R. v. T.K., 1999 CanLII 15191 (BC S.C.)

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Citation: R. v T.K.
S99-2133

Date: 19990503
Docket: X052094
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

T.K.

APPLICANT/ACCUSED

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE LOO**

Counsel for the Respondent: H.R. Walters

Counsel for the Applicant/Accused: D.R. Corrigan and F.G. Potts

Date and Place of Hearing/Trial: New Westminster, B.C.
22, 23, 24, 25,26, 29,
30 & 31 March 1999

[1] On April 23, 1999, following a *voir dire*, I directed a judicial stay of the proceedings with written reasons to follow. These are my reasons.

[2] The accused was charged under s. 271 and s. 279(2) of the ***Criminal Code*** with sexual assaulting and unlawfully confining L.W. The only issue was consent.

[3] The accused raised several ***Charter*** challenges, and sought an acquittal, or alternatively, an order staying the proceedings. In general, the accused alleged incompetence and bias on the part of the investigating officers, lack of disclosure, and that his rights under sections 7, 8, 9 and 11(d) of the ***Charter*** had been infringed.

THE BACKGROUND

[4] In June 1997 L.W. was 32 years old, and recently separated. In November 1996 she and her two children moved into a house in a residential cul de sac in South Surrey. She came to know the accused and his wife who lived four houses away. They were all about the same age, they socialized, and their children went to school together.

[5] On Friday, June 13, 1997 L.W. had a date with T.H. He spent the night at L.W.'s. Her children were with their father.

[6] The next morning, which was a Saturday, at about 7:30 a.m., the telephone woke them up. It was the accused. He was downtown and wanted L.W. to pick him up where his car was parked in downtown Vancouver and drive him home. He had been drinking earlier and did not want to drive home. His family was away for the weekend. L.W. got up, went downtown, and drove him home. When she returned home, T.H. was just getting up. It was about 9:30 a.m.

[7] About 15 minutes later the accused called again, and L.W. went back to his house to help him move a picnic table. As she was leaving, he said he wanted to show her something. She followed him into the garage. There was no vehicle in the garage. It was there that they engaged in sexual intercourse while L.W. had a pair of thumbcuffs on. I will come to the details later.

[8] L.W. returned home. She had been gone about 20 to 30 minutes. She never said anything to T.H. about what had happened to her, and he did not notice anything unusual. She appeared normal. T.H. said that they went out for breakfast, returned to the house, and he left around noon when she said she was going to have a shower. A little while later, T.H. returned with a friend, and they stayed about half an hour. Later that day L.W. made a brief appearance at a block party in front of her house. Afterwards she attended a piano recital with her mother and sister. In the evening she went to a nightclub with her brother and a friend. Three days later, on June 16, 1997, she made a complaint to the police.

THE INVESTIGATION AND ARREST

[9] Constable Palta, the investigating officer from the RCMP Surrey detachment, was asked to see L.W. at Surrey Memorial Hospital. He went to the hospital at about 9:00 p.m. and spoke to the examining nurse who told him about the nature of the sexual assault complaint, and gave him the specimens and L.W.'s clothes. Constable Palta never asked the nurse whether L.W. had given a statement, but admitted it was reasonable to assume that she had. He then met with L.W. and took a statement which he wrote down by hand.

[10] She made the following assertions which I note in point form:

- the accused put thumbcuffs on her, and then closed the garage door;
- they had intercourse; he then unsuccessfully tried to have her perform fellatio; they had intercourse a second time;
- she was crying when she left; and
- T.H. was at her place and knew that she had gone to the accused's but she never told him anything.

[11] That evening Constable Palta returned to the detachment, logged in the exhibits, relayed the complaint to his supervisors, and possibly did a computer check, which disclosed nothing. He decided that even though L.W. was not at risk, there were no safety issues, or any threat the offence would be repeated, the next day the accused's house would be searched, he would be arrested, charged, and detained. From that point on, Constable Palta admitted that the only evidence he was interested in was evidence that would assist the Crown in securing a conviction.

