B.3 Remedy Sought

[12] Counsel for C.M. sought a stay of proceedings under the common law doctrine of abuse of process. Defence alleged that the fairness of C.M.'s trial was compromised and the integrity of the judicial process would be undermined if the trial was allowed to proceed.

[13] The Crown opposed the application. The Crown went a step further. It submitted that the Court should dismiss the application on a summary basis before hearing it. The Crown submitted that since there was no state misconduct being alleged, there was no possibility that the Court could find an abuse of process.

[14] The defence alleged that the conduct of the complainant's father has created the situation. There is no allegation that the Crown, the police or any other "state actor" has done anything other than continue with the prosecution.

[15] In support of its position that there must be state misconduct, the Crown relies on *R. v. Finn*, [1996] N.J. No. 71 (affirmed in [1997] 1 S.C.R. 10). The following summary of *Finn* contained in *R. v. Grant*, [2020] O.J. No. 1694 is useful and precise:

43 In *R. v. Finn*, [1996] N.J. No. 71, 106 CCC (3d) 43, the accused was charged with committing theft and fraud against her former employer. The employer threatened criminal proceedings would follow if the accused did not make satisfactory payment arrangements. The Appeal Division of the Newfoundland Supreme Court reversed the trial court's decision to stay the proceeding.

44 The Court in *Finn* articulated the two lines of thinking related to *the necessity of proof or involvement or acquiescence on the part of officers of the state in the improper threats of criminal action by victim-complainants*. The first absolute view is that threats so affect the process that a stay may be entered irrespective of whether the police or prosecutors engaged in impeachable conduct. The second distinguishes between the Crown's officers and victim-complainant in public prosecution and requires impeachable conduct by officers of the state. Without it, no abuse of process is sufficient to ground a stay of public prosecution. Under the second line, there must be evidence of state involvement that acquiesces to the complainant's conduct. Unfortunately, it is not clear even from the Court's description of what this "acquiescence" would look like. (my emphasis is added).

45 The Court in *Finn* rejected the absolute view because of the Crown's "independent decision to prosecute in normal course as a matter of public policy, and not for the purpose of implementing any alleged threat by the complainants to invoke the process to enforce recovery of debts": (*Finn*, at para. 37).

46 In the Supreme Court's decision on *Finn*, [1997] 1 S.C.R. 10, Justice Sopinka upheld the Appeal Division, finding at para. 1:

The charges were laid after an independent investigation and decision by the authorities. It cannot therefore be said that the purpose of the prosecution was to advance the civil interest of the complainant to recover a debt.

[16] In my view, *Finn* does not stand for the proposition that if there is no state misconduct, there cannot be an abuse of process and therefore no stay of proceedings. *Finn* and the related cases deal with the situation where a complainant threatens to use the criminal process to collect money owed as a result of theft. The debt is not paid. The Crown prosecutes the theft.

[17] The similarity of this line of cases to the case before the Court is that the Crown is prosecuting a case after an independent investigation and decision. There is no misconduct on the part of the Crown or the police.

[18] In the case at bar, the allegation by the defence is that a third party (the father of the complainant) has done something that profoundly affects the rights of the accused person and creates a situation where the public would perceive that to proceed with the trial would be a violation of societal norms of fair play and decency. This is a different situation.

[19] From *R. v. Babos*, [2014] 1 S.C.R. 309, it appears that there may be situations where a stay of proceedings is appropriate for an abuse of process and there is no “state actor” who has done something which can be considered to be misconduct:

37 Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state misconduct, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example (see, e.g., *R. v. Keyowski*, [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), 68 N.S.R. (2d) 247 (S.C., App. Div.)).

[20] There is support for this approach from *R. v. O'Connor*, [1995] 4 S.C.R. 411 where it is stated:

70 For these reasons, I conclude that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process. Because the question is not before us, however, I leave for another day any discussion of when such situations, if they indeed exist, may arise. As a general rule, however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.

[21] And in *R. v. Conway*, [198] 1 S.C.R. 1659:

9 Stays for abuse of process are not limited to cases where there is evidence of prosecutorial misconduct. In delivering the reasons of the Court in *R. v. Keyowski*, [1988] 1 S.C.R. 657, Wilson J. made it clear that all relevant factors, including, but not restricted to, bad faith on the part of the Crown, are to be considered (at p. 659):

To define “oppressive” as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown’s exercise of its discretion to re-lay the indictment amounts to an abuse of process.

