

CANADA / JUDGMENT

R. v. A.R.

2025 BCSC 1594

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1594 R. v. A.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. A.R.,

2025 BCSC 1594

Date: 20250501

Docket: 31097-2

Registry: Prince Rupert

Rex

v.

A.R.

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Before: The Honourable Justice Gibb-Carsley

Oral Reasons for Judgment

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Place and Dates of Trial:

Prince Rupert, B.C.

September 10-13, 16 & 17, 2024

December 16-20, 2024

February 10, 11, 26 & 28, 2025

Place and Date of Judgment:

Prince Rupert, B.C.

May 1, 2025

[1] THE COURT (by videoconference): These are my reasons for judgment.

Introduction

[2] The accused, A.R., is charged with one count of sexual assault contrary to s. 271 of the Criminal Code against the complainant that allegedly occurred on the morning of April 11, 2022, in Prince Rupert, British Columbia.

[3] The Crown alleges that the accused sexually assaulted the complainant in the morning after a gathering at the complainant's home (the "Residence") when the accused, the complainant, and others were drinking and socializing. At the time of the alleged assault, only the complainant and accused were at the Residence.

[4] As I will describe below, the complainant says that she awoke on the couch to the accused sexually assaulting her. The accused acknowledges that he and the complainant engaged in sexual activity on that morning, but says the sexual activity was consensual and also of a different nature than what was described by the complainant. As I will describe below, the accused testified that he only had oral-genital contact with the complainant, while the complainant testified that the accused started with non-consensual oral-genital contact and then progressed to non-consensual aggressive vaginal penetration.

[5] The Crown asserts that it has met its burden, based on the complainant's evidence, to find that the accused is guilty of sexual assault. However, the Crown also argues that even if the court rejects the evidence that the accused sexually assaulted the complainant with non-consensual vaginal penetration, by the accused's own testimony, he has admitted that he sexually assaulted the complainant because he did not obtain the requisite consent to perform oral-genital contact on the complainant, both through the steps he took to obtain consent and because the complainant did not have the requisite mental capacity to consent

due to her level of intoxication.

- [6] This case, as is the case in many sexual assault cases, presents two diametrically different explanations of an event.
- [7] Before continuing my reasons, I wish to state what is perhaps obvious for the parties. These cases are very difficult for all involved. I accept that the complainant found it difficult to testify at the trial about what she recalls as a difficult and painful event. Further, the accused, if convicted, faces the consequences of being a convicted sex offender and the potential of incarceration. I make these remarks to acknowledge that the stakes are high for both the complainant and the accused. I have considered the evidence and the law carefully in coming to my decision, cognizant of the importance of the fundamental principles of the presumption of innocence and the Crown's heavy burden to prove the accused's guilt beyond a reasonable doubt.
- [8] At trial, both the complainant and the accused testified. This case turns almost entirely on my assessment of the reliability and credibility of their evidence to determine if the Crown has met its burden.
- [9] In these reasons for judgment, I will first set out some of the background facts for context. I will then turn to the legal principles applicable to the law of sexual assault in Canada. Finally, I will turn to my analysis and determination, where I will discuss my findings of fact and conclusions. Before doing so, I note that the elements of identity and jurisdiction are not in issue in this case.

Background Facts

- [10] I will set out more specific facts regarding the evidence adduced at trial as it relates to my analysis below. However, for context, I will first set out some of the generally non-controversial facts.
- [11] The complainant was 21 years old at the time of trial and 19 years old at the time of the alleged offence. The accused is 41 years old and had just turned 38 years old at the time of the alleged offence. The accused and the complainant met while working at the same business in Prince Rupert, B.C., in late 2021 or early 2022.
- [12] The accused and the complainant attended a gathering at the Residence in Prince Rupert, B.C., in the late hours of April 10, 2022, or the early morning hours of April 11, 2022. The evidence is consistent that both the accused and the complainant consumed alcohol. The evidence is also consistent that the accused and the complainant's friends, C.F. and C.J., were also at the gathering. There is inconsistency between the complainant's evidence and the evidence of other witnesses as to whether another man, named A.T., was at the gathering. The complainant testified that A.T. was not at the gathering, however, the accused and C.F. testified that A.T. was at the gathering. There are also inconsistencies in the evidence about when people arrived at the Residence.

- [13] The evidence is consistent that at some point, only the complainant and the accused were at the Residence after everyone else had left. As for the specific time that the alleged sexual assault occurred, it is uncontroversial that the sexual activity occurred during the morning hours of April 11, 2022, when only the complainant and accused were at the Residence. However, the accused and the complainant provided conflicting evidence as to when the alleged sexual contact occurred. The complainant testified she believed that she was assaulted at around 10:00 a.m. The accused testified that he believed the two had consensual sexual activity at around 7:00 a.m.
- [14] As to the nature of the sexual activity, the complainant and the accused testified to two distinct versions of events.
- [15] The complainant and the accused both testified that the accused had oral-genital contact with the complainant, but the accused testified that it was consensual and that he remained fully clothed when it happened, while the complainant testified that it was not consensual. Further, the complainant testified that the accused was unclothed and had forced penetrative intercourse with her while holding her against her will. As I will describe below, one of the reasons that the accused testified that he did not have penetrative sex with the complainant and why he remained fully clothed was because he was recovering from a recent hernia surgery and did not want to expose his bandages or the wound on his lower left groin. I note that the medical reports indicate that the incision for the surgery was on the accused's left groin.
- [16] It is not contested that D.H., a friend of the complainant who, at the time of the trial, was her boyfriend, was contacted by the complainant at 10:30 or 11:00 a.m. to come over to the Residence. When D.H. arrived at the Residence, the accused was there and D.H. told the accused that it was time to leave. D.H. helped the accused find the accused's keys and then the accused left. D.H. comforted the complainant, who he believed was distraught. D.H. had to attend to some personal matters but returned to the Residence sometime around 4:00 p.m. that afternoon. He encouraged the complainant to report the matter to the RCMP.
- [17] It is also not contested that in the afternoon of April 11, 2022, the complainant contacted the RCMP to report that she was sexually assaulted by the accused. Constable Mireille Wilson of the RCMP arrived at the Residence at approximately 4:30 p.m. on April 11, 2022. The RCMP took photos of the Residence and seized clothes that the complainant said she was wearing before the alleged sexual assault, which included a t-shirt, underwear, and shorts. The complainant gave a statement to the police and a sexual assault kit was completed which included a vaginal swab to check for DNA.
- [18] The t-shirt, underwear, and shorts were subsequently tested for DNA. Dr. Bella Mosimann, a forensic specialist with NFLS, completed and submitted a forensic science and identification services laboratory report dated December 5, 2022 (the "Forensic Report"). I qualified Dr. Mosimann as an expert in the evaluation of forensic DNA, including the interpretation of body fluid identification testing results, analysis, and interpretation of DNA typing profiles,

comparison of DNA profiles in the calculation of the statistical significance of DNA results, and factors affecting DNA transfer, prevalence, persistence, and recovery. I found Dr. Mosimann to be a helpful expert witness. Her evidence was cautious, and I found she did not overstate her opinions, and she presented unbiased evidence to the Court to assist in assessing the meaning of the forensic evidence.

