CANADA / JUDGMENT

R. v. A.C.

2019 BCSC 173

COURT
Supreme Court of British Columbia

DECIDED
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2019 BCSC 173 R. v. A.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. A.C.,

2019 BCSC 173

Date: 20190213

Docket: 27270

Registry: Vancouver

Regina

v.

A.C.

Restriction on publication: A publication ban has been mandatorily imposed

under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Crown:

A. Campbell

Counsel for the Defendant:

M. Klein, Q.C.

Place and Date of Trial:

Vancouver, B.C.

June 11-13, 2018

October 24-25, 2018

November 2, 2018

Place and Date of Judgment:

Vancouver, B.C.

February 13, 2019

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Introduction

[1] I note for the purposes of those present in the courtroom that, pursuant to s. 486.4 of the Criminal Code, there is a publication restriction with respect to this file, which prohibits the disclosure of any information that could identify the complainant. I will be using initials for names. I will refer to the complainant as H.R. and to the accused as A.C.

[2] A.C. is charged with sexually assaulting H.R. on the night of December 8, 2015, contrary to s. 271 of the Criminal Code. The sexual assault is alleged to have occurred in A.C.'s student residence on the University of British Columbia ("UBC") campus. He has pleaded not guilty to the charge.

[3] Both A.C. and H.R. agree that they engaged in sexual activity on that night and in that place. H.R. agrees that some of the sexual activity was consensual but testified that she did not consent to other activity. A.C. says that H.R. consented to all of the sexual activity. In an alternative submission, he argues that he had an honest but mistaken belief that she was consenting.

[4] As is always the case, A.C. is presumed to be innocent of the offence with which he is charged, and the Crown bears the burden of proving, beyond a reasonable doubt, each essential element of the charge. A.C. does not have to prove anything. The burden of proof does not relate to the individual pieces of evidence led by the Crown.

[5] Thus, the issue in this case is whether the Crown has proven beyond a reasonable doubt that H.R. did not consent to the sexual activity and, if she did not, whether the Crown has disproven that A.C. had an honest but mistaken belief that she did.

[6] The credibility of H.R. and A.C., both of whom testified, is central to this case. Some of their evidence about the evening of December 8, 2015, was not contradictory. However, it diverged on the key factual issues.

[7] There was a break in the middle of this trial when it became apparent that, through inadvertence, the Crown had not disclosed the records from H.R.'s first medical examination on December 9, 2015, the morning after the alleged assault. After production of the records, the trial was adjourned to allow A.C. time to locate, and interview, the emergency room physician at Burnaby General Hospital, who performed the first examination.

The Witnesses

[8] In addition to H.R.'s evidence, on behalf of the Crown, I heard evidence from:

(a) T.W., one of H.R.'s roommates who, accompanied by another roommate, picked her up at UBC after the events of December 8, 2015;

(b) Rosalyn Chin, a sexual assault nurse examiner at Surrey Memorial Hospital who examined H.R. in the early morning hours of December 9; and

(c) Constable Benson Tsui, the RCMP officer assigned to investigate H.R.'s complaint of sexual assault. Constable Tsui took an audio and video-recorded statement from A.C. on March 17, 2016.

[9] A.C. testified on his own behalf and called Dr. Alan Chou who conducted H.R.'s first sexual assault examination.

The Events of December 8, 2015

The Uncontroversial Evidence

[10] Although there were some minor differences in the evidence of H.R. and A.C. about their contact leading up to their date on December 8, 2015, those differences were not material.

[11] H.R. is 22 years old and a fourth-year student studying towards a science degree at a university in the Lower Mainland. When she met A.C., she was in her second year. She lived on campus in a townhouse with three roommates.

[12] A.C. is 27 years old. He is currently on a study leave from UBC, but, when he met H.R., he was a UBC student and lived in a student residence on campus.

[13] H.R. and A.C. met through Tinder, an online dating application ("app"). Both H.R. and A.C. had signed up for the app, which allows users to create an online profile using their first name and a photograph. The app matches a user's profile with the profiles of other users. A user can "like" or "dislike" another user by reviewing their profile and photo, and swiping the photo to the right, if they are interested in "meeting" them online, or to the left, if they are not. If two users "like" each other's profiles, the app allows them to chat online before deciding whether they wish to meet in person.

[14] H.R. testified that she created a Tinder profile to meet new people. She matched with about 50 other Tinder users, spoke to 20 of them, and went on dates with about six. Typically, the dates involved going to a movie, having coffee or dinner, or going for a walk.

[15] A.C. testified that he used Tinder to "hook up" with women usually for casual dating or for sexual encounters.

[16] H.R. and A.C. "liked" each other on Tinder. At first, they chatted with each other within the app about their families, school, and their mutual love of dogs. For about a week or two before they arranged to meet, they continued their conversations by text message on their personal cell phones.

[17] They arranged to meet for dinner at a sushi restaurant on the UBC campus on December 8, 2015, at 7 p.m.

[18] H.R. travelled to the UBC campus by bus. She testified that the trip took over an hour. She arrived early. A.C. texted her that he was running late but after waiting for about 30 minutes, and believing that she had been stood up, H.R. left the restaurant and started the bus trip home. While she was on the bus, A.C. texted her that he had arrived at the restaurant and asked her where she was. He asked her to reconsider going home, and although she was irritated, she agreed. A.C. met her with an EVO car share at the Oakridge Mall.

[19] The first time H.R. and A.C. met in person was when A.C. picked her up. She went with him, and they drove back to the UBC campus.

[20] The sushi restaurant had closed, so they decided to get a pizza. When they arrived at the pizza restaurant, it was about to close, so they took a pizza to go and went to A.C.'s student residence to eat it and watch a movie. H.R. testified that she was comfortable going to A.C.'s residence.

[21] H.R. described A.C.'s residence as having a bathroom, a small kitchen and a bedroom/study area. There was no living room. When they arrived, H.R. took off her jacket and boots and sat on the edge of the bed, which was the only place to sit. A.C. tidied up and got them plates. H.R. said A.C. seemed like a "nice guy", and he was cute. She said she was excited to eat pizza and watch a movie with him.

[22] At some point, A.C. sat at the head of his bed with his back against the headboard and his legs stretched out in front of him. H.R. moved up to the head of the bed and sat beside him. They moved closer to each other, and A.C. put his arm around her. He leaned in to kiss her, and they began kissing. H.R. said it was a little awkward at first, but she kissed him back.

[23] H.R. testified that she was excited to kiss and cuddle A.C. She thought he was really cute and smart. She said the kissing was "kind of nice". As they continued to "make out", H.R. testified that the position they were in was somewhat awkward, so she moved on top of him, straddling and facing him. According to H.R., the kissing went on for five to ten minutes.

[24] Up to this point in their evidence, the parties had similar accounts of the evening. There were significant differences from this point on.

H.R.'s Direct Evidence about the Sexual Activity

[25] H.R. testified that, while she was straddling him, A.C. began to move his hand up the back of her shirt and pull at it as if to take it off. She said that she was not comfortable with him doing so, as she thought, "this was a bit quick". She said she kept moving his hands to either side of her legs. She said he seemed intent in taking her shirt off, and because she did not want him to tear it, she allowed him to pull it off over her head.

[26] H.R. said that once her shirt was off, A.C. started kissing her neck and breasts. He then unclasped her bra. H.R. said she tried to hold the front of the bra against herself but eventually it came off. She could not recall how that happened. H.R was still straddling A.C. as he took off her shirt and bra.

[27] H.R. said that they did not discuss undressing, and she felt it was all happening very quickly. It seemed to H.R. that A.C. was just trying to undress her as fast as possible to get to sex.

[28] Once H.R.'s bra was off, A.C. kissed and fondled her breasts. She testified that it was weird and uncomfortable. She described things moving quickly and said that A.C. did not talk to her or seem to pay attention to her. She said it seemed he was just trying to get at her breasts and get her naked.