[12] Constable Palta returned for duty the next day at 6:00 p.m. He met L.W. and took a second statement. This time it was audiotaped, and eventually reduced to a transcript. He logged the tape into his personal locker because he knew the tape was important.

[13] Constable Palta then swore the information to obtain a search warrant and at about 8:00 p.m. Constables Wellington and Cross obtained the warrant from a Justice of the Peace. As it was after regular hours they drove to White Rock to see the Justice of the Peace who was on call.

[14] The Warrant to Search authorized the search of the accused's residence on June 17, 1995 between the hours of 7:30 p.m. and 11:55 p.m.

[15] Constable Palta knew that under section 488 of the ***Criminal Code*** the warrant had to be executed between 6:00 a.m. and 9:00 p.m. unless the Justice of the Peace was satisfied there were reasonable grounds for it to be executed at night, and the reasonable grounds are included in the information.

[16] There are no grounds for a night search stated either in the information or in the warrant. Constable Palta's only explanation for conducting the search at night was that it suited the officers' schedules.

[17] The search of the accused's residence was conducted between approximately 10:00 and midnight. In addition to uncovering nothing, the search seriously frightened the accused's wife and family. The accused was arrested without warrant, taken into custody, strip searched and detained overnight.

[18] When he was arrested, the accused voluntarily indicated he and L.W. consented to sex with the thumbcuffs, which he had thrown into the garbage afterwards because they were both so disgusted. However, Constable Palta was not interested in finding out from the accused what he had to say because in his words, "It wasn't going to be taken into account at that time."

[19] Constable Palta was aware that the charge of sexual assault and unlawful confinement were both hybrid offences under section 495 of the ***Code***. The accused could be prosecuted by indictment or summary conviction. He could not be arrested without warrant, except in certain limited circumstances which were not present. Nevertheless, Constable Palta arrested him without warrant, knowing that there was no need to establish his identity, no need to secure or preserve evidence, no need to prevent the continuation or repetition of the offence, and no grounds for believing that he would fail to appear. As if that were not enough, Constable Palta also knew that on the basis of section 497, after having arrested the accused, he had no grounds for detaining him. Had he been arrested during the day, he could have been before a judge and released right away.

[20] The only reason the warrant was obtained at night, the search conducted at night, the accused arrested at night, strip searched and detained overnight, is because Constable Palta's shift did not start that day until 6:00 p.m.:

> Q It was just administrative convenience?
> A That's that's the way the events unfolded.

[21] The accused was strip searched because Constable Palta has a "personal policy" to strip search every person he arrests and detains in the police cells.

[22] While the ***Criminal Code*** allows convictions for sexual assault without the requirement of corroboration, it is dangerous to act merely on a complainant's statement without cross-checking and verifying the peripheral details. This has been the subject of judicial comment in four cases of the Newfoundland Supreme Court - Trial Division. The first of the cases is ***R. v. D.O.S.*** reflex, (1992), 103 Nfld. & PEIR 146 in which the complainant alleged that her friend W.P. witnessed a major struggle between her and the accused charged with sexual assault. The friend was contacted by the police but had no recollection of the incident and no written statement was taken from her. Green J. at paragraphs 29 to 32:

> ...
> Before leaving W.P.'s evidence I feel I must make some comment on the role of the police investigation with respect to W.P.'s involvement in the case.