- [19] Dr. Mosimann testified that DNA profiles of two individuals, one assumed to be the complainant, were present on the interior front panel of the front middle crotch area of the underwear seized by the RCMP. The second profile was designated as an unknown male individual.
- [20] When the second profile was compared to the DNA of the accused, he could not be excluded as being a match. Dr. Mosimann testified that the chance that the DNA typing profile found on the complainant's underwear matched an individual other than the accused was 1 in 290 million. Dr. Mosimann also testified that the DNA could remain on clothing, depending on the environment, for several months and that DNA can stay on clothing even after washing. She testified that she would expect that a garment left on the floor if it was "not kept moist", especially in an absorbent material like cotton as opposed to on a hard surface, will continue to have DNA on it after a month.
- [21] It was not determined if the DNA sample recovered from the underwear was from semen, saliva, blood, or sweat or some other source. Dr. Mosimann testified that DNA can get onto clothing through either direct or indirect contact. As I will describe below, this is important as the accused and the Crown present different theories on how DNA that cannot be excluded from being the accused's DNA was on the complainant's underwear.
- [22] In respect of the results from the sexual assault kit, the sample obtained through the taking of a vaginal swab from the complainant was tested and it was determined that, while male DNA was found in the sample, there was no male DNA typing profile obtained. Dr. Mosimann testified that the likelihood of whether a penetrating male would leave DNA traces inside a vagina will depend upon several factors, including whether a condom was used, if there was ejaculation, and if the individual does not have sperm cells (for example, if he had a vasectomy). She further testified that while there are reasons that a penetrating male might not leave DNA, the reason a body cavity swab is taken in circumstances of alleged sexual assault is because it is expected that the male will leave DNA if there is penetrative sexual contact.
- [23] At trial, in addition to the complainant and the accused, Dr. Mosimann, Constable Wilson, the complainant's cousin C.F., and as did the complainant's friend who she called after the alleged assault, D.H., testified.
- [24] I will comment more upon the testimony of the other witnesses in my analysis below. However, before turning to my analysis, I will provide an overview of the governing legal principles applicable in this case.

Governing Legal Principles

Reasonable Doubt

- [25] An accused person is presumed innocent unless the Crown proves his or her guilt beyond a reasonable doubt. The burden to prove each of the elements of the offence rests with the Crown and that burden never shifts to the accused. The Crown must meet the standard with respect to each element of the offence. That said, the Crown is not required to prove each individual piece of evidence that makes up its theory beyond a reasonable doubt: see *R. v. Morin*, [1988] 2 S.C.R. 345 at 354.
- [26] A reasonable doubt is one that is based on reason and common sense, not an imaginary or frivolous doubt, and it is logically derived from the evidence or absence of evidence: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 39. Believing an accused is probably guilty is not enough for a conviction. Proof beyond reasonable doubt is "much closer to absolute certainty than to proof on a balance of probabilities": *R. v. Starr*, 2000 SCC 40 at para. 242.
- [27] However, despite this high burden established by the reasonable doubt standard, I am permitted to rest a finding of guilt on uncorroborated evidence. This principle is codified in respect of sexual assault in s. 274 of the Criminal Code and was articulated by the Supreme Court in *R. v. A.G.*, 2000 SCC 17 at para 30:

I appreciate Finlayson J.A.'s unease in the face of what the trial judge termed the "well known difficulties" associated with the features of these types of cases, with which he was also very familiar. Having been exposed, like many in the criminal courts, to several such cases, the trial judge was aware of the need for caution in preserving the integrity of the presumption of innocence. He was entitled to believe the uncorroborated evidence of the complainant in this case as in any other case, and he did. If it were unreasonable for him to do so, it would be impossible to convict in the many similar cases where there is a long delay in the disclosure of the uncorroborated allegations of a complainant in a sexual assault case. This is not the law.

Sexual Assault

- [28] Section 271 of the Criminal Code sets out the offence of sexual assault. The offence is an assault within the definition set out at s. 265(1) of the Criminal Code. It is "committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated": *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 24; see also *R. v. Schank*, 2023 BCSC 931 at paras. 85-120, for a comprehensive review of the law of sexual assault.
- [29] As with any offence, the Crown must prove both the actus reus and mens rea elements of the offence. In this case, given that identity is not an issue, the elements of the offence the Crown must satisfy beyond a reasonable doubt are:
- a) The actus reus elements:

- 1) the accused applied force to or touched the complainant directly or indirectly;
 - 2) the touching by the accused was of a sexual nature; and
 - 3) the complainant did not consent to the sexual activity in question.
- b) The mens rea elements
- 1) the touching by the accused was intentional; and
 - 2) the accused knew or was recklessly or wilfully blind that the complainant did not consent to the sexual activity in question.

Actus Reus

- [30] The actus reus of the offence is established by proof of the three elements listed above. The first two elements are determined objectively. To prove that there was touching, it is sufficient for the Crown to prove that the accused's actions were voluntary. To establish that the touching was of a sexual nature, the Crown need not prove that the accused had any mens rea with respect to the sexual aspect.
- [31] The third element, the absence of consent, is determined subjectively with reference to the complainant's internal state of mind towards the touching when it occurred. At the actus reus stage, consent means that the complainant in their mind agreed to the sexual touching taking place. The accused's perception of consent is only examined as part of the mens rea analysis: see *R. v. Barton*, 2019 SCC 33 at para. 90.
- [32] The issues regarding whether the complainant had the requisite capacity to provide her consent are considered under the third element, because subjective consent requires the complainant to have been capable of consenting and to have, in fact, consented to the sexual activity in question: see *R. v. G.F.*, 2021 SCC 20 at para. 2. In other words, capacity is a precondition to consent: see *G.F.* at para. 102.
- [33] Section 273.1(1) of the Criminal Code defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question." Consent is not considered in the abstract but must be linked to the sexual activity in question. As such, to provide consent, it must be freely given, it must exist at the time the sexual activity in question occurs, it can be revoked at any time, and it must relate to the specific sexual act, its sexual nature, and the partner's identity: *Barton* at para. 88. Consent must be affirmatively communicated through some positive signal or words for each sexual act: *R. v. Goldfinch*, 2019 SCC 38 at para. 44; *Schank* at para. 106.
- [34] The complainant need not express her lack of consent or revocation of consent for the actus reus to be established: *R. v. J.A.*, 2011 SCC 28 at para. 37. Further, the law prohibits any inference of consent based on implied consent or broad advance consent: *Barton* at paras. 98-99.

Capacity to Consent

- [35] The Supreme Court in *G.F.* articulated the basis and requirements for capacity to consent as follows:
- [55] As capacity is a precondition to subjective consent, the requirements for capacity are tied to the requirements for subjective consent itself. Since subjective consent must be linked to the sexual activity in question, the capacity to consent requires that the complainant have an operating mind capable of understanding each element of the sexual activity in question: the physical act, its sexual nature, and the specific identity of their partner: *Barton*, at para. 88; *Hutchinson*, at paras. 54-57.
- [56] There is one further requirement. Because subjective consent requires a "voluntary agreement", the complainant must be capable of understanding that they have a choice of whether or not to engage in the sexual activity in question: *Criminal Code*, s. 273.1(1). At the very least, a voluntary agreement would require that the complainant exercise a choice to engage in the sexual activity in question. In this narrow sense, in order to voluntarily agree to the sexual activity in question, the complainant must understand that saying "No" is an option. In *J.A.*, this Court held that consent requires that the complainant have "an operating mind" at the time of the touching, capable of evaluating each sexual act and choosing whether or not to consent to it: paras. 36 and 43-44. Thus, an unconscious complainant could not provide contemporaneous consent. It follows that where the complainant is incapable of understanding that they have this choice to engage or refuse to engage, they are incapable of consenting. Accordingly, a complainant who is unable to say no, or who believes they have no choice in the matter, is not capable of formulating subjective consent: see *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237, at para. 60, citing *R. v. Daigle* (1997), 1997 CanLII 9934 (QC CA), 127 C.C.C. (3d) 130 (Que. C.A.), *aff'd* 1998 CanLII 786 (SCC), [1998] 1 S.C.R. 1220.
- [57] In sum, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:
1. the physical act;
 2. that the act is sexual in nature;
 3. the specific identity of the complainant's partner or partners; and
 4. that they have the choice to refuse to participate in the sexual activity.
- [58] The complainant will only be capable of providing subjective consent if they are capable of understanding all four factors. If the Crown proves the absence of any single factor beyond a reasonable doubt, then the complainant is incapable of subjective consent and the absence of consent is established at the *actus reus* stage. There would be no need to consider whether any consent was effective in law because there would be no subjective consent to vitiate.