[29] H.R. thought that A.C. then rolled her over. He took off his shirt and was on top of and "towering over" her. She said that he started trying to undo her belt and seemed to be clawing at it in a frantic manner. She testified that it scared her to watch him. She described this "big guy [being] on top of her" and said she undid her belt for him because she was scared.

[30] A.C. took off her pants, "shoved his hand down her underwear", and roughly rubbed her clitoral area in a way she described as uncomfortable and awful.

[31] H.R. said that A.C. then laid on his back, took off his pants, and pulled down his underwear showing his erect penis. He asked her to rub his penis with her hand. She testified that they did not discuss whether she would. She said she did not want to and thought she shook her head no. He grabbed her hand and started rubbing it up and down his penis as if to show her how he wanted it done. She testified that it felt awful. She did not know what to say because she felt scared and frozen. She said she "didn't want to give him a hand job" but thought she could just get it over with and it would be done. He kept his hand on hers and continued to guide it. When he released the pressure on her hand, she tried to move it away, but he put his hand back on top of hers and kept doing it for about five to ten minutes. H.R. testified that A.C. did not ask her if she wanted to touch his penis.

[32] H.R. testified that A.C. then told her to "suck [his] dick". She testified that she did not want to and shook her head no. He repeated it in a more commanding tone, and she said no. She said that he put his hand against her back and pushed her down so her head was right over his penis so that she had to suck it. She described him pushing her head "up and down over and over" and not letting her come up for air. She said that, when she tried to come up for air, he pushed her head down harder. She was retching and gagging as his penis hit the back of her throat. She described it as disgusting and horrible. She said that the "blow job" lasted about ten minutes - "definitely longer than the hand job." H.R. said that A.C. never asked her if she wanted to perform oral sex on him, she did not want to do so, and she did not make any sounds or noises to indicate she was enjoying it.

[33] H.R. testified that when A.C. finally let her come up to breathe, she moved away from him and laid back down. He then tried to rub her clitoral area again. She could not recall whether her underwear was on or off, but she said it was very rough and she did not want him to do it.

[34] H.R. said that A.C. grabbed her underwear and pulled it down. Once it was off, he spread her legs and began trying to put his penis in her vagina. She asked him to put a condom on, and when he did not seem to hear her, she said "condom" at almost yelling volume. He put one on and tried to enter her again. H.R. said that she wanted to leave, but was naked on the bed. She felt stuck and wondered if he would try to hurt her or stop her if she tried to leave. She felt "frozen" and could not seem to move.

[35] H.R. said that the attempts at vaginal intercourse hurt her. She testified that she repeatedly told A.C. that it hurt. She described feeling as if she was "being torn open". He did not respond, but kept pushing harder and harder. She asked him if he had any "lube". He said he did not and continued to push and thrust. She said he did not seem to acknowledge what she was saying and the only thing he said to her was that she was "really tight".

[36] During the vaginal sex, H.R. said she was lying on her back and A.C. was on top of her. She repeated that it hurt. She described the pain as burning, raw, and unpleasant. It felt like he was "masturbating into her" instead of having sex with her.

[37] After H.R. refreshed her memory by reference to her police statement, she said that she told A.C. to stop at one point, not very loudly. He did not respond.

[38] At some point during the vaginal sex, H.R. said she gave up saying "Ow" and, because she had heard that pretending to enjoy sex could get it over more quickly, she began to make moaning noises so that it would appear that she was enjoying herself. H.R. testified that the vaginal sex went on for about 15 minutes.

[39] They did not discuss having vaginal sex, and H.R. testified that A.C. never checked to see whether she was enjoying herself.

[40] After the vaginal sex, H.R. testified that A.C. told her to get onto all fours. She did not respond. At one point in her evidence, H.R. said that A.C. then grabbed her and flipped her over onto all fours; at another, she said he grabbed, pulled, and pushed until she was on all fours. She began to feel pressure on her rectum, which scared her. She said it felt like he was attempting anal sex and it was incredibly painful. She felt a lot of pressure, and it did not feel like the vaginal sex that had preceded it. She repeatedly asked him to stop until she was doing so at yelling volume. She testified that it felt that he got at least the tip of his penis into her rectum. H.R. described the attempt at anal sex as "the most horrifying part of the whole thing". It disgusted her that someone would try to have anal sex on a first date without discussing it. Even thinking about it at trial made her want to vomit.

[41] H.R. said she remembered saying please stop and "no" several times. She could not move away because she had nowhere to go. H.R. estimated that the anal sex lasted two or three minutes. She said that they had not discussed having anal sex.

[42] H.R. testified that A.C. then flipped her back over, spread her legs again and reinserted his penis into her vagina and continued to thrust. H.R. said she felt defeated and pretended to make pleasurable noises to get it over with more quickly. She agreed that she faked having an orgasm. After five or ten minutes, A.C. moaned and ejaculated inside her.

[43] H.R. testified that A.C. got up, went to the bathroom, and disposed of the condom. He came back to bed, and she went to the bathroom. Her vagina hurt a lot - it was raw and burning. When she was squatting over the toilet, she felt like she was ripping open something that had been ripped open during the sex. Her legs felt shaky, and she felt exhausted and defeated. She noticed blood in the toilet and coming down her legs. She described the blood as more than her "typical amount of period blood". She cleaned herself up with toilet paper. The situation felt surreal, and she did not know what to do.

[44] H.R. returned to the bedroom area, found her underwear, and put it on. She testified that she hoped her underwear would stop the blood so it would not get on the bed. She got back into bed. She wanted to cry, but not in front of A.C. They briefly spoke about what time they each had to get up in the morning.

[45] H.R. said that she wanted to leave but did not want to explain why. She waited until A.C. fell asleep and texted a friend. She then texted two other friends, one of whom was T.W., and told them it was an emergency and she needed a ride home. She wanted them to rent a car instead of asking their male friend to drive.

[46] Once H.R. thought A.C. was asleep, she dressed, and left as quietly as possible. The door slammed on her way out and, because she did not want A.C. to follow her, she took the stairs. She sat in the stairwell for about 20 minutes, waiting for her ride.

[47] H.R. said that she cried as she walked to the car to meet her friends. Once in the car, she was rather quiet. She did not want to talk to them or explain what was going on. She just felt numb.

[48] When they arrived back at their residence, she went into her roommate's room, had tea, and they tried to find out what had happened. T.W. asked her a series of yes/no questions. She did not want to talk about it so showed them the text she had sent her friend, outlining what had happened. At that point, T.W. called campus security.

[49] H.R. acted on advice to get a forensic sexual assault examination. At first, she went to Burnaby General Hospital, where Dr. Chou examined her in emergency. She then went to Surrey Memorial Hospital where there was staff available to perform a sexual assault examination. She was examined by Nurse Chin. She described the examination as invasive and it meant having to relive her feelings of being genitally violated. Her vagina still felt raw and sore. She still felt like there was some pressure in her rectum, but it had gone down

significantly.

[50] Following the incident, H.R. described feeling awful and depressed. She decided that it was not fair that she had to go through this, so she reported the incident to the RCMP in February 2016.

A.C.'s Direct Evidence about the Sexual Activity

[51] A.C. agreed that he leaned in to kiss H.R. when they were sitting on his bed with their backs against the headboard. He said that she got on top of him, straddling him, and that they continued to kiss.

[52] A.C. said that while they were kissing, H.R. was making pleasurable moaning sounds for most of the time, indicating to him that she was enjoying herself.

[53] A.C. testified that while they continued to kiss, he began to remove her shirt, and that she allowed him to do so by raising her arms. He pulled her shirt up over her head.

[54] He testified that they continued to kiss as he removed her bra. He said that H.R. did not resist him removing either her shirt or her bra. He said, "she didn't give [him] any indication that she didn't want to have [her] bra taken off".