[22] In my view, there may very well be situations where, as a result of circumstances created by non-state actors, that it would be unfair to proceed with a trial. If the Crown insisted on proceeding in such a situation, the Court could intervene. Accordingly, I am not prepared to dismiss the defence application on a summary basis.

[23] Having got over the initial hurdle, however, the defence application for a stay of proceedings fails based on the facts of this case.

[24] The common law abuse of process falls into two categories: fair trial and the residual category. These were described by the Supreme Court of Canada in *R. v. Babos*, 2014 S.C.C. 16, stated at paragraph 30 to 32:

30. A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 S.C.C. 12). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

31. Nonetheless, this court has recognized that there are rare occasions – “the clearest of cases” -- when a stay of proceedings for an abuse of process will be warranted (*R. v. O’Connor*, [1995] 4 S.C.R. 411 (S.C.C.) at para. 68). These cases generally fall into two categories: 1) where state conduct compromises the fairness of an accused’s trial (the main category); and 2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the “residual” category) (*O’Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather it falls squarely within the latter category.

32. The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

- 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated, or aggravated through the conduct of the trial, or by its outcome".
- 2) There must be no alternative remedy capable of redressing the prejudice; and
- 3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits".

[25] The defence relies on the residual category as justification for a stay of proceeding. It is submitted that to proceed with the prosecution of C.M. will undermine the integrity of the judicial process. The defence has referred to *R. v. D.B.*, [2008] 2 S.C.R. 3 where the Court speaks of the importance of protecting the privacy of young people who are before the Court. There is no disputing this importance; however, the issue is whether or not once that this privacy has been breached, does it render the trial unfair to proceed?

[26] If it is proven that the complainant's father breached s. 110(1) of the *YCJA*, then he can be prosecuted pursuant to s. 138 of the *YCJA*. This, of course, does not deal with the effects of publicizing the name of the accused; however, it provides a remedy as against the person making the disclosure.

[27] In the end, if the trial of the young person proceeds in such a situation, he will be either found guilty or not guilty. If found not guilty, the disclosure of the accused's identity should have little or no effect on him. If found guilty, the publication of the accused's identity can be dealt with in the sentencing process. A stay of proceedings at this stage would be tantamount to an acquittal.

[28] The act of publicizing the name of an accused young person when there is a ban on its publication, in the absence of further extraordinary circumstances, should not result in a stay of proceedings against the accused. The practical implication of such a consequence would be that a young person could avoid a criminal prosecution if anyone (including, presumably, a friend or a parent) publically disclosed that young person's name.

[29] It is not unfair to proceed with C.M.'s trial. To the contrary, it would be unfair to stop the judicial process as a result of the actions of a third party. The application for a stay of proceedings was dismissed on April 16, 2021 for these reasons. After the application was dismissed, the defence called its case and C.M. testified on June

24, 2021. I now turn to my decision with respect to the trial of the charges against C.M.

[30] In assessing the case against C.M., I will first provide a brief summary of the testimony of each of A.B. and C.M.

C. TESTIMONY OF A.B.

[31] A.B. testified that she shut off her phone around midnight and went to sleep in her bed in her room. This was on a night when her brother had gone out to celebrate his 18th birthday with some of his friends. She knows that her brother came back into the house with some friends after she had fallen asleep. They had been drinking. She could hear her brother vomiting.

[32] She woke up when C.M. touched the upper part of her inner left thigh. She could smell alcohol on him. He was sitting by her feet and he had his hand on her thigh. His hand was crawling upward toward her private area. She grabbed his wrist and pushed it away. She sat up. C.M. said he was scared about A.B.'s brother who was puking so much. C.M. grabbed A.B. by her left wrist. He asked her if she would go downstairs and sleep with him. She refused. He got up and walked away.

[33] A.B. went back to sleep and then woke up again to C.M.'s hands in her pants and underneath her underwear. It felt like she had peed. He was touching her in the labia area. He was aggressive. He had his weight on her right leg. He was trying to put a finger inside of her. She remembers that it hurt a lot. She tried to push his hand away and he kept returning it. This went on for 20 seconds to a minute, but probably closer to 20 seconds. She was able to get his hand out and as she did, his hand scratched her in the hip area. This scratch was visible for about two days and took a week to heal.