- [36] A person who is unconscious or sleeping is incapable of consenting to sexual activity: see the Criminal Code, 273.1(2)(a.i); *R. v. J.A.*, 2011 SCC 28 at para. 33.
- [37] A loss of memory or blackout on its own cannot be taken as proof of lack of consent or lack of capacity to consent to the sexual activity in question: see *R. v. Schank*, 2023 BCSC 931 at para. 112, citing *R. v. J.R.*, [2006] O.J. No. 2698 (S.C.J.) at paras. 17-20, *aff'd* 2008 ONCA 200.

Mens Rea

- [38] The mens rea of the offence is established by proof of the two elements listed above: intention and knowledge. The focus at this stage is on the mental state of the accused. The key question is whether the accused honestly believed that the complainant communicated consent to the sexual activity in question: *Barton* at para. 90; *Schank* at para. 114.

Honest But Mistaken Belief in Communicated Consent

- [39] To establish the defence of an honest but mistaken belief in communicated consent within the mens rea analysis, the evidence must show that the accused believed the complainant affirmatively communicated her agreement to engage in the sexual activity by words or conduct. As such, the focus at this stage shifts to the accused's mental state and the question becomes, "whether the accused honestly believed [that] 'the complainant effectively said 'yes' through her words and/or actions'": *Barton* at para. 90.
- [40] To rely on the defence of honest but mistaken belief in communicated consent, the accused must first show that there is an air of reality to the defence. As explained in *Barton* at 121:
- [121] This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused honestly believed the complainant communicated consent.
- [41] If the air of reality test is met, the onus switches to the Crown to negative the defence. The Crown can do so, for instance, by proving beyond a reasonable doubt that the accused did not take reasonable steps to determine whether the complainant was consenting, or by proving the accused's mistaken belief was not honestly held: see *R. v. H.W.*, 2022 ONCA 15 at para. 52.
- [42] In *Barton*, the Supreme Court further explained that the reasonable steps requirement is a precondition to the defence of honest but mistaken belief in communicated consent. The reasonable steps inquiry has both objective and subjective dimensions, in that the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time: *Barton* at para. 104. The inquiry is highly fact-specific, and the court must take a purposive approach in considering the circumstances of the offence: *Barton*, paras. 106, 109.

- [43] To that end, in *Barton*, the Supreme Court provided a non-exhaustive list of factors that would not constitute reasonable steps, as well as circumstances where the threshold may be elevated:
- [107] That said, it is possible to identify certain things that clearly are not reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law (see *Ewanchuk*, at para. 51, citing *M. (M.L.)*). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see *Sheehy*, at p. 518). Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants (see *Sheehy*, at p. 537).
- [108] It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.
- [44] Finally, as a matter of law, both in the common law (see *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 98) and under s. 273.2 of the Criminal Code, there are limits to the defence of honest but mistaken belief in communicated consent:

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

- (a) the accused's belief arose from
 - (i) the accused's self-induced intoxication,
 - (ii) the accused's recklessness or wilful blindness, or
 - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (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; or
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

Legal Principles Regarding the Accused's Evidence

- [45] The accused testified at this trial. As such, the principles articulated in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, are applicable. In *W.(D.)*, the Supreme Court established the following framework to assist the trier of fact with the meaning of reasonable doubt in cases involving conflicting evidence from the accused and witnesses for the Crown:
- a) if you believe the evidence of the accused, obviously you must acquit;
 - b) if you do not believe the testimony of the accused but are left in reasonable doubt by it, you must acquit; and,
 - c) even if you are not left in reasonable doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by the evidence of the guilt of the accused.
- [46] Further, since *W.(D.)*, appellate courts have suggested a fourth step: where the trier of fact, after careful consideration of all the evidence, is unable to determine whom to believe, the accused must be acquitted: *R. v. C.W.H.*, 68 C.C.C. (3d) 146, 1991 CanLII 3956 (B.C.C.A.).
- [47] The *W.(D.)* framework is applied with reference to the evidence as a whole, rather than examining any particular aspects in isolation: *R. v. P.A.*, 2024 BCCA 93 at para. 33.
- [48] I note that there is no specific form or sequence of analysis that the court must follow when applying the *W.(D.)* analysis. In a judge-alone trial, the order in which the judge analyzes the evidence in his or her reasons is inconsequential, so long as the focus throughout remains on the principle of reasonable doubt as a central consideration: *R. v. Tyers*, 2015 BCCA 507 at para. 15.
- [49] I also note that the first two elements of the *W.(D.)* analysis "assume that the [trier of fact] should decide whether or not they believe the exculpatory evidence of the accused": *R. v. C.*, 2004 NSCA 135 at para. 23 (emphasis added). Yet, in certain cases an accused person may provide both inculpatory and exculpatory evidence: see e.g., *R. v. J.H.S.*, 2008 SCC 30 at para. 10. That being so, it remains my overarching task to determine if I am left with a reasonable doubt as to the accused's guilt, after considering his evidence (whether inculpatory or exculpatory) in context, and considering the evidence as a whole: see *R. v. Matthias*, 2009 BCSC 1729 at para. 102 (albeit in reference to a charge of murder).
- [50] Ultimately, *W.(D.)* instructs that I must not allow the determination of whether to enter a verdict of guilty or a verdict of not guilty to become a mere credibility contest. I must not reject the evidence of the accused as a consequence of believing evidence of the complainant. Further, I must not make a direct progression from a finding that the complainant's evidence is to be believed to the accused's conviction.

Assessing Credibility and Reliability

[51] The analysis of credibility and reliability involves a close examination of numerous factors. The term "credibility assessment" refers to an assessment of two qualities of a witness's testimony, their credibility and their reliability: see G.F at para. 82. It is well-established that while often considered together, reliability and credibility are not the same. The distinction was articulated by the Ontario Court of Appeal in *R. v. H.C.*, 2009 ONCA 56 at para. 41:

[41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall; and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence

[52] Stated bluntly, credibility addresses whether a witness is lying, whereas reliability is concerned with honest mistakes.

[53] If the complainant testifies that she did not consent to the sexual activity in question and the issue is contested, then it is necessary for the court to assess the credibility and reliability of the testimony. As explained in *Ewanchuk*:

[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, as occurred in this case, 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.

- [54] The assessment of credibility is important in this case. However, courts must be cautious not to decide a case based on a choice between the Crown's evidence and the accused's evidence: see *R. v. Pangan*, 85 B.C.A.C. 54, 1996 CanLII 2461 (C.A.) at para. 40. In other words, as I stated above in respect of the W.(D.) analysis, the determination of an acquittal or of a guilty verdict cannot be based on a mere credibility contest.
- [55] Our Court of Appeal in *R. v. J.T.*, 2019 BCCA 180, summarized the factors to be considered in assessing credibility at para. 31:
- [31] a witness's demeanor in the witness box, although it is recognized that it would be dangerous to rely wholly on demeanor to convict; internal inconsistencies in a witness's testimony at trial and/or external inconsistencies in a witness's testimony with prior testimony or out-of-court statements; any explanation by the witness for the inconsistencies; any consistent evidence or corroborating evidence to support the witness's evidence, although corroboration is not a requirement; and how a witness withstands cross-examination.
- [56] It is with these legal principles in mind that I now turn to my analysis.