[55] A.C. said that after H.R.'s bra was off, he slid down his pants and guided her hand to his penis and that she "masturbate[d] [him] for a few minutes". He denied forcing her hand. A.C. said that H.R. did not verbally or physical indicate that she did not want that to occur. He described that he was laying on his back, sort of on his side, and she leaned over him as she rubbed his penis. He said that she was partially over top of him. He stated that he did not recall her making any sounds when she was masturbating him.

[56] A.C. testified that he made a request for oral sex. He agreed that he used the words "suck my dick", not in a commanding way, but as a request. He said that H.R. slid down the bed and performed oral sex on him for a few minutes. He disagreed that he forced her to do so or forced her head onto his penis. He denied hearing any retching or gagging sounds and said he did not recall any sounds while she was fellating him. He said that if there had been any indication that she did not want to engage in oral sex, or any other of the sexual activities, he would have stopped.

[57] Following oral sex, A.C. testified that they continued to kiss and that she assisted him in removing her pants by untying and taking off her belt. He agreed that he was having difficulty getting the belt off but denied tearing at her belt. He testified that H.R. assisted him in taking her pants off by leaning back so he could pull them off.

[58] A.C. said that he used his hand to stimulate her vagina underneath her underwear and that she made pleasurable moaning sounds as he did so. He said that H.R. was lying on her back and he was on his side. After a few minutes of stimulating her vagina, he said he removed his pants and underwear, and her underwear came off. He did not recall taking her underwear off, and he was not sure how that happened. He testified that they continued to kiss for a minute or two and then he got a condom from the night table.

[59] A.C. did not recall H.R. telling him to get a condom, but he agrees he did so. He put the condom on and, as she was lying on her back, he put his penis into her vagina. He said he was not forcing her in any way. He did not force her legs open or anything of that sort.

[60] A.C. testified that they had vaginal intercourse in a missionary position for a few minutes and that H.R. was moaning pleasurably, indicating that she was enjoying herself. He never heard her ask him to stop. She never gave him any physical indication that she did not want to engage in vaginal intercourse. A.C. stated that they continued to have sex in that position and that H.R. started to moan louder and had an orgasm.

[61] A.C. said that, after H.R.'s orgasm, they changed positions, and he used his hands to guide her hips as she rolled over onto her stomach with her "rear up". He did not agree with the suggestion that he "flipped" her over. He stated that she did not resist moving onto her stomach. He said that he started to enter her vagina from the rear, and she made a sound and moved her body in what he described as "an uncomfortable way", so he stopped what he was doing. He said that he did not hear H.R. say anything but heard her make a noise. When asked to clarify what he meant by moving in an uncomfortable way, A.C. said that H.R. moved suddenly, a little bit away from him. Because of her movement and the noise he heard her make, he stopped what he was doing.

[62] A.C. denied that he was attempting anal penetration but agreed that it was possible that his penis touched her anal area.

[63] A.C. said that H.R. rolled back over onto her back; he believed she did so by herself. He re-entered her vagina, and they continued to have sex in a missionary position. She moaned pleasurably, indicting to him that she was enjoying herself. At one point, she moaned louder, and A.C. believed that she was having another orgasm. He said that, at about that time, he ejaculated and went to the bathroom to remove the condom. H.R. remained in bed.

[64] A.C. testified that he returned to the bed and they discussed their plans for the morning, who had to get up first, and he fell asleep. He recalled seeing H.R. gathering her things and going to leave. He asked her if she was okay for a ride, and she did not say anything and left.

[65] A.C. testified about the circumstances of his statement to Constable Tsui. He said that he returned a call from Constable Tsui, but that he had no idea what it was about until he arrived at the RCMP station and realized he was being investigated for sexual assault. He said that he felt completely overwhelmed and in shock. He wracked his brain about what he could have done which could possibly have been misconstrued as a sexual assault.

[66] Initially, A.C. did not know who had made the complaint but, after Constable Tsui provided him with a few details, he recalled the unusual circumstances of the start of his evening with H.R., but not their sexual activity.

[67] After reading through some of the Crown disclosure, A.C. testified that he was able to "gain a more clear picture of the events of the evening".

H.R.'s Evidence on Cross-Examination

[68] During his cross-examination of H.R., A.C.'s counsel sought to bring out inconsistencies in her direct evidence and to demonstrate that she had consented to the sexual activity or that, because of her actions and physical communications, A.C. honestly but mistakenly believed she was consenting.

[69] With respect to H.R.'s expectations for the date with A.C., she said that it was first date and it was likely an opportunity to meet a person. She agreed that she wanted to kiss and cuddle A.C. She acknowledged that she had not ruled out the possibility of sexual activity when she went back to A.C.'s residence. She never conveyed her expectations to A.C. and did not define the parameters of the date.

[70] With respect to A.C. putting his arm around her, she agreed she was comfortable with that occurring. She also agreed that she found the kissing, which he initiated, pleasant and that she kissed him back. She straddled him to make the kissing easier.

[71] H.R. denied that she assisted A.C. in taking her shirt off, but agreed that she allowed him to do so. She said that she loosened or relaxed so that her shirt would not be torn.

[72] H.R. could not recall how her bra came off. She did not recall A.C. tearing at it. She agreed that, at some point, she moved her arms from the front of her chest to allow her bra to come off. She agreed that while her shirt and bra were coming off, she was still straddling him, and that she did not say or do anything to indicate that she was uncomfortable with him taking her clothes off, or that she did not want their sexual activity to proceed.

[73] Although later in her evidence, she said she was afraid when her shirt and bra came off, she did not say she was struck with fear at that point. She also said that she did not leave because she thought perhaps "it could stop there and after doing so and that maybe it was - but because I wasn't sure about this whole thing and so I still wasn't sure if I should get up or not".

[74] H.R. acknowledged that after her bra was off, she and A.C. kissed but said that she was not "kissing back". She described "kissing back" as when you actively move to continue kissing and said she was not moving her head. Her breasts were exposed, and she said that she was nervous to speak up. She agreed that she was not petrified with fear. When asked how A.C. would know that she was not enjoying this activity, she said, "I think he should know based on my physical communication". When it was put to her that part of her physical communication was allowing him to remove her shirt and bra, she agreed that she "allowed

him to remove both, yes".

[75] With respect to whether H.R. was kissing A.C. back when her shirt was off, she was taken to her evidence at the preliminary inquiry in which she said that she continued to kiss A.C. after her shirt was off. In cross-examination, she said that she must have misunderstood the question because "there was kissing, not who was doing the kissing."

[76] With respect to whether they continued to make out after her bra came off, H.R. agreed that when two people are described as "making out", it meant two people engaged in some sort of sexual interaction. At the preliminary inquiry, H.R. testified that after she let go of her bra, she and A.C. continued to make out. When asked whether her answers at the preliminary inquiry were true, she responded, "yes, to my understanding at that time". She was then asked:

Q. Well, you understood what making out was then, right?

A. I don't believe I made a distinction at that time.

Q. Well, you didn't feel the need to make a distinction because you understood what making out was and you agreed that continued; isn't that right?

A. Yes, I agreed in the preliminary trial.

Q. Well, is that an untrue answer, were you not telling the truth then?

A. I tell the truth to the best of my memory every time I'm put on the stand.

Q. Right. Did your memory get better since the preliminary inquiry?

A. Memories change over time, what we remember can change from time to time.

Q. Right, so that we -- after a while we just don't -- don't recall what we're remembering anymore?

A. Pardon?

Q. So does that mean after a period of time we just simply may or may not have an accurate memory; is that what you're saying?

A. I'm saying that I don't really have a full understanding of how memory works, but that different things we can recall at different times.

Q. Will you agree with me that your memory has changed from the preliminary inquiry to now, do you agree?

A. I think I recall different things at different times. Why is that so hard to understand?

[77] H.R. was then directed to the statement she had given to Constable Tsui:

Q. And if I could take you to P. 32 and line 17 Constable Tsui says, "No, okay, um, after he removed your shirt did you guys continue making out?" And it says HR, which I presume to be you and your answer there is, "Yes." Is that answer true?