> As indicated, when W.P. was contacted by the police by telephone, she indicated, as she did in court, that she could not recollect seeing any incident of the nature described by C.J. As a consequence, no statement was taken from her; yet her evidence, I have found, was very valuable to a determination of this matter and, specifically, was valuable to the defence.
>
> It is perhaps natural, if on questioning, a person says he or she cannot recall an incident, to assume that that person has nothing of value to add to the investigation and to discount that person's further involvement. There is, however, a great danger in this. The effect of being too quick in concluding that because a person cannot recollect anything specifically about a particular incident, the person's evidence is of little value, may be to reject relevant evidence that does not support the Crown's case. The fact that a person does not recollect may of course mean that he or she has forgotten but it could also mean, in circumstances where the witness had an opportunity to observe and would normally be expected to have seen something, that the incident did not happen. The Crown (and I use that term compendiously to include the police) have a duty in investigating an alleged crime, to attempt to uncover all reasonably available evidence that may have the effect of confirming the charge or exonerating the accused. ...
>
> ... Such lack of recollection may well contribute to a reasonable doubt. The accused is entitled to the benefit of that evidence. It is incumbent on the Crown to make that information available to the defence, and in some circumstances, to the court and not merely to discount or dismiss it simply on the assumption that the lack of recollection means that the witness has nothing to add. In my view, the greatest guarantee of an accused person's civil liberties, is not the court, defence counsel or even the Canadian Charter of Rights and Freedoms, but a competent police force dedicated to conducting a thorough investigation with an open mind and with a view to uncovering relevant evidence that bears on the truth or falsity of the allegations facing the accused.
>
> There is obviously a great danger in merely acting on a complainant's statement and, as long as no one else specifically contradicts it, proceeding on to court without further investigation to attempt to check out peripheral details. ...

(see also ***R. v. G.C.***, [1997] N.J. No. 157 (QL) (Nfld. S.C.))

[23] ***R. v. J. F.***, [1998] N.J. No. 86 (QL) (Nfld. S.C.) also concerned an allegation of sexual assault and an improper police investigation. O'Regan J. set out in paragraph 11 the principles which he had to address, including the following principle:

> A reasonable doubt may arise from the evidence, a conflict in the evidence, or a lack of evidence. It may also arise from doubts created about the quality of the evidence resulting from the failure of the prosecutorial authorities to conduct a proper investigation in circumstances where it would be reasonable to follow up on lines of inquiry based on knowledge that was then available.

[24] At paragraph 13, O'Regan J. states:

> Unfortunately in this case the complainant was really left to her own resources in giving her testimony. This is a classic case of the Police accepting a complaint, then acting on it without conducting further investigation. When the Criminal Code was amended to permit convictions for sexual assault without corroboration, the intent was not to discourage investigation.

[25] ***R. v. Parsons***, [1999] N.J. No. 20 (QL) (Nfdl. S.C.) also a decision of O'Regan J., emphasizes that where the issues of consent and credibility are at the forefront, the best protection for an accused facing a serious charge is a thorough investigation. He stated at paragraph 38:

> I find it very difficult to comprehend how an investigating officer can

> without attempting to corroborate or investigate summarily decide what he is going to believe or disbelieve.

[26] And at paragraph 42:

> It is not appropriate for an investigating officer to make his own determination as to what evidence he decides to believe or not to be *(sic)* believe especially when the accused is placed in jeopardy under such a serious charge.

[27] When Constable Palta first became involved in the investigation it was readily apparent that credibility was an issue. He should not have decided that he would simply accept the complaint without investigating further to corroborate the allegations that she made. At most, all he did was run a computer check which revealed nothing.

[28] Constable Palta was not interested in finding out from the accused what he had to say about the complaint made against him. He was not interested in evidence unless it would help in convicting the accused. He was intent on simply believing L.W. without making any independent inquiries apart from interviewing those family members to whom L.W. had told she had been raped.

[29] The RCMP have approved the use of ***An Investigative Guide For Sexual Offences***, prepared in 1997 by the Canadian Research Institute for Law and the Family. It was reviewed in detail by Constable Palta in cross-examination. It deals with the role and response of the police to allegations of sexual assault and provides a basic framework for case management and investigation, recognizing that these cases are difficult to investigate and to prosecute when the only witness is the complainant. While obviously the manual does not have the force of law, it does shed light on what constitutes a competent investigation. Constable Palta admitted that a number of the investigative steps were good practice. They include:

- in deciding whether to lay a charge, assess the available evidence, including the credibility of the complainant and other witnesses.
- ascertaining whether the complainant has spoken or been interviewed about the subject matter of the allegations before the police became involved and noting the content of all prior statements to help assess whether the incident is substantiated and the charges warranted and to help decide what additional investigation is needed to resolve any inconsistencies or contradictions.