Analysis

- [57] As referenced above, because this case involves two competing narratives of an event, it is critical to my determination to assess the credibility and reliability of the witnesses. This is especially important for the complainant and accused, given that they were the only two individuals present when the alleged sexual assault occurred. However, I must remain rooted in the fundamental principle that the burden of proving the accused's guilt always remains with the Crown.
- [58] In assessing credibility and reliability, I am cognizant of the guidance provided by the Supreme Court in *R. v. Dinardo*, 2008 SCC 24, that:
- [23] In a case that turns on credibility the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt.
- [59] Before turning to my analysis of the evidence, I note that in this trial the accused brought applications pursuant to s. 276 and 278 of the Criminal Code to adduce evidence of a prior sexual relationship between the complainant and the accused. I allowed those applications, as I was satisfied that the requirements under s. 276 and 278 of the Criminal Code were met. Accordingly, limited evidence regarding the complainant's previous sexual activity with the accused that would otherwise be impermissible was admitted at trial. Specifically, evidence regarding two sexual encounters between the accused and the complainant that occurred before the alleged offence were adduced at trial through the complainant and the accused, and through communications between the complainant and the accused that reference the relationship.

[60] The primary reason I allowed the evidence of the previous sexual activity between the complainant and the accused was because the Crown asserts that the accused's DNA was deposited on the complainant's underwear during the alleged sexual assault on April 11, 2022. However, the accused argues that it is possible and indeed, given the accused's version of events, likely that the DNA from which he could not be excluded from as a match that was found on the inside front panel of the underwear was not from sexual contact on April 11, 2022, but from a previous sexual encounter between the accused and the complainant. I concluded that without the evidence of previous sexual activity between the complainant and the accused, the accused would not be able to make the argument that the DNA was from a previous sexual encounter, thus preventing the accused from being able to make full answer and defence.

How the Gathering Started and Who Attended

[61] The accused testified he arrived at the complainant's Residence after work at about 1:00 a.m. on April 11, 2022. The accused testified that he had arrived in a taxi and saw people outside the Residence drinking beverages and "shot-gunning". I accept that shot-gunning is drinking rapidly from a can containing an alcoholic beverage by putting holes in the can to force the liquid into the drinker's mouth due to the carbonation. The accused testified that he saw the complainant, C.F., a man named A.T., and C.J., another friend of the complainant.

[62] There was very little evidence from the complainant about the events leading up to the alleged sexual assault. This is because the complainant testified that she blacked out during the evening and then, as I will describe below, awoke in a state of undress with the accused sexually assaulting her with oral-genital contact.

[63] In terms of what the complainant testified that she did remember, she testified that on the evening of April 10, 2022, she picked up alcohol and waited for people to arrive at the Residence. She testified in direct that she was at the Residence at about 6:30 p.m. and her friend C.J. arrived at about 7:30 p.m. The complainant testified that the other guests arrived at about 12:30 a.m. and her cousin, C.F., arrived at 12:30 or 1:00 a.m. on April 11, 2022. She also testified that only C.J. and C.F. and the accused were at the gathering and was certain that A.T. was not there.

[64] The complainant testified that she was sober until people showed up and then "probably got really drunk". She testified that at the gathering, the group were hanging out, listening to music, and watching YouTube. She was not able to describe her level of intoxication as the night progressed but stated that she "got really drunk and passed out". The complainant testified that she did not remember when she blacked out, but her last memory was that C.J., C.F., and the accused were there and she was "sitting around talking, listening to music, that's all I know", and that she and the others were in the living room on the couch. The complainant testified her next memory was when she woke up without "much of [her] clothes on and I was laying there on the couch". I will return to the complainant's testimony of the alleged sexual assault later in these reasons.

- [65] The accused testified that everyone was drinking during the gathering. He testified that A.T. was making a drink with candies inside a vodka bottle and making the candy dissolve. C.F. corroborated both that A.T. was at the party and making that specific alcoholic drink. I note that the complainant was firm on her recollection that A.T. was not at the party. I accept the accused's recollection and reject the complainant's recollection of who was at the Residence during the gathering and find as a fact, that A.T. was at the gathering.
- [66] The accused testified that, at one point, A.T. and C.J. were asleep on the couch, and he, the complainant, and C.F. went outside to smoke. While the three of them were outside, the door inadvertently locked and they could not get back inside. They could not awaken A.T. or C.J. so, according to the accused, the complainant had to stand on C.F.'s shoulders to reach the window and crawl into the Residence to unlock the door.
- [67] C.F. was asked about this specific incident of being locked out of the Residence. She testified that an incident like that occurred, but it did not happen on that night, which I take to mean it happened at another gathering at the Residence. In my view, the details provided by the accused of the event are very specific. I accept the accused's version of events that the incident of being locked out occurred on April 11, 2022, and that C.F. was mistaken about the event occurring at another time. As I will describe below, this is important to my conclusions, because I find it raises a concern that C.F. has confused or conflated the events of two different nights of social gatherings at the Residence.
- [68] Adding to this concern, C.F. also testified that A.T. was the last one who showed up to the gathering, and testified that the accused arrived at 10:00 p.m. I find that evidence is unreliable, and I accept that the accused arrived at 1:00 a.m. after his work shift ended, and that the accused was the last one to arrive at the gathering. Given the foregoing, I am cautious in accepting C.F.'s evidence about all of the events on April 11, 2022, wholesale, most important of which is the level of the complainant's intoxication.
- [69] The accused testified that after he, the complainant, and C.F. got back into the Residence after being locked out, A.T. and C.J. woke up and left. He believes that this occurred at about 5:00 or 6:00 a.m. The accused testified that after that, he, the complainant, and C.F. continued to drink, listen to music, and watch YouTube. I note that the complainant and C.F. corroborated that listening and watching music on YouTube was an activity that occurred during the gathering, although I note that C.F. specifically testified that "music was playing on the TV", which I infer means that the music was being played or watched from a screen on a platform such as YouTube or a music-streaming service.
- [70] The accused testified that sometime after A.T. and C.J. left, the complainant went to the washroom and the accused started to clean up some bottles and some spilled alcohol on the floor. He testified that C.F. told him to leave it for the complainant. This was also generally corroborated by C.F., who testified that she recalled telling the accused not to clean up.

- [71] The accused testified that he believes that C.F. left at around 7:00 a.m. At this time, only the complainant and the accused were at the Residence.
- [72] I pause to note that C.F. originally testified that she left the complainant's Residence at 1:00 a.m. but acknowledged that she could have left later in the "wee hours" of the morning. I accept that C.F. did not leave the gathering at 1:00 a.m. and that it is likely that she left the gathering at 6:00 a.m. or 7:00 a.m., as testified to by the accused. In my view, this is supported by my acceptance that the accused only arrived at the party at approximately 1:00 a.m. after his work shift, and the subsequent events which I accept occurred thereafter, including drinking, trips from inside to outside to smoke, listening to music, watching YouTube, and becoming locked out and finding a way back in through the window. In my view, it is reasonable that the events would have taken hours and therefore highly implausible that C.F. left the Residence at 1:00 a.m., the same time that the accused arrived. Again, C.F.'s unreliability in terms of the time she left the complainant's Residence on April 11, 2022, suggests that C.F. may be confusing the April 11, 2022, gathering with a different gathering when describing her recollection. This causes me some hesitation to accept her recollection of the state of the complainant's intoxication when C.F. left the Residence.

Events Immediately Before the Alleged Sexual Assault

- [73] C.F. testified that when she left the gathering, the complainant was "really wasted", which she clarified to mean that the complainant was not coherent, could hardly walk, and had to hold onto things in order to get around. At the time she was leaving the party, C.F. believed that the complainant was not feeling well and was heading to bed.
- [74] In my view, C.F. was a credible witness who earnestly attempted to answer questions. As I just referenced, however, my concern with accepting her evidence about the state of the complainant's sobriety and the complainant going to bed after C.F. left is that I found C.F. to be unreliable regarding at least four events of that evening:
- 1) the time she left the gathering;
 - 2) when the accused arrived at the gathering;
 - 3) the order of arrival as between A.T. and the accused; and
 - 4) whether she, the complainant, and the accused were locked out of the Residence for a period of time on April 11, 2022.
- [75] Given the evidence presented that this group of friends had several parties that involved socializing and drinking around the spring of 2022, I am reluctant to accept C.F.'s evidence as determinative about the complainant's sobriety and if the complainant was heading to bed. Further, the complainant's own evidence does not corroborate that she went to her bedroom after C.F. left the party, because she testified that she awoke to the accused sexually assaulting her on the couch.