A. Yes.

Q. But today you say you weren't making out?

A. I think -- I may have misremembered at some point.

MR. KLEIN:

Q. At which point?

A. I'm not sure.

Q. So you may have misremembered back then and you may be misremembering now?

A Yes. Yes.

Q Which answer should we rely upon?

A. I think it's fair to say that the kissing continued but whether it was making out or not is uncertain.

Q. So you prefer today's answer as opposed to the answer you gave to the police closer to these events?

A. Yes.

[78] When asked about A.C. removing her belt, H.R. agreed that she said he was frantic and frustrated because he could not get the belt undone and, because it was taking a long time, she undid the belt for him.

[79] H.R. could not remember whether she was wearing tight jeans. All she could recall about A.C. taking her jeans off was that he was over top of her and grabbed the waist and pulled them down. She agreed that, in order to do so, A.C. moved backwards. She could not recall where her hands were at the time. She agreed that she did not say anything.

[80] H.R. could not remember A.C.'s position when he was rubbing her clitoral area. She described him as still being over top of her but could not remember how. While she did not remember his position, she was certain that he could not have been beside her. She agreed that she did not say anything to express that she was uncomfortable with him touching her vaginal area and that she did not physically move away from him.

[81] With respect to A.C. grabbing her hand and having her grab his penis to rub it, she said that she was lying down. When he took his hand away, she said that she stopped stroking his penis. She could not recall whether she slowly stopped, or tapered off. By contrast, in her evidence at the preliminary inquiry, H.R. said:

Q. What happened next?

A. He laid down beside me and removed his pants and pulled down his underwear but didn't remove them and revealed his erect penis. He told me to rub his penis. I shook my head and he grabbed my hand and guided it to his penis and started moving it up and down as if to show me how to do it.

This continued for a little while and he let go and I kind of slowed to a stop, to which he put his hand back over mine and repeated moving it up and down to show me how he wanted it done.

[82] When pressed, H.R. said that she did not "quite remember at this moment the slowing down part" but remembered stopping. She acknowledged that she could not disagree that she had slowed down when A.C. removed his hand from hers.

[83] With respect to the "blow job" as H.R. described it during her evidence, H.R. said that A.C., who was lying on his back, to her left, pushed her on her back and pushed her head down. When pressed in cross-examination, she reluctantly agreed that, at some point, she opened her mouth and put it around his penis. She remained certain that she was making retching and gagging noises.

[84] When asked about the sexual activity after A.C. said "suck my dick", H.R. agreed that she was sitting up a little bit on his right and the lights were dim. She agreed that she did not say no at first, but shook her head. She said that she said no "after he commanded it". H.R. was asked about the tone of her voice at the time she said "no" after hearing what she said was A.C.'s command to "suck my dick". She said it was not in a soft voice. She was referred to her preliminary inquiry evidence where she said she did so in a soft voice. When asked if that answer was true, she said:

A. I may have misremembered.

Q. Today or back then?

A. Back then.

Q. Back then?

A. Yeah.

Q. So your memory has improved with the passage of time?

A. I think my memory has been refreshed as to different parts sometimes.

Q. And how so?

A. I don't understand.

Q. Well, how is your --

MR. KLEIN:

Q. So how is your memory refreshed?

A. I have worked with Ms. Campbell several times going over answers and we've worked on looking at all the statements and it's helped to refresh my memory to a lot of things.

Q. Did you not do that for the preliminary inquiry?

A. There wasn't as much prep in the time between the prep and the preliminary trial was about a month's time.

Q. So in that answer were you lying at the preliminary inquiry?

A. No.

[85] H.R. agreed that it was more likely that, if she used a soft voice, A.C. would not have heard her say "no" to oral sex. She agreed, "[A]t that moment he didn't, he could have not heard me". It was then suggested to her that the reason she was changing her evidence from what she gave at the preliminary inquiry was that she wanted to give the impression that A.C. must have heard her when she said no to oral sex. She said that her preliminary inquiry evidence was not accurate and when asked "and you say today's evidence is more accurate because of the meetings you've had with crown counsel", she answered "yes".

[86] H.R. was cross-examined about whether, during the oral sex, she thought to herself that if she could make A.C. ejaculate, it might be the end of the evening and she would not have to have intercourse with him. She has agreed with that suggestion when it was put to her at the preliminary inquiry, but could not recall having that thought during her trial evidence. She agreed that there were some things that she could recall better at trial than she could on previous occasions, and some things that she could not.

[87] H.R. was cross-examined about when, during the evening, she became frozen in fear as she described in her direct evidence. She confirmed that she was not frozen in fear when her shirt came off. She did not get up and walk away although there was nothing physically stopping her from leaving. H.R. was asked if there was anything psychologically stopping her from leaving, she responded, "I think it's fair to say I was a little scared" but agreed that there was nothing that A.C. had done at that point that made her scared. She was asked whether there was anything preventing her from leaving when she allowed A.C. to take off her shirt. She responded, "the idea that if I tried to leave he could very well hurt me at any point or stop me at any point.

[88] What followed was an exchange between H.R. and A.C.'s counsel about whether she was fearful:

Q. So at that point in time you are fearful of this man and thought you couldn't leave; is that what you're telling us?

A. Yes.

Q. Okay. I thought you told us at that point you weren't fearful. That's changing now?

A. I think men in general, especially ones that are significantly larger than me, are scary to begin with.

Q. So just as a general proposition men that are larger than you are -- invoke fear in you; is that right?

A. Yes.

Q. Why did you get into the car with him?

A. Because he seemed nice at the time.

Q. But you just told us as a general proposition these large men are imposing and --

A. It's not --

Q. -- create fear in you. I'm not sure how - how those two things coincide.

A. I think that's just the general state of being a woman.

Q. Well, let's not talk about generally about women. What about you?

A. What about me?

Q. Yes. Is that how you feel about it?

A. What are you specifically referring to?

Q. What we're just been talking about.

A. Yes, can you rephrase the question?

Q. Well, you've just told us that you -- any man that's larger than a woman will create fear in you, as I understand it. Is that right?

A. Yes.

Q And but you got into this car with this larger man, you weren't scared to do that, right?

A Right.

Q. And you said because he was nice.

A. Yeah.

Q. So it can't be all men that are larger, just some men, is that fair?

A. That's fair.

Q Why did you tell us it was all men then?

A. I don't know how to answer the question.

A. I don't know how to answer this question.

Q. What do you mean, you don't know how to answer?

A. I mean that a lot of the explanation comes from things that would take a long time, and a very complex time, and are complex to explain.

Q. So you're not going to be able to provide us with an explanation; is that what you're telling us?

A. I mean that it's hard to explain how it feels to be a woman in a society of men.

Q. Well, let's not talk about women in general, let's just talk about you. You've told us as a general proposition that all men that are larger strike fear in you; do I have that correct, larger than you?

A. I believe I said earlier that men in general that are larger.

Q. Men in general that are larger?

A. Strike fear in me.

[89] However, in an apparent contradiction, H.R. said that it was only sometimes that she had a fear of men in private places. She agreed that she could have said no to going into A.C.'s apartment and agreed she was not petrified with fear from "this imposing man".

[90] When asked whether, when she allowed A.C. to take her shirt off, she could have left, she said she could not. She then said that she thought it would be "hard to leave given that he's trying to get me naked not so gently". She agreed that she did not say she did not want to participate. She said that she was scared at that point. She disagreed that continuing to make out was inconsistent with being scared. H.R. agreed that she testified at the preliminary inquiry and told Constable Tsui that she continued to "make out" after her shirt came off but repeated that she may have "misremembered at some point". The following exchange then occurred:

Q. And at some point in the preliminary inquiry you said we continued to make out.

A. Yes.

Q. And you told that to a police officer as well.

A. Yes.

Q. But now you're saying no?

A. No to which part?

Q. The making out.

A. I think I said earlier that I may have misremembered at some point.

Q. Right. On two earlier occasions potentially, right?

A. Yes.

Q. And is the reason you're saying that is because you want to leave this court with the impression that at that point when your shirt comes off that you are frozen in fear, intimidated by this person and cannot leave; that's the impression you want to leave with the court, isn't it?