[30] Unfortunately, Constable Palta did none of those things. If he did, things might have been different.

SEXUAL ASSAULT NURSE EXAMINER PROGRAM

[31] Constable Palta was unaware of the protocol between the RCMP Surrey detachment and Surrey Memorial Hospital in connection with the Sexual Assault Nurse Examiner Program, known by its acronym SANE. If a victim wants the police to be involved, as L.W. did, the SANE nurse examines the victim, collects the forensic evidence, reports the matter to the police, turns over the exhibits to the police, and forwards a detailed report to the investigating police officer in 3 to 4 weeks time.

[32] The SANE nurse in this case sent her report to the detachment. Constable Palta never saw the report until late February 1999, after incessant demands by defence counsel that it be produced. He agreed that the report had simply been placed in the master files, which was where it was when he found it. If he had read the report at about the time it was made, or if he had interviewed the nurse the same night he first interviewed L.W., he would have learned that what L.W. told the SANE nurse was different from what she told him. I note in point form, L.W. told the nurse the following:

- L.W., not the accused, placed the cuffs on her thumbs;
- the sequence of events was different: he first tried to get her to perform fellatio, then they had intercourse, but there is mention of only one act of intercourse, not two;
- she did not struggle; and

- except for a bruise to her right nostril, no injuries were noted.

[33] At trial, L.W. said that she suffered bruises on her legs and thumbs as a result of the incident. The bruises were not evident to the SANE nurse at the time of examination.

[34] Constable Palta admitted that if he had known about the statement L.W. had made to the nurse, he would have had additional questions as the SANE statement was inconsistent with what she had told him. I note that L.W.'s evidence at trial also conflicts in part with the evidence she gave at the preliminary.

THE EVIDENCE OF T.H.

[35] T.H. saw L.W. a few minutes after the incident. She appeared normal. There was no indication that she had been crying or that she was upset. They went out for breakfast and then returned to the house. T.H. left about noon. T.H. then went to pick up his friend and they both returned and stayed about half an hour. The only observation that T.H. noticed about L.W. was that she appeared distant. Later that evening, he saw L.W. dancing at a nightclub.

[36] Constable Palta admits that T.H. was the first person to see L.W. within a few minutes of the incident. He agreed that he was a key witness, yet he never interviewed him before the arrest. His reason for not doing so was because L.W. never told him anything. He never interviewed T.H. until weeks after the incident, and by then the accused's rights had already been violated by what I find to be an unlawful search and detention. The fact that T.H. might not have noticed anything untoward in her behaviour or appearance within the first hour or so following the alleged incident is significant. If she had been crying and was as upset, as she says she was, it seems quite odd that T.H. would not have noticed. I found T.H. to be a credible witness with a memory for detail. Where his evidence contradicts with L.W.'s, I accept his.

THE EVIDENCE OF R.M.

[37] R.M. is the accused's 23 year old nephew. They worked together in the same office. On Saturday morning, June 14, it was R.M. who had picked L.W. up to drive her downtown so that she could drive the accused back home in his truck. R.M. struck me as a serious, truthful witness.

[38] On the following Tuesday, R.M. noticed that the accused was not acting normal. He seemed upset. R.M. asked him what was wrong. The accused told him that he had sex with L.W. on Saturday morning after he had left and asked what he should do. He was concerned about losing his wife and the children over it. They agreed that he would tell his wife sooner, rather than having her find out later. R.M. was adamant that when the accused talked about the sex he had with the complainant, it was about consensual sex. That evening, the accused was arrested.

[39] T.H.'s friend who saw L.W. within a few hours of the incident, was never interviewed. The neighbours were never interviewed as to whether they observed anything either at the time of the incident, or at the block party. The only persons who were interviewed were the persons L.W. told that she had been raped. They included her sister, her brother, and a woman with whom L.W. works. They testified that L.W. was extremely distraught and upset.