D. TESTIMONY OF C.M.

[34] C.M. testified that in May of 2017, he was in Yellowknife for a basketball tournament and was staying at the home of J.B., who he had known for at least ten years. He also knew J.B.'s sister, A.B.

[35] On that evening, he and J.B. and seven friends were drinking at the sandpits which are near Yellowknife. C.M. shared a 26 ounce bottle of alcohol with seven others. He would have drank around 5 ounces himself. He also shared a joint of cannabis. He vomited on himself. He blacked out and woke up on the truck ride back to J.B.'s house. By "blacked out", he meant that he does not remember what happened but he would have been conscious.

[36] They went inside the house. J.B. was throwing up. C.M. went into A.B.'s room, touched her on the left thigh. She woke up and he told her to go help J.B. She said no, and C.M. left the room, went downstairs and fell asleep. He did not go to her room at any point after that.

E. ANALYSIS

E.1 The W.D. Analysis

[37] As counsel points out, the test in *R. v. W.D.*, [1991] 1 SCR 742, which was modified by the BC Court of Appeal in *R. v. H. (C.W.)* (1991) 68 CCC (3d) 146 is applicable in this situation:

- (a) if I believe the accused and he convinces me he is not guilty, then it of course follows that the Crown has not proved the case beyond a reasonable doubt and the accused must be acquitted;
- (b) if I do not know whether to believe the accused or the complainant, then I must acquit;
- (c) There is a middle ground where I may not believe everything the accused has said, but his evidence denying the sexual assault at least raises a reasonable doubt and, if so, I must give him the benefit of that doubt;
- (d) And, finally, if I do not believe the accused and his evidence does not raise a reasonable doubt, then I must still consider all of the evidence which I heard and which I do believe to determine if the Crown has proven beyond a reasonable doubt the case against the accused.

[38] The Crown has to prove all of the elements of the sexual assault. The burden of proof is on the Crown. The standard of proof is proof beyond a reasonable doubt. Given the Agreed Statement of Facts, there is no controversy that the incident occurred in May of 2017 at A.B.'s residence in Yellowknife and that it was the accused, C.M. that entered A.B.'s bedroom and placed his hand on her left thigh.

[39] The accused denies that the touching of A.B.'s thigh was for a sexual purpose and denies going into A.B.'s bedroom a second time.

E.2 Assessment of the Testimony of C.M.

[40] C.M. testified that he woke A.B. up by touching her thigh and then he asked her to go help her brother. During his testimony, he denied asking her to go

downstairs. Yet in paragraph 5 of the Agreed Statement of Facts filed with the Court and signed by C.M. on December 10, 2020, paragraph 5 states, “C.M. asked A.B. to come downstairs with him. She told him ‘no’. C.M. left her bedroom. The door remained ajar, and A.B. went back to sleep.”

[41] This is a significant inconsistency because C.M. also testified that J.B. was in his bedroom upstairs throwing up. A.B.’s bedroom was also upstairs. C.M. was sleeping downstairs on the couch because there was not enough room in J.B.’s bedroom. To ask her to go downstairs would mean that C.M. was not asking A.B. to help her brother.

[42] C.M. was inconsistent on a number of points within his own testimony:

- (a) Initially, he said that J.B. started throwing up when they arrived at the residence. Then he said that they were at the residence for a couple of hours before J.B. started throwing up.
- (b) Initially, he said that the incident where he woke up A.B. was at 5:00 a.m. but then later said it was around 3:00 a.m.
- (c) Initially, he said that three or four people were dropped off at J.B.’s house. Then, he said two or three. Then, he said it was only someone named Liam.

[43] Even though C.M. could not remember many details, he was certain that he touched A.B. on the left thigh. He remembered that there were no blankets on the bed. He remembered that J.B. was throwing up into a slushy cup and what his position on the bed was.

[44] C.M. was a witness who clearly did not have a clear and consistent memory of what happened that night. The inconsistencies between one part of his testimony and another part are a clear indication of someone who is inventing what happened as opposed to remembering what happened. I cannot accept that given that his memory of the majority of what happened that evening can be so poor, i.e., either he says he cannot remember it or that his description is inconsistent, he can have such a specific detailed memory of what went on in A.B.’s bedroom. He is simply not credible.

E.3 Assessment of the Testimony of A.B.