A. I want to leave the impression that I found him intimidating.

Q. At that point?

A. Why it doesn't matter which point.

Q. I'm talking about this point now.

A. Okay, sorry. Yes.

Q. And you agree if you concede that you were making out in a consensual fashion that that's inconsistent with that impression, isn't it?

A. Sure.

[91] Later in the cross-examination, counsel for A.C. took H.R. to the statement she gave to Constable Tsui on February 2, 2016, in which she indicated that she allowed her shirt to be taken off because she "thought maybe [she] could stop at any time if [she] wanted to". When asked to agree that her answer did not suggest that she was frozen in fear, she said that she did not know. She then said that she could not remember thinking that, but agreed that it must have been what she thought when she spoke to Constable Tsui.

[92] H.R. was then taken to the following content of her statement to Constable Tsui (as read in):

Q. Yeah, like what was your thoughts? I mean you obviously - you told me that you were uncomfortable with him taking your shirt off, and, you know, and it keeps progressing, right?

A. Yeah, um

Q. And then what did you think was going to happen?

A. I don't know, um, I thought I was just being, um, a bit I know like I -I didn't know whether I should resist or not and I was scared to resist, I thought maybe I could just get it over with and I don't have to see him again. Um, maybe I was just being a bit of a prude or something like that, um.

[93] H.R. was asked what she meant about being a "bit of a prude" and said that "in previous experiences where I can refuse sex, I was called a prude for doing so".

[94] H.R. agreed that she told Constable Tsui that she believed that A.C. may have thought she was consenting to the sexual activity because "if he thought otherwise he would have stopped".

[95] H.R. agreed that she did not say anything to A.C. when he took her underwear off. She testified that, when he first tried to enter her vagina, she said no but then had to raise her voice about him using a condom. She agreed that, after she raised her voice, A.C. complied with her request. She agreed that raising her voice to tell him to use a condom was an exception to her being "frozen" (in fear).

[96] H.R. agreed that she used her normal tone of voice when she told A.C. that the vaginal intercourse hurt. She also said that she did not recall her tone of voice on that occasion. H.R. said that, when she asked A.C. to stop the intercourse, she only said it once, not very loudly, and he did not respond. She also agreed that, during the intercourse, she pretended to enjoy it by conveying pleasurable moaning sounds.

[97] With respect to H.R.'s evidence about being grabbed and flipped over, prior to what she believed was an attempt at anal sex, in cross-examination she could not recall where A.C. grabbed her or how she ended up on all fours. She denied that she put herself on all fours and said that he must have moved her in some way, but had no recollection of that occurring. She did not recall being anally penetrated. She said that his penis touched her anal area but could not say whether it was penetrated. She could not recall how she was flipped back over onto her back but agreed that once the vaginal sex continued, she moaned in what she believed was a pleasurable way.

[98] H.R. agreed that, after the sexual activity, she contemplated staying with A.C. overnight.

A.C.'s Evidence on Cross-Examination

[99] In cross-examination, the Crown sought to highlight the implausibility of A.C.'s version of events and contrast his selective and limited memory of the sexual activity during his statement to Constable Tsui with the detail with which he recalled the sexual activity at trial.

[100] Initially, in his March 17, 2016 statement to Constable Tsui, A.C. did not specifically recall his date with H.R. He had been on a number of Tinder dates, and he said he was unable to remember this one. However, as Constable Tsui provided further information, he remembered personal details about H.R.'s appearance. He described her as tall, with reddish-brown hair, and of medium build, or slightly heavier. He recalled that she was a university student, which school she attended, and her area of study. He recalled where they agreed to meet for dinner, that he was coaching hockey and was late, and that she had left by the time he arrived. He recalled renting an EVO, picking her up at Oakridge Mall, driving back to the UBC campus, getting a pizza, and going to his place to eat it.

[101] He then told Constable Tsui that they had sex and H.R. left. When he was asked about how the date progressed from pizza to sex, A.C. could not recall any specific details:

BT: OK. Um, can you tell me a little bit more how it went from pizza to sex?

AC: Um, we were just watching a movie probably. Um, and then I kissed her probably and then I don't, this is from December, I don't remember exactly what happened. Um, I don't like, she doesn't like, I don't remember anything bad happening or anything.

[102] When Constable Tsui again asked A.C. to tell him in detail how the sex happened, he said, "I honestly don't remember that far back. I don't know exactly um, I don't know. I, I mean I'm, I would never, I would never you know like, do that to someone." Later he said, "we grabbed pizza because it was convenient. It's, I mean I don't, I don't remember that much after." Toward the end of the statement, when asked by Constable Tsui if there is anything in particular he remembered or wanted him to know, he said, "I mean I don't remember a lot about what happened. It was quite a while ago."

[103] When the Crown suggested to A.C. that he actually recalled the details of his sexual activity with H.R. but did not want to admit them to Constable Tsui, A.C. did not agree. He testified that he recalled the beginning of the date because it was unusual, but, otherwise, there did not seem like there was anything "different than a normal sexual encounter would be". He did not recall anything "bad" happening and said that, as far as he could recall, H.R. was not upset when she left.

[104] When Constable Tsui asked A.C. whether he remembered anything that H.R. might have said during their sexual activity, A.C. could not recall anything that was said. Constable Tsui then asked:

BT: Why do you think it was consensual?

AC: Well, she never said, 'I don't' - I mean, it was a long time ago but if someone says no, then I just wouldn't; I would stop. I'm not going to do anything they don't want to do.

BT: But as she said, she did say no when you asked her to perform oral sex

AC: Okay. Then we probably - I'm sure we didn't do it, then.

[105] The Crown asked A.C. about his recollection of the second part of the date:

Q. And what about the second part. Was that just usual for you?

A. It didn't seem like anything was different than a normal sexual encounter would be.

Q. Well, let's talk about that a little bit. You've given evidence about using Tinder as a casual dating service where you would typically see your date one or twice. Is that correct?

A. Yes.

[106] The Crown then referred to the part of A.C.'s statement regarding his use of Tinder, and A.C. explained that he would usually only see the people he met through the site once. A.C. said that "it's consensual". The Crown then asked:

Q. So what do you mean when you say that it's consensual?

A. I mean both parties agree to have sex.

Q. Is that your understanding of Tinder?

A. I wouldn't say that's my understanding of Tinder overall.

Q. Is that how you used it, though?

A. Sometimes.

[107] A.C. agreed that the description of Tinder that he gave to Constable Tsui was accurate. It was a place to meet people, to "hook up, you know, kind of casual dating consent kind of things". He said it was primarily used by "people that don't want long-term relationships, stuff like that". He was then asked on cross-examination:

Q. Can you explain exactly what did you mean in that context there?

A. About my understanding of Tinder?

Q. Yes.

A. I think that's quite accurate. I do think it's mostly for casual dating.

Q. And when you say "dating" do you mean sex?

A. It can be for sex.

Q. And you've said that's sometimes how you used it. Is that correct?

A. For casual dating.

Q. Casual sex?

A. Yes.

[108] A.C. agreed that he thought it was possible that H.R. would come back to his residence because it was a Tinder date, H.R. had come a long distance to meet him, left feeling stood up, and then changed her mind and agreed to come back to campus with him. He agreed that he thought there was a possibility of him having sex with H.R. He also agreed that his date with H.R. was likely to be a one-time date.

[109] A.C. agreed that he and H.R. had not discussed anything sexual in their communications prior to their date, or on the evening of December 8, 2015.

T.W.'s Evidence

[110] T.W. testified that she met H.R. in their first year at university. On December 8, 2015, they were roommates living in a townhouse on campus. She knew H.R. was going on a date with someone from UBC. They took the bus together part of the way. T.W. was back at home when she got a text message from H.R., asking her and their other roommate to pick her up. H.R. said it was an emergency. T.W. asked if they could get a male friend, who had a car,

to drive them. H.R. just wanted the girls to come, so they rented a Zipcar, and drove to UBC to pick her up.