- [76] Put bluntly, I do not accept C.F.'s evidence as conclusive proof of the complainant's state of intoxication. That said, I accept that, based on the evidence of the complainant, the accused, C.F., and the photos in evidence of the complainant's living room, that there was significant consumption of alcohol at the gathering and the complainant was most likely intoxicated.
- [77] The accused testified that after C.F. left, he and the complainant continued to "finish off beverages". The accused testified that he and the complainant were sitting together on the couch and listening to music on YouTube while singing along with the lyrics in a "karaoke" style. He testified that they listened to three or four songs and then began kissing.
- [78] Later in his direct examination, the accused was again asked about the time he and the complainant started kissing, specifically in reference to when C.F. left. He answered that the kissing started about 20 minutes after C.F. left. I accept that this appears to generally accord with his evidence that he and the complainant listened to three or four more songs on YouTube after C.F. left before commencing kissing, as the general length of three or four songs is in the range of 20 minutes.
- [79] The complainant does not remember when she allegedly blacked out, but she testified that her last memory was sitting around talking and listening to music with C.J. and C.F., with the accused being in the living room.

The Alleged Sexual Assault

- [80] The accused testified that while he and the complainant were kissing, he felt the complainant's hand on his shoulder that subsequently led him down towards her bottom area. The accused clarified that what he meant when he was led down, was that he was led down to the complainant's vagina. He then testified that the complainant started taking off her sweats and lifted her bottom so that she could slide them off. At this point, the accused started "doing oral". He clarified later in his testimony that her underwear and sweats were removed at the time. He also testified later in his direct examination that after he had started the oral-genital contact, he asked, "Are you good?" and the complainant replied, "Yes."
- [81] The accused testified that he never removed any of his clothes. As I will describe below, the accused says that one of the reasons he did not take off any of his clothes was because he was recovering from a hernia surgery that he had on March 30, 2022, which left him with a two or three-inch wound on his left groin area from which staples were removed sometime around April 6 or 7, 2022. The wound was covered in bandages.

- [82] The accused testified that he believed that the oral-genital contact lasted approximately 15 minutes. As I will describe below, the accused testified he never had penetrative intercourse with the complainant and never held or restrained her in any way. The accused testified that after "we were done", the complainant got up to go to the washroom. He then says he fell asleep on the couch until about 10:00 a.m. when he awoke and started cleaning up the living room. Shortly after that time, he testified that D.H. arrived and asked him to leave.
- [83] As set out above, the complainant has little memory of the gathering or when she blacked out. She testified that her first memory after sitting on the couch with C.F. and C.J. was waking up on the couch at around 10:00 a.m. First, she testified that she had "most of [her] clothes off", and that the accused had his pants down, his face near her "private parts", and was using his tongue on her vagina. Later in her testimony, the complainant stated that she had no clothes on when she awoke, and that her clothes were on the floor by the couch. She also later testified that the accused had his pants completely off.
- [84] The complainant testified that while the accused was using his mouth on her vagina, she felt a stinging irritation. She testified that the accused then started penetrative intercourse without her consent. The complainant testified that she was at first on her back, and then the accused put her on her knees and "continued" intercourse. She testified that the accused tried to get her to go on top of him and she said "stop" and repeatedly said she had to go to the bathroom to try and get away.
- [85] Later in her direct examination, the complainant testified that after she awoke to the accused licking her vagina, the accused then moved her onto her knees so that the accused could "do intercourse". This is a different account than the complainant's initial testimony about the assault in which she testified that the accused started by licking her vagina, then had intercourse with her, and then continued intercourse by moving her to her knees.
- [86] Later in her direct examination, the complainant testified that she was trying to get away, that it hurt, and she was "standing up and pushing him away", but the accused continued, and he held the complainant's "wrists, hands, and arms to [her] side". The complainant testified she kept asking to go to the washroom and when the accused let her go, she grabbed her phone, went to the bathroom, and messaged D.H.
- [87] D.H. testified that he went to the Residence after receiving a call and then a message from the complainant. I was not provided with any copies of text messages or communications between the complainant and D.H. that would have clarified the timing of events. D.H. testified that he believed that he arrived at the Residence about 10 minutes after he was contacted. D.H., the complainant, and the accused all testified that when D.H. arrived, he asked the accused to leave, saying words to the effect of "it was time to go". D.H. then helped the accused find his keys in the couch and the accused left.

After the Alleged Sexual Assault

- [88] The complainant testified that after the accused left, her back and legs were sore, her private parts were in pain, and she was uncomfortable. She lay down with D.H. until he had to leave to attend to personal matters. D.H. returned later in the day and, after discussing what happened, the complainant decided she should report the assault to the police.
- [89] As set out above, Constable Wilson arrived and took photos of the inside of the Residence and also took photos and seized the shorts, shirt, and underwear that the complainant said she was wearing immediately before the alleged sexual assault and that she says were removed from her by the accused without her consent.
- [90] In my view, the complainant's clothing and the testimony about that clothing from the witnesses is important in this case, as it is helpful in assessing the reliability and credibility of the witnesses and better assessing what occurred on April 11, 2022.
- [91] I now turn to that analysis.

The Complainant's Clothing and DNA Evidence

- [92] The accused testified that the complainant was wearing sweats during the gathering, including immediately before they engaged in sexual activity. C.F. testified that the complainant was wearing a hoodie and "joggers" at the time when C.F. left the party.
- [93] The complainant testified that she was not wearing sweatpants or "joggers" at the party. Her testimony was that she was wearing shorts, underwear, and a t-shirt at the gathering, including before the alleged sexual assault. The shorts, underwear, and shirt are the items of clothing that were photographed, seized, and forensically tested by the RCMP.
- [94] I accept as a fact that the complainant was wearing sweatpants or "jogger pants" and not shorts, as she testified, during the gathering and immediately before the alleged sexual assault. I base this on the evidence of C.F. and the accused.
- [95] I acknowledge that I have accepted some of C.F.'s evidence, specifically about what the complainant was wearing, and rejected other aspects of her evidence, specifically some of the details of the gathering, the level of the complainant's intoxication, and where the complainant was going when C.F. left the party. I do so based on my view of the totality of the evidence regarding these facts, and especially my concern that C.F. may have conflated or confused two different gatherings at the Residence. In drawing these conclusions, I am guided by our Court of Appeal which held that it is open to the court to reject all, none, or some of a witness's evidence: see *R. v. Fay*, 2023 BCCA 151 at para. 47.
- [96] My finding that the complainant was not wearing the clothes that she testified she was wearing on the evening of April 11, 2022, and immediately before the alleged assault is important for three reasons. First, because it undermines the complainant's reliability about the events of April 11, 2022, and the details of the alleged sexual assault.

- [97] Second, given that the shorts, shirt, and underwear were reported as being linked to the alleged offence because they were the clothes purportedly being worn by the complainant during the assault and were subsequently photographed and seized by the police, I have some concerns as to how the incident was reported to the police and investigated. In other words, the police were told the clothing was removed by the accused and left on the couch. The clothes were photographed on the couch, seized, and forensically examined. This is despite my conclusion that they were not worn by the complainant on April 11, 2022.
- [98] Third, and related to the second concern, is that the Crown rests much of its case against the accused on the DNA sample for which the accused could not be excluded, found in the inner front panel of the complainant's underwear.
- [99] I will now discuss these issues.