[40] The accused does not claim he is entitled to a perfect investigation. He says he is entitled to a competent investigation. In this case, the officer acted on an uncorroborated complaint and, without any further investigation, conducted a search, arrested the accused without warrant, strip searched, and detained him overnight, all in contravention of his rights under the ***Charter***. For almost two years, in order to comply with his conditions of bail, the accused has had to report each week to his bail supervisor and abstain from the use of alcohol and non-prescription drugs. There is no evidence that the incident was affected by either alcohol or drugs.

DISCLOSURE

[41] Corporal Cross interviewed R.M. The interview was taped, and a transcript produced. The 15 page transcript which was not in evidence, shows that in 18 places the tape was inaudible, in 3 places the tape skipped, in 2 places there were questions marks. Corporal Cross says that he was never asked to produce the tape and that he followed the policy or directive in

destroying or recycling the tape to avoid cluttering the file.

[42] In the weeks following June 17, Constable Palta's tape of his interview with L.W. was transcribed and a copy of the transcript returned to him along with the tape. In the normal course, an officer compares the transcript with the tape to ensure that it is an accurate transcript of the interview and indicates with his signature that such is the case. Constable Palta did not do that.

[43] Prior to this trial, the only notes disclosed relate to the investigation on June 16 and 17. As this trial progressed it was apparent that a full disclosure had not been made (I should add through no fault of counsel for the Crown, Mr. Walters). Other documents were produced to both Mr. Walters and defence counsel after a search was made of the officer's notes and the police master file during Constable Palta's cross-examination.

[44] As early as July 3, 1997 counsel for the accused wrote to Crown Counsel asking for a copy of the transcript and the tape of the interview. The many requests for disclosure were repeated on August 5, 1997, January 20, 1998, September 14, 1998, October 28, 1998 and January 22, 1999. They seemed to have fallen on deaf ears, blind eyes, or simply been filed away.

[45] Constable Palta said he was only asked to produce the tape in the last month or two. During cross-examination, he located correspondence in the police master file which was sent to him by Crown Counsel in August 1997 asking him to produce the tape. The word tape was even underlined. He did not comply with the request because he forgot. He was asked for the tape several more times before and in December 1998. By then, he had lost the tape. That, in addition to the facts that the transcript of the interview was never compared with the audiotape and it shows more than 20 "inaudibles", numerous pauses and sighs, renders the Crown's explanation for the loss of evidence unacceptable.

[46] In this case, I find that the accused was prejudiced by the loss of the tape. The defence had asked for the tape within a couple of weeks of the incident and the arrest. Had the defence been given the opportunity to compare the transcript to the tape, they might have been able to determine some of what was inaudible or missing in the transcript.

CONCLUSION

[47] I find in all of the circumstances that this is a clear case in which a judicial stay of proceedings should be and is granted.

[48] While my reasons for directing a judicial stay of proceedings have involved harsh criticism of Constable Palta's investigation, I recognize that this was his first investigation into an allegation of sexual assault. Constable Palta was cross-examined at length. He gave his answers as best and as honestly as he could. He conducted the investigation in the manner he thought was appropriate. However, I have found that in doing so, the rights of the accused have been seriously infringed and no other remedy other than a stay of proceedings in my view is appropriate.

[49] Counsel for the defence sought an order of acquittal on the basis that the *voir dire* took place at the close of the Crown's case. The defence concedes that a ***Charter*** application for a judicial stay of proceedings, and an application which seeks an acquittal are "two different beasts". I agree with the Crown that there has been no application seeking an acquittal, and no argument on the sufficiency of the evidence. While s. 24(1) of the ***Charter*** may give the court a wide latitude in fashioning a remedy, I do not think an acquittal is appropriate in this case.

"L.A. Loo, J."
The Honourable Madam Justice L.A. Loo

New Westminster, B.C.
3 May 1999