[111] T.W. testified that, as H.R. walked to meet them, she had her hood up and her headphones in. She had obviously been crying because her eyes were swollen and red. She was shaky, sniffling, and had tears on her face. She got into the car and lay on the backseat in a sort of fetal position. She was very quiet but would occasionally mention something about directions as they drove home.

[112] Once home, the three of them sat on the bed in T.W.'s room. Initially, they spoke about benign things, but then they started talking about what had happened. H.R started to sob. T.W. began asking her yes/no questions to find out what had happened. H.R. was crying so hard, she could not talk. Ultimately, H.R. showed them a text message she had sent to another friend about the date. T.W. said that she and H.R.'s other roommate called campus security. H.R. was on the bed in a fetal position.

[113] About ten minutes later, two campus security officers arrived and questioned them about what had happened. It was suggested that H.R. go to the hospital. T.W. told her it would be a good idea to preserve as much evidence as possible. Initially, H.R. was reluctant, but she eventually agreed, and their male friend drove them. On the way there, H.R. was quiet again, but she cried periodically. At the hospital, she was still crying, but began making a few jokes. T.W. said that H.R. was much quieter than usual, was obviously uncomfortable, and was shaking a bit.

[114] T.W. was not able to remember if they had been to one hospital or two.

Constable Benson Tsui's Evidence

[115] On December 8, 2015, Constable Tsui was an RCMP officer at the UBC detachment. He was the lead investigator into H.R.'s sexual assault allegation.

[116] After taking H.R.'s statement on February 23, 2016, Constable Tsui testified that he attempted to contact A.C. by telephone. He spoke to A.C. by phone on March 17, 2016, and advised him that he was a suspect in an alleged sex assault and asked him to come to the UBC detachment to give a statement. A.C. agreed to meet Constable Tsui that afternoon. A.C. was not told the date of the alleged sexual assault.

[117] A.C. gave a voluntary audio and video-recorded statement. It was entered as an exhibit during Constable Tsui's evidence as part of the Crown's case.

Rosalyn Chin's Evidence

[118] Rosalyn Chin is a forensic sexual assault nurse examiner who was qualified to give expert evidence in the area of the assessment of injuries, mechanism of injury, and collection and preservation of evidence. She explained that, during an assessment, her role is not to look for injury, but to document the injuries that she sees.

[119] Nurse Chin examined H.R. starting at 5:40 a.m. on December 9, 2015, in the forensic suite at Surrey Memorial Hospital. While H.R. was in a gynecological bed with her feet in stirrups, Nurse Chin examined her genitalia externally and internally. She took swabs of her genitalia, including the anus and perineum. In addition, Nurse Chin performed a physical exam during which she held H.R.'s labia and moved it forward and downward to see genital regions that could not be seen without touching.

[120] Nurse Chin made the following observations:

(a) circumferential redness of the labia minora, which she said could be caused by blunt force trauma or a medical condition;

(b) petechiae at 7:00 o'clock on the hymen, which is a red dot that is caused by blunt force trauma by pressure or suction;

(c) discharge from the vaginal orifice, which was dried blood which could have been mixed with vaginal fluid;

(d) a 1 cm x 0.5 cm laceration, with active bleeding, on the posterior fourchette/fossa navicularis, which was caused by blunt force trauma. She said it could be caused by a sliding and friction force, which is non-penetrating. With respect to the sliding force, Nurse Chin said it could be a penis, an object, or something that just slides that can cause the friction, and which causes an opening to the top layer of the skin.

[121] On cross-examination, Nurse Chin said that it is uncommon to see any injuries in consensual or non-consensual sex, but, if there is an injury, this is the most likely one.

[122] Nurse Chin said she saw brown discharge in the vagina that could have been caused by blunt force trauma, a medical condition, or a menstrual period.

Dr. Chou's Evidence

[123] Dr. Chou testified as the emergency room doctor who examined H.R. at Burnaby General Hospital on December 9, 2015. He examined her to make sure that she was medically stable to be transferred to Surrey Memorial for a forensic examination. He made notes of his examination in case he was required to testify.

[124] In examining H.R.'s external genitalia, Dr. Chou observed light bleeding from around her perineum - the opening to her vagina. He described it as similar to a light menstrual period in quantity. Dr. Chou examined H.R.'s external genitalia. He did not use a speculum. He

observed a small laceration to her introitus, which he had not measured but estimated to be 3 mm in length. He clarified that this area encompasses the fossa navicularis and posterior fourchette. He agreed that it was possible that the laceration went inward toward the vaginal opening.

[125] Dr. Chou testified that it is uncommon to see injuries such as this tearing and agreed that this kind of injury can be consistent with a report of sexual assault.

The Applicable Legal Framework

[126] To convict A.C. of the offence of sexual assault, I must be satisfied that the Crown has proven, beyond a reasonable doubt, that he intentionally applied force to H.R., without her consent, in circumstances of a sexual nature.

[127] H.R.'s lack of consent is part of the actus reus, or guilty act, of the offence. A.C.'s awareness of that lack of consent is part of the mens rea, or guilty intent, of the offence. The mens rea of sexual assault involves an intention to touch and actual knowledge, recklessness, or wilful blindness as to lack of consent, either by words or actions, from the person being touched.

[128] In the leading case of R. v. Ewanchuk, [1999] 1 S.C.R. 330, the Court sets out the approach to determining whether a complainant's lack of consent to sexual activity has been proven:

[26] The absence of consent is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: [citations omitted].

[29] While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

[30] The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the mens rea stage of the inquiry.

[129] Thus, it is open to A.C. to assert that H.R.'s words and actions, before and during the sexual activity, raise a reasonable doubt about her assertion that she, in her mind, did not want the sexual touching to take place.

[130] The question at this stage is purely one of credibility and whether H.R.'s conduct is consistent with a claim of non-consent. Other matters, such as the consistency of H.R.'s previous statements, which bear on the issue of her subjective state of mind, are also considered. A.C.'s perception of her conduct is irrelevant at this stage. It only arises at the mens rea stage of the analysis.

[131] In R. v. J.A., 2011 SCC 28 at para. 34, the Court confirmed that consent to sexual activity is an ongoing process that must be specifically directed to each and every sexual act rather that a gate that, once opened, authorizes unlimited sexual contact and activity.

[132] Consent is not consent for the purposes of the actus reus of sexual assault if it was given under fear, fraud, or duress. In those circumstances, the law is concerned with determining the complainant's reasons for choosing to participate in, or ostensibly consent to, the touching in question. As set out at para. 39 of Ewanchuk, "the question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated."

[133] If a trier of fact finds that a complainant consented to the sexual activity, or has a reasonable doubt with respect to that issue, the trier of fact must go on to consider the Criminal Code provisions which vitiate a complainant's consent. As applicable to this case, the following parts of s. 265(3) and s. 273.1 are relevant:

s. 265(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant ;

(b) threats or fear of the application of force to the complainant or

s. 273.1 (1) Subject to subsection (2) and subsections 265(3), "consent means, for the purposes of sections 271 the voluntary agreement of the complainant to engage in the sexual activity in question.

Where no consent obtained

(2) No consent is obtained, for the purposes of section 271 where

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses by words or conduct, a lack of agreement to continue to engage in the activity.

[134] As with the actus reas of the offence, consent is an integral component of the mens rea. At this stage, consent is considered from the perspective of the accused: Ewanchuk at para. 45. The mens rea of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no" but also when it is shown that the accused knew that the complainant was essentially not saying "yes": R. v. Park, [1995] 2 S.C.R. 836 at para. 39.