Inconsistency in the Evidence as to the Complainant's Clothing

- [100] I accept as a fact that the complainant was not wearing the shorts during the gathering or immediately before the alleged sexual assault. I am unable to conclusively determine if the complainant was wearing the underwear seized by the police at the gathering or immediately before the alleged sexual assault. However, for the reasons that follow, I find it was unlikely that the complainant was wearing the underwear that was ultimately seized by the police immediately prior to the sexual assault.
- [101] As set out above, the basis for rejecting the complainant's evidence that she was wearing the shorts is the evidence of both C.F. and the accused. However, for reasons I will now describe, I also find that, based on the complainant's evidence, it is unlikely she was wearing the underwear immediately before the sexual assault.
- [102] The complainant provided two different versions as to what she did with her clothing after the alleged sexual assault. In one, she took her clothing with her to the bedroom and bathroom when she went to contact D.H. The complainant later testified that she left her clothing on the couch and only took the phone. In both versions, the complainant was consistent that she never put on her clothing again. However, the DNA was found on the inner front crotch panel of the complainant's underwear. This, asserts the Crown, supports that the accused had sexual contact with the complainant and his DNA was transferred to the complainant's underwear on April 11, 2022.
- [103] The difficulty that I have in accepting the Crown's theory is that if the complainant never put on the underwear after the alleged assault as she testified, it seems unlikely that the DNA linked to the accused could be deposited on the front inside panel of the underwear. While it is possible that the DNA was deposited while the complainant and accused removed the underwear, I do not find it supports the Crown's theory that the accused had penetrative intercourse with the complainant, because if the complainant did not put her underwear back on after the alleged assault, it seems unlikely that DNA from the accused could be deposited inside the front panel of her underwear from the events of April 11,

2022. This is especially so because the vaginal swab taken from the complainant on April 11, 2022, as part of the sexual assault kit, did not contain a DNA sample from which the accused could not be excluded. Although I acknowledge that while no male DNA typing profile was obtained in that sample, male DNA was detected in that sample.

- [104] The description by the complainant of the accused's removal of her clothes was a key part of her evidence of the alleged sexual assault. Given that I have found that her evidence of the clothing she was wearing is unreliable, it raises a doubt regarding whether her evidence of the details of the alleged sexual assault is reliable.

Linking the Accused's DNA to the Sample Taken from the Underwear

- [105] Having concluded that the complainant was not wearing the shorts during the alleged sexual assault, I am concerned that the complainant presented the shorts, underwear, and shirt to the investigating officer of the RCMP as the clothing that she wore during the alleged assault. The complainant also told the investigating officer that the clothing was left on the couch, which is contrary to her evidence at trial that she gathered her clothes and took them into her bedroom or bathroom.
- [106] The photographs taken by the RCMP of the complainant's living room shows the clothing on the couch. When showed the police photographs of the couch, the accused testified that it was generally how it looked when he left, but "these clothings weren't there". The clothing to which the accused was referring were the shorts, shirt, and underwear.
- [107] Further, the complainant reported to the investigating officer that she was wearing her shirt and bra when she awoke on the couch. I note that if the complainant woke to have her shirt still on during the alleged sexual assault as she first told police, the shirt would not have been "left on the couch" as it would have been worn by the complainant when she left the living room.
- [108] However, the complainant testified that she was mistaken when she told the officer she was wearing the shirt and bra. She ultimately conceded that she did not know what she was wearing when she woke up. The complainant testified that after the alleged sexual assault, she grabbed her phone and her clothes and went to the bathroom. While there are inconsistencies regarding whether she took the clothes into her bedroom or the bathroom, what appears consistent was that she took her clothes from the living room such that they were never left on the couch.
- [109] The shorts, underwear, and shirt were on the couch when photographed by the investigating officer. In my view of the evidence, even the different versions of the events, it appears that at least some of the clothing must have been taken from the complainant's bedroom and placed back on the couch after the accused left and before the police arrived to investigate. This, in my view, greatly undermines my ability to rely upon the complainant's version of events. It also attenuates any reliance I can place on the potential link between the DNA found on the inside front panel of the complainant's underwear and

the alleged sexual assault on April 11, 2022.

The DNA Evidence Sample Obtained from the Underwear

- [110] If the clothing was not the clothing worn by the complainant during the alleged sexual assault, the DNA evidence is of limited use in determining the accused's guilt. Further, even if I accepted that the complainant was wearing that underwear immediately before the alleged sexual assault, I struggle to see how the accused's DNA would be deposited in the inside front panel area of the underwear based on her evidence. As mentioned above, the complainant testified that she never put the underwear on again after the alleged assault.
- [111] I am not satisfied that there was evidence before me of how the accused's DNA could be on the inside front panel of the complainant's underwear based on her evidence, other than the submissions of counsel that it must have occurred while the complainant was unconscious.
- [112] There is, however, another explanation proffered by the defence as to how the DNA was deposited on the complainant's underwear. The accused argues that the DNA from which the accused cannot be excluded as a match was deposited on the complainant's underwear during a previous sexual encounter with the complainant prior to the alleged sexual assault on April 11, 2022. This very issue was the subject of the accused's s. 276 hearing. At that hearing, I allowed the accused to tender evidence that the complainant and the accused had previous sexual activity that included penetrative sex a week before the alleged sexual assault.
- [113] To be clear, in no way am I considering the previous sexual activity between the complainant and accused to show either that the complainant is less worthy of belief or that she was more likely to have consented on April 11, 2022. That is impermissible reasoning based on the twin myths: see Barton at paras. 55-60.
- [114] As to the plausibility of the scenario that the accused's DNA could remain on the complainant's underwear for some period of time, as set out above, Dr. Mosimann testified that DNA evidence can remain on fabric in the right circumstances for weeks and even months, and even after washing.
- [115] Accordingly, it is possible that the accused's DNA was deposited on that underwear on a different occasion prior to the alleged assault. In my view, this is a reasonable alternative theory as to why the accused's DNA would be on the complainant's underwear. As such, I do not accept as a fact that the DNA from which the accused could not be excluded was deposited on the underwear on April 11, 2022.
- [116] It may be that the underwear was the same underwear worn by the complainant immediately prior to the alleged sexual assault, but given that I have doubts regarding: (1) what the complainant said she was wearing; (2) the actual location of the clothing after the sexual assault as compared to when the police arrived; and (3) the complainant's evidence that she never put her underwear back on after the alleged assault, thus making it

implausible that the accused's DNA could be deposited on the inside front panel of the underwear after the sexual assault, I have trouble accepting the Crown's theory that the underwear seized by the police was the underwear worn by the complainant on April 11, 2022.

Other Evidence Regarding the Events in Question

[117] There are other aspects of the evidence that assist in my assessment of determining whether the Crown has met its burden, I will turn to those aspects of the evidence now.

The Accused's State of Undress and Hernia Surgery

[118] The accused testified that he never took his clothes off during the sexual activity on April 11, 2022. The complainant testified, first, that when she woke up, the accused had his pants off, and later she testified that when she woke up, the accused's pants were down.

[119] I note that when asked during direct examination if he ever took his clothes off, the accused testified, "not that night." In my view, by making this distinction, the accused's evidence is internally consistent, and it acknowledges that on other nights he had taken his clothes off with the complainant when they had penetrative sex.

[120] Further, the accused answered that. "I still had bandages on my lower left side from my surgery, and I didn't want to expose them". The bandages to which the accused referred were from his recent hernia surgery.

[121] More specifically, the accused testified that on March 30, 2022, he had hernia surgery on his lower left side. This was corroborated by medical records regarding the surgery and was admitted as a fact by the Crown. I note that while I admitted the medical record for the purpose of establishing that the accused had hernia surgery on March 30, 2022, I did not admit it to establish the prognosis or diagnosis resulting from his surgery. In my view, that would require additional expert evidence. However, I did consider the testimony of the accused about the results and impact of the surgery upon his health, his view of how he was recovering, any physical limitations he believed he had, and the state of his wound on April 11, 2022.