[45] A.B. was a young witness who answered questions with a great deal of maturity. She was cross-examined on the effects of the passage of time on memory; the effects of melatonin on her memory; the effects of waking up suddenly. In all cases, she acknowledged that there may have been effects; however, was certain about her recollection and perception on the key points.

[46] She did not embellish the facts and did not appear to have a bias against the accused. For example, when C.M. said to her that he wanted her to come downstairs to sleep with him, she acknowledged that it could have been fear on his part where he needed company or it could have been a sexual invitation. Similarly, she acknowledged that the initial touching on the thigh could have been innocent

[47] Her description of not telling the police officer about the sensation of peeing when C.M.'s hand was touching her genitals because she was 13 and was embarrassed seems truthful. The defence takes issue with the seven month delay between the incident and when A.B. told the police about the assault and submits that A.B. may have initiated the complaint to support her girlfriend who complained about a similar incident. In response, I found A.B.'s explanation to be very credible. She said that with her level of understanding at her age, she was not sure that C.M.'s actions were something she could take to the police. She also said that she was afraid that she would not be believed.

[48] The defence indicated that there were a number of places in A.B.'s statement where she said that she did not remember what happened because it happened so long ago. She also refers, in the statement, to the possibility that it was "all in her head". I have reviewed these portions of the statement. In the statement, A.B. spoke in a relatively rambling style. When she was referring to not remembering what happened, it was in the context of certain things that were not clear. On those events or memories that were clear, she was certain. When she was referring to uncertainty about things happening, she was relating how she was trying to reconcile some things that seemed odd to her, such as, for instance, the fact that she was going to school on a Saturday or Sunday.

[49] I do not find it unusual that A.B. was not woken up by the sound of C.M. stumbling into her room or sitting on her bed; yet would have heard her brother vomiting or her brother and his friends arriving home. Nor do I find the initial confusion about thinking that it was a school night because she went to school the next day to be a reason to disbelieve her. A.B. was the type of witness who was trying to be as honest as possible and to explain why she thought in a certain way. For example, she spoke about the realization that she had either volleyball or

basketball practice. She spoke about looking down in the shower and seeing the scratch.

[50] There is one important inconsistency between A.B.'s statement to the police and her testimony that requires examination. In her statement, she stated at page 26, line 1080, "... and I remember one of his hands was like inside ... my vagina or one of his fingers were I don't know if ... how many maybe it was one maybe it was two ... I don't know I just remember it hurt a lot and when when I sorta was getting his hand out I guess he like ... you know like I said it was sorta like quick sand."

[51] In her testimony at trial, in regard to the above-noted portion, she was asked, "At any point, were C.M.'s fingers inside your vagina?" She responded, "No."

[52] On the face of it, this is a fairly important inconsistency. On the other hand, A.B.'s description of the sensation that she was peeing when C.M. was rubbing her in the clitoris area along with her willingness to correct what she said in the statement based on what she remembered at trial are indications to me of her truthfulness. She was not asked to describe what "inside my vagina" meant during the statement. Earlier on in the same paragraph in the statement, she was asked where C.M. was touching her and she said, "um ... sorta like lavia ... I guess I think what's it called I'm pretty sure ... it wasn't internal or anything but it was sure ... it was sorta ... like rubbing against it ...". Overall, I am not satisfied there is an inconsistency.

[53] The issues in the testimony of A.B. arose from a witness who seemed willing to explain herself. She never gave the impression that she was misleading the Court. To the contrary, she appeared that she was trying to tell the truth and to explain in as much detail her thinking process.

[54] I accept the testimony of A.B. as credible. I am not left with a reasonable doubt with respect to C.M.'s touching of A.B.

[55] I find that C.M. touched A.B. under her clothes in the area of her clitoris. This touching lasted between 20 seconds and a minute. Due to the nature of the touching, it was clearly for a sexual purpose. It was against A.B.'s consent and in any case, she could not provide legal consent given her age.

F. SUMMARY

I find that the Crown has proven the elements of both of the offences. C.M. is guilty of the s. 271 sexual assault. There will be a conditional stay of proceedings with respect to the s. 151 charge. This stay will become absolute after the appeal period has expired provided no appeal is filed.

Garth Malakoe
Y.C.J.

Dated at Yellowknife, Northwest
Territories, this 9th day of July,
2021.

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