[135] For purposes of the mens rea analysis, the question is whether the accused believed that he had obtained consent: A belief by the accused that the complainant, in her own mind, wanted the accused to touch her but did not express that desire, is not a defence. Likewise, the accused's speculation as to what was going on in the complainant's mind is not a defence. A belief on the part of the accused that the complainant's silence, passivity or ambiguous conduct constitutes consent is a mistake of law and provides no defence: Ewanchuk at paras. 46-47, 51.

Honest but Mistaken Belief in Consent

[136] Provided there is an "air of reality" to the defence, the accused may raise the defence of honest but mistaken belief in consent. The defence is, in effect, to negate the mens rea of the offence on the basis that the accused did not know that the complainant was not consenting: Ewanchuk at para. 44. The defence arises only after the actus reus of non-consent has been established.

[137] Section 273.2 of the Criminal Code places limits on the defence of honest but mistaken belief. In relevant part, it provides:

273.2 It is not a defence to a charge under s. 271 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 the accused's

(ii) 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.

Application of the Legal Framework to the Evidence in This Case

[138] As set out above, there is no disagreement that sexual activity took place in this case. A.C. agreed that he engaged in each sexual act H.R. described although he disagreed that he ever attempted anal intercourse. Rather, he said that he was attempting vaginal intercourse from the rear.

[139] As a result, A.C. has conceded two of the essential elements of the offence of sexual assault: that he intended to and did touch H.R. and the sexual nature of that touching.

[140] What is in issue is H.R.'s evidence that she did not consent to the sexual activity and A.C.'s knowledge of that lack of consent. Given the evidence at trial, these issues are inextricably linked to the credibility and/or reliability of the witnesses.

[141] In this case, A.C. gave evidence that is potentially capable of demonstrating or raising a doubt that H.R. consented to the sexual activities. As a result, I must apply the analytical framework set out in R. v. W(D), [1991] 1 S.C.R. 742.

[142] If I believe A.C.'s evidence, or have a reasonable doubt based on his evidence, I must find him not guilty. If I do not believe A.C.'s evidence, and I am not left in a state of reasonable doubt by it, I must then go on to consider whether, on all of the evidence, I am satisfied beyond a reasonable doubt that H.R. did not consent and that A.C. was aware of her lack of consent.

[143] Finally, if after a careful consideration of all the evidence, I am unable to decide whom to believe, I must find A.C. not guilty: R. v. C.W.H. (1991), 68 C.C.C. (3d) 146 (B.C.C.A.) at para. 24.

[144] As Justice Charron wrote for the majority in R. v. Dinardo, 2008 SCC 24, at para. 24, the assessment of credibility will not always lend itself to adopting the three distinct analytical steps in W.(D.) but will depend on the context. In a case such as this, which turns on credibility, I must direct my mind to the decisive question of whether A.C.'s evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt.

[145] In Bradshaw v. Stenner, 2010 BCSC 1398, Justice Dillon set out a helpful framework for assessing the credibility of a witness' evidence:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a

reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". I have found this approach useful.

[Citations omitted.]

I have applied that framework to the assessment of credibility in this case.

The Credibility of H.R.'s Evidence

[146] As I have said, I must consider whether H.R. subjectively, in her own mind, consented to each of the sexual acts that occurred on December 8, 2015. I must consider and weigh H.R.'s evidence about her state of mind in light of all the evidence. Her evidence that she did not consent requires an assessment of whether the totality of her conduct is consistent with her claim of non-consent. The burden remains on the Crown to prove H.R.'s lack of consent beyond a reasonable doubt.

[147] With respect to some of the sexual activity H.R.'s memory about her subjective consent differed at trial from what she said to the RCMP, and her evidence at the preliminary inquiry. Considering her evidence overall, I find that this compromised the credibility of her evidence regarding her subjective state of mind with respect to consent to the individual acts. Her evidence about: "being unsure about the whole thing"; thinking that things were moving too quickly; being concerned that A.C. was not talking to her, not paying attention to her, not checking in to see if she was enjoying herself, or masturbating into her as opposed to having sex, is not supportive of subjective non-consent.

[148] I am concerned that, as a result of the inconsistencies which I have outlined in her evidence, she may have substituted her retrospective assessment of A.C.'s conduct for her actual state of mind at the time of their sexual activity. While some victims of trauma may experience memory problems, I am not willing to draw any inferences in this regard in the absence of expert evidence.

[149] Each time H.R.'s memory changed, she stepped back from her earlier statement or evidence that suggested her more active and willing involvement in the sexual activity. During her trial evidence, H.R. painted a picture of herself as a passive unwilling participant in most of the sexual activity.

[150] H.R.'s evidence that she was, at times, fearful of A.C. was internally inconsistent and inconsistent with her actions that night. At trial, she said that she, and all women, are fearful of men who are larger than they are. If I accept her evidence that she had a general fear of larger men, she would have felt fear from her first meeting with A.C., as he is a large man and larger than she was. However, that stated fear was inconsistent with the fact that, after A.C. was late for their date and she changed her mind about going home, she willingly got into A.C.'s car, was comfortable going back to his residence, wanted to kiss and cuddle

with him, and had not ruled out the possibility of engaging in sexual activity. None of that evidence was consistent with an overall fear of men who were larger than her.

[151] Further, although she testified at trial that she did not consent to A.C. removing her shirt and bra, I did not find her evidence in that regard credible. It differed from her statement to Constable Tsui and her evidence at the preliminary inquiry. I accept that she consented to continuing with their sexual activity after her clothes were removed.

[152] Similarly, H.R.'s evidence was inconsistent about when, during the sexual activity, she became frozen in fear. I accept that H.R.'s state of fear could change over the course of an evening but, in this case, the inconsistencies are concerning. For example, H.R.'s answers at trial about her state of fear when A.C. removed her shirt and bra differed from her statement to the RCMP and her evidence at the preliminary inquiry. She told the RCMP that, when A.C. was removing her shirt, she "thought maybe I could stop at any time if I wanted to". That answer was not consistent with her stated fear of A.C., and was fundamentally different from the tenor of her evidence at trial.

[153] H.R. was not frozen in fear when, on her evidence, she told A.C. to put on a condom during the vaginal intercourse, when she asked whether he had any lube, and when, on her evidence, she told him that she did not want to engage in anal intercourse. On her evidence, A.C. put on a condom when she asked him to during the vaginal sex. A.C. also stopped what she believed was an attempt at anal intercourse after she told him to.

[154] H.R. was reluctant to agree that she participated in, or assisted A.C. in removing her clothes. At trial, she testified that the reason she allowed him to take her shirt off was to prevent it being torn. In her statement to the police, she said she thought she could stop at any time. She could not recall how her bra came off. She testified that she took her belt off because A.C. was tearing at it and appeared frustrated. Her reluctance to agree that she was actively participating in these activities also extended to whether she and A.C. continued to kiss and make out after her shirt and bra were taken off. Her evidence that things were moving too quickly is not evidence of her subjective non-consent.

[155] During her trial evidence, H.R. clearly understood what "kissing back" and "making out" meant but said that her evidence at the preliminary inquiry, and her statement to the police, reflected her memory at the time and that she had misremembered. In cross-examination, she tried to explain why her evidence with respect to kissing and making out with A.C. changed. Her explanation was not credible. Her memory changed with time. It did not improve.

[156] During cross-examination, H.R. tried to distance herself from any suggestion that she had a soft voice. She acknowledged in cross-examination that admitting that she spoke softly made it less likely that A.C. would have heard her protestations to sexual activity. For example, at trial she said that she said no to oral sex. However, when she was taken to the transcript of her preliminary inquiry evidence, in which she agreed that when she said "no", it was in a soft voice, she changed her evidence. She explained that the change was because

she reviewed her evidence with Crown counsel in preparation for trial. She acknowledged that she had also prepared with Crown counsel in advance of the preliminary inquiry but said there was less time. She then gave the evidence I set out above about how her memory became clearer after the preliminary inquiry.