[122] The accused testified that he understood that it would take him three weeks to fully recover and that he was not to "overexert" himself during that time. He further testified that he was told not to lift anything heavier than 12 to 15 pounds. He testified that when he went back to work, although his job was not overly physical, he was accommodated so that he would not have to "move up and down" to retrieve certain objects.

[123] The accused also testified that this was his second hernia surgery, and so he was particularly careful. He testified that, "I was being cautious because I didn't want to relapse or whatever happened again". The accused said that if he did overexert himself, he felt the wound "kind of prying" and it feels like a sharp pain. He said that he took approximately

one week away from work to assist in his recovery from the hernia surgery. I note that March 30, 2022, was a Wednesday. As such, I accept that the accused was off work until sometime around April 6, 2022. I also note that the three-week recovery period would stretch to April 20, 2022, which is nine days after the alleged assault.

- [124] The accused testified that the incision for his hernia surgery was about "two to three inches long", along his left side and was sutured with staples. The staples were removed about a week after the surgery, which again is approximately April 6, 2022. He testified that on April 11, 2022, the date of the alleged assault, he had bandages on the wound. He said that he would have to change the bandages when they would get wet and he would apply ointment to the wound as necessary. He described that on April 11, 2022, he still had pain from the surgery and was still at that time cautious not to overexert himself.
- [125] The complainant testified that during the alleged sexual assault, the accused did not have his pants on or had his pants down, that the accused held her wrist and hands and forced intercourse while she was on her back, and the accused then continued intercourse with her after forcing her onto her knees. She testified she had stood and tried to push him away and was only able to escape to the bathroom after the accused asked her to get on top of him. I note that the complainant, when providing details of the sexual assault and that the accused had his pants off or down, did not testify the accused had bandages or wounds on his left groin area.
- [126] The accused testified he never held the complainant down or restrained her in any way. He testified how he was holding her arms and testified that he was not holding her down and that doing so would have hurt him due to his recent hernia surgery. Further, he testified that after the staples were removed, he was told by his doctor to, "keep it clean and not to do anything to open up the wound again". The accused testified in part that his concern about not further injuring himself stopped him from initiating intercourse, as he testified that he did not want to expose "my lower part down there". I pause to note that I accept that the evidence from the doctor is hearsay evidence and I do not admit it for the truth of its contents. However, I accept that the accused believed that he was supposed to take some care so as not to open up the wound again.
- [127] The accused's evidence on this point was not contested and I accept that his description and rationale appear cogent. In other words, recovering from hernia surgery that occurred 11 days before the alleged assault, having staples removed from the wound five days before the alleged assault, and having a wound and bandages on his groin, in my view, supports the accused's version of events that he kept his pants on, only performed oral-genital contact and not penetrative intercourse, and that he did not aggressively restrain the complainant on the morning of April 11, 2022.

[128] I accept the accused's evidence that he did not remove his clothing, that he was cognizant of not risking relapsing his hernia surgery through physical activity and was self-conscious about revealing his wound on his groin to the complainant. I accept his evidence on this issue that he only had oral-genital contact with the complainant and did not remove his pants.

Absence of the Accused's DNA Found in the Sample Taken from the Complainant's Vaginal Swab

[129] As set out above, Dr. Mosimann testified that while there was the presence of male DNA in the sample taken from the vaginal swab from the complainant after the alleged sexual assault, it was insufficient to generate a sample from which to match DNA.

[130] I find that the DNA evidence, or more precisely lack of DNA evidence, somewhat corroborates the accused's version of events, or at least fails to support the complainant's evidence that there was penetrative intercourse.

[131] In making this conclusion, I accept that Dr. Mosimann testified that while it would be expected if there was penetrative intercourse that the male would leave DNA in the vagina of the female, there are reasons that a male's DNA might not be found in a vaginal swab after penetrative intercourse, which includes if the male used a condom, could not produce sperm, or did not ejaculate. Further, I accept that there was male DNA found in the sample, however, not enough to produce a DNA sample. As such, I do not find this is conclusive evidence that the accused did not have penetrative intercourse with the complainant, but I also find it does not provide compelling evidence that supports the Crown's assertion that the accused had penetrative intercourse with the complainant either.

Inconsistencies with the Complainant's Testimony

[132] I acknowledge that the complainant appeared to find testifying difficult. I have no trouble accepting that the complainant was emotional and that it was a stressful experience for her testifying in court. My assessment of the complainant's testimony was that she was generally attempting to be truthful with her answers but provided very little detail and had to be prompted to provide detail in both direct and cross-examination. This made my ultimate assessment of her evidence more difficult, especially so because her evidence shifted. In saying this, I again acknowledge the difficulty in testifying in court, especially regarding events that occurred several years in the past. However, it is difficult for a trier of fact to assess the truth when details, which may even appear insignificant, are inconsistent or become mutable during the testimony. In other words, when assessing the high bar of beyond a reasonable doubt, which is much closer to certainty than more likely than not, trust in a witness can be eroded if what appears to be even non-controversial facts are denied by that witness.

[133] I have already referenced the complainant's inconsistencies regarding the clothing she was wearing, whether the clothing was left or placed on the couch for the RCMP investigator, and who was attending the gathering. However, there are other inconsistencies with her evidence that cause me concern as to whether I can accept her evidence regarding the events of April 11, 2022.

[134] One example is the complainant's repeated refusal to acknowledge she had any sort of relationship or contact with the accused, either platonic or romantic, prior to the alleged assault. She refused to acknowledge that she and the accused had, on previous occasions, gone to a movie, gone to a bar on at least two occasions, and also communicated by text messages frequently. The complainant said her lack of memory of any events with the accused was because she only met him to drink and so would black out.

[135] However, I was shown text messages exchanged between the two that appeared to be coherent exchanges that referenced non-drinking events.

[136] For example, the complainant denied going to a Batman movie with the accused on or around March 5 or 6, 2022. One of the text messages shown to the Court read as follows:

Complainant: I enjoyed tonight. Thank you for hanging out with me...

Accused: Was fun 4 sure. Thanks 4 watching that movie really wanted 2.

Complainant: Me too. Tmrw if your up to it I'll be comfortable at mobys to properly dance or whenever.

[137] While I accept that, with the passage of time, memory of specific events can dull, my specific concern is that the complainant testified that her lack of memory of the seemingly non-controversial events was due to alcohol consumption and that she had blacked out. This is the same reason she testified that she could not remember the events around the alleged sexual assault. The text messages around these events suggest to me that the claimant was not blacked out from alcohol use during her entire relationship with the accused. For example, the text message exchange I just reproduced appears to be coherent and made by someone with an operating mind. Put bluntly, the complainant's description of not remembering events due to black outs, including her relationship with the accused, erodes my confidence in her evidence that she only has a few memories of the night of the alleged sexual assault.

[138] Again, I wish to be clear that the fact that there was any sort of relationship between the complainant and the accused is irrelevant to whether the alleged sexual assault occurred. Friends, family members, intimate partners, and strangers can, and do, commit sexual assault. My concern is that the complainant appeared to use the excuse of alcohol use and black outs to explain and answer why she was unable or unwilling to provide evidence in court. This impacts my assessment of her credibility.

Conclusions Regarding Whether the Crown has Proven the Accused had Penetrative Intercourse with the Accused on April 11, 2022

- [139] There are inconsistencies in the various versions of the events related to the alleged sexual assault as described by the various witnesses. It is my job to attempt to determine what occurred during the alleged sexual assault. I remain mindful that if I am not able to satisfy myself beyond a reasonable doubt as to the guilt of the accused, I must acquit.
- [140] To reiterate, under the test in W.(D.), if I believe the evidence of the accused or if I do not believe the accused, but am still left in reasonable doubt, or if, after careful consideration of all the evidence, I am unable to determine whom to believe, I must acquit. Based on the evidence I described, I find I generally believe the evidence of the accused that he only had oral-genital contact with the complainant. However, even if I am left at the situation of not knowing who to believe, the same result occurs.
- [141] I am left with reasonable doubt as to whether the accused had penetrative intercourse with the complainant on April 11, 2022. However, in this case, that is not the end of the analysis. The Crown asserts that, even on the accused's own evidence, he has committed sexual assault of the complainant because he did not obtain consent to have oral-genital contact.
- [142] I will turn to that analysis now.

Whether the Accused Committed Sexual Assault on the Basis of His Own Evidence

- [143] The Crown argues that, by his own testimony, the accused admitted that he sexually assaulted the complainant. The Crown's argument is twofold: first, the complainant did not consent to the accused putting his mouth on her vagina, and second, the Crown argues that the complainant was too intoxicated to consent. These two arguments do not exist in watertight compartments -- the complainant's intoxication is a factor to be considered by the accused when he is to determine if the complainant's communication of consent is sufficient.

Honest But Mistaken Belief in Communicated Consent

- [144] In response to the first Crown argument, the accused raises the defence of honest but mistaken belief in communicated consent. In my view, there is an air of reality to the defence, insofar as there is evidence upon which a reasonable trier of fact, acting judicially, could:
- 1) find that the accused took reasonable steps to ascertain consent; and
 - 2) that the accused honestly believed the complainant communicated consent.
- [145] The air of reality stage is not a high bar. I must only undertake a limited weighing of the evidence, and any doubt should be resolved in favour of the accused.

[146] In *R. v. Al-Akhali*, 2025 ONCA 229, the Court of Appeal for Ontario articulated the test under the two-part reasonable steps test as follows:

[23] Under the two-part reasonable steps test, judges and juries first determine the circumstances that the accused subjectively knew. Next, they decide if a reasonable person knowing those circumstances would have taken more steps than the accused took to ascertain communicated consent to the sexual activity. The defence fails if the answer to this second question is yes and succeeds if the answer is no or there is reasonable doubt.

[Citations omitted.]

[147] The second requirement, that the accused must "take reasonable steps" in the circumstances known to them at the time to ascertain that the complainant was consenting, is codified in s. 273.2(b) of the Criminal Code. I note that the law was modified to include this requirement in 1992, when Parliament intervened to correct the old law which allowed the accused's subjective belief that the complainant consented to exculpate, no matter how unreasonable and even if the accused did nothing to ascertain consent.

[148] As set out above, the accused testified that after he and the complainant started kissing, she placed her hand on his shoulder and guided his head to her vagina. He also testified that the complainant took off her sweatpants and underwear. The accused testified that he believed that these actions demonstrated the complainant's consent to sexual activity. I accept that the accused took no positive steps at that time to make further inquiries as to whether the complainant was consenting. The issue is whether his actions to ascertain consent were reasonable in the circumstances of being directed to have oral-genital contact with the complainant by her removing her pants and underwear and directing his head to her genitals.

[149] The reasonable steps analysis is highly contextual: *Barton* at para. 108. What steps were required in any particular case depends on the particular facts. Put simply, context is critical in assessing consent. In my view, on the evidence I have accepted, the complainant's actions communicated consent to the accused. There were no additional steps that the accused would reasonably be required to take in these circumstances.

[150] The accused testified that he did take an additional step to ensure the complainant was consenting but did so after he commenced oral-genital contact.

[151] During trial, the accused testified as follows:

Accused: Well, while we were doing that oral sex and then -- of the 11th.

Counsel: Yeah.

Accused: While we were still doing the oral with her, and then that's when I asked -- got [indiscernible] and asked if she was -- 'Are you good?'

Counsel: Yeah.

Accused: And then, she replied, 'Yes.'

[152] As indicated in the accused's testimony, he asked the complainant, "Are you good?" and she replied in the affirmative. But he did so after he had already started the oral-genital contact. I accept that it is not a reasonable step to "test the waters" by engaging in sexual activity and seeking consent after, but note that in *Barton*, the court found that it is not a reasonable step if an accused attempts to test the waters, if an accused recklessly or knowingly engages in non-consensual sexual touching: *Barton* at para. 107 (emphasis added). In the circumstances of this case, the complainant communicated consent in advance of the commencement of the sexual activity. Using the language of the Supreme Court in *Barton*, I do not accept the Crown's argument that the complainant was reckless or knowingly engaging in non-consensual sexual touching prior to asking the complainant if she was "good".

[153] I accept that, in the circumstances, the accused has established that there is an air of reality to his defence of honest but mistaken belief in communicated consent. I conclude that in the particular circumstances of this case, the complainant's actions of guiding the accused to perform oral-genital contact were sufficient to establish that the accused's reaction of complying with the complainant's invitation to commence oral-genital contact without first making further verbal inquiries before commencing sexual activity was reasonable in the circumstances.

[154] While each case of alleged sexual assault is factually distinct, I am guided by *R. v. Heymerdinguer*, 2021 ABCA 112, in which the Court of Appeal for Alberta accepted the trial court's determination that there was voluntary agreement by gesture in circumstances similar to the case at bar:

[29] In considering the honesty of the respondent's belief and reasonable steps, the trial judge found that the pushing down of the respondent's head, if true, was "not ambiguous; it can only mean one thing... It is, rather, the actual initiation of sexual conduct... taking [the respondent's] evidence at its highest and its most favourable and generous level". Further, the trial judge found: "If invited by the other party, albeit by gesture or conduct, to perform a sex act, what other step is necessary to ascertain consent? While not true in every instance, the evidence of reasonable grounds can also be evidence of reasonable steps". Here, he found there was "some evidence of voluntary agreement by gesture".

[155] Where there is an air of reality to honest but mistaken belief in communicated consent, the onus shifts to the Crown to negative that defence. The Crown bears the burden to show, beyond a reasonable doubt, either:

- 1) the accused failed to take any reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting; or
- 2) that the accused did not have an honest but mistaken belief in communicated consent: *Barton* at para. 123.

- [156] Here I must also consider the credibility and reliability of the complainant's and the accused's evidence.
- [157] In the circumstances of this case, I have accepted the accused's evidence where it contradicts the complainant's evidence. I have further accepted as a fact that in the circumstances of this case, the accused and complainant were not strangers to each other and were, in fact, known to each other. I have also accepted that the complainant put her hand on the accused's shoulder and guided his head towards her vagina. This, in my view, is not ambiguous and can reasonably be seen as an invitation through a gesture to perform a sexual act.
- [158] Based on the evidence that I accept, I am satisfied that the accused has established the defence of honest but mistaken belief in communicated consent, including the complainant guiding the accused to have oral-genital contact, coupled with the complainant removing her sweatpants and underwear.

Capacity to Consent

- [159] I will now turn to the Crown's argument that the complainant was intoxicated to the point that she could not provide consent.
- [160] Incapacity short of unconsciousness can flow from intoxication or mental impairment. There is no clear threshold beyond which either intoxication or mental impairment amount to incapacity to consent, so "equating any degree of intoxication with incapacity would be wrong in law": see G.F. at para. 84-85.
- [161] In my view, the Crown has failed to prove the absence of any of the four G.F. factors beyond a reasonable doubt. I accept that the complainant had been drinking and there was a large quantity of alcohol consumed at the gathering. However, there was no specific evidence as to how much the complainant drank. In any event, even if there was that evidence, I am left without clear evidence of intoxication and its impact on the mental functioning of the complainant at the time of the alleged sexual assault.
- [162] The evidence of the complainant's level of intoxication comes from the complainant and C.F. I accept from all of the evidence at trial, the evidence of the complainant, C.F., the accused, and the photos of the copious empty liquor containers in the complainant's living room that there was consumption of alcohol at the gathering. I also accept the complainant was newer to drinking alcohol, as she had only begun drinking in the months before the alleged assault.
- [163] However, while I accept that the complainant consumed alcohol at the gathering and