[157] When she testified that she told A.C. that the vaginal sex hurt, she also tried to distance herself from any suggestion that she said those words in a low voice. Her evidence in this regard was concerning, and I conclude that she was trying to adjust or shade her evidence to advance a position that she expressed her lack of consent to the various sexual acts loudly.

[158] H.R. was soft-spoken when she testified at trial and had to be repeatedly reminded to keep her voice up. Even allowing for the courtroom environment, I accept that she is a soft-spoken person. However, on her evidence, when she wanted to, H.R. was able to make A.C. understand her.

[159] While the evidence about the softness of H.R.'s voice is more directly relevant to A.C.'s alternative argument that he honestly but mistakenly believed that H.R. was consenting, the changes to her evidence in that regard are also relevant to the assessment of her credibility as to her subjective state of mind on the issue of consent.

[160] During cross-examination, when pressed on points of inconsistency, H.R. tended to misunderstand a question, or answer a question with a question. She did so with respect to her evidence about her general fear of men and when she was asked about continuing to make out with A.C. after her shirt and bra were off.

[161] H.R.'s trial evidence also changed from her evidence at the preliminary inquiry about slowing to stop after A.C. removed his hand during the "hand job". While this was a minor inconsistency, it followed her pattern of distancing herself from active involvement in the sexual activity.

[162] H.R. was not specific about how A.C. forced her to perform the oral sex which followed. She testified that he pushed on her back, to force her head down, and then forced her head up and down while he was lying down. It is difficult to picture how this could have physically happened as she described.

[163] I had a similar concern about H.R.'s evidence about the anal sex. H.R.'s evidence was that A.C. flipped her over onto all fours, so that he could anally penetrate her. At one point in her evidence, she testified that he pushed and pulled her until she was on all fours, at another she could not recall how she ended up on all fours. According to her evidence, immediately prior to being flipped over, H.R. and A.C. were engaging in vaginal sex in the missionary positon. If A.C. flipped her over, she would have been on her stomach. Some further action would be required to have H.R. up on all fours.

[164] It is also concerning that during her direct evidence, she testified that she believed that A.C. got the tip of his penis into her anus, but in cross-examination, could not recall whether he had anally penetrated her. H.R.'s continuing disgust about A.C. attempting anal sex on a first date makes her inability to recall whether she was penetrated less credible.

[165] Finally, H.R.'s description of the amount of blood she observed flowing down her legs (more than normal period blood) was inconsistent with Dr. Chou's recorded note that there was some bleeding on her perineum after the sexual activity, which H.R. described to him as spotting rather than heavy period-like bleeding. As Dr. Chou's records were not produced until after H.R. testified, this inconsistency was not put to H.R.

[166] While both Nurse Chin and Dr. Chou testified that H.R. suffered injuries to her vaginal area, neither was in a position to opine that the injuries were only consistent with non-consensual sex.

[167] T.W.'s evidence about H.R.'s demeanor on December 8 and 9 was potentially corroborative of H.R.'s evidence that she had non-consensual sex, but it was also potentially corroborative of her being upset by a sexual encounter in which she felt used and treated insensitively. It is also potentially corroborative of her significant negative reaction to what she believed was an attempt at anal sex. During her evidence, H.R. remained repulsed by the thought of it.

[168] There is a direct contradiction between H.R. and A.C.'s evidence about whether she told A.C. to stop during the oral sex and the vaginal intercourse. H.R. testified that she said no to fellating A.C. and told him to stop the vaginal intercourse which was hurting her. A.C. denied that she told him to stop and, during his statement to Constable Tsui, said if she asked him to stop, he would have done so.

The Credibility of A.C.'s Evidence

[169] The Crown urged me to find that it was not credible that A.C. was unable to recall the sexual aspects of his date with H.R. when he was interviewed by Constable Tsui. Because of the unusual circumstances of the early part of the evening, after some prompting, he recalled the date in some detail to the point of them taking pizza back to his residence. He recalled almost nothing thereafter.

[170] The Crown said that A.C. would have remembered the sequence of the sexual activity with H.R. In particular, receiving oral sex from a woman on a first date, then having vaginal sex, switching positions and the woman making sounds expressing displeasure, then returning to vaginal sex until ejaculation.

[171] I accept that, during his statement to Constable Tsui, it was unlikely that A.C. had no memory of the sexual aspects of his date with H.R. However, I cannot reach the conclusion that his evidence defied credulity. The Crown's submission did not take into account A.C.'s evidence about the casual sex he engaged in through Tinder. He told Constable Tsui that his

other Tinder dates usually ended in intimacy or sexual intercourse. He frankly acknowledged that he rarely saw his dates more than once. He was consistent that he could not recall the sexual aspects of his date with H.R. because, as he said, there was nothing remarkable about it.

[172] The Crown's submission is based on a particular view of the nature of sexual relationships between individuals which does not take into account the accused's extensive use of Tinder for repeated casual sexual purposes. There is no reason to believe that any particular sexual act or sexual partner would stand out in such a context. The fact that, when prompted, A.C. remembered details about who H.R. was is related to the unusual circumstances at the start of their date.

[173] A.C. was questioned by Constable Tsui about three months after his sexual encounter with H.R., Crown disclosure was provided after that, the preliminary inquiry occurred in June 2017, and he testified in this trial almost three years after the events occurred. A.C. said his memory was refreshed by reviewing the Crown's disclosure. I accept A.C.'s evidence that he was in shock when he met with Constable Tsui and was wracking his brain to recall the date he had with H.R. I also accept that his memory was refreshed by the Crown disclosure, which explains some of the difference in detail between his police statement and his trial evidence. However, if A.C. truly had no memory of his sexual activity with H.R. when Constable Tsui interviewed him, it is unlikely that the Crown disclosure would have brought back the specific details of each sexual act that he was able to recall at trial.

[174] The Crown introduced A.C.'s statement. It was exculpatory and, with respect to the consensual nature of the sexual activity he engaged in with H.R., was consistent with his trial evidence.

Conclusion

[175] Having considered the evidence as a whole, I am left not knowing whom to believe. I am troubled by H.R.'s statement to Constable Tsui that if A.C. had thought she was not consenting to the sexual activity, he would have stopped. If she repeatedly said no and asked A.C. to stop as she said at trial, there can have been no doubt about her lack of consent.

[176] There is an inconsistency in their respective evidence about how the anal sex or rear-entry sex stopped. H.R. testified that she repeatedly asked A.C. to stop until she was doing so at yelling volume. A.C. testified that she moved away from him and made a sound and that he stopped what he was doing. The fact that he stopped is agreed. Whether anal penetration occurred is not.

[177] A trial is not a credibility context requiring a decision about which of A.C.'s and H.R.'s version of events is true. After considering all of their evidence, I find that neither version is inherently implausible, and I am unable to decide whom to believe.

[178] The burden is on the Crown to prove beyond a reasonable doubt that H.R., in her own mind, did not consent to the sexual activity. The burden is also on the Crown to prove that A.C. was aware that H.R. was not consenting. Where I am unable to decide whom to believe, the Crown has not met its burden.

[179] Having found that the Crown has not met its burden of proving that H.R. did not consent to the sexual activity, I must consider ss. 265(3)(a)-(b) of the Criminal Code which restrict the circumstances in which a complainant's consent will be valid.

[180] Apart from H.R.'s evidence that A.C. commanded her to fellate him and forced her head down to do so, there was no credible evidence of him compelling her to participate in any of the other sexual acts by force or threats of force. I accept that A.C. told H.R. to fellate him but not that he commanded her to do so. I found that H.R.'s description of the oral sex is unlikely to have been physically possible, so I cannot find the existence of any physical compulsion or threat based on it.

[181] Because I have found that the Crown has not proven, beyond a reasonable doubt, that H.R. did not consent to the sexual activity, it is not necessary for me to consider A.C.'s alternative submission that he had an honest but mistaken belief that H.R. was consenting.

[182] In all the circumstances, I find A.C. not guilty of the offence of sexual assault.

"MacNaughton J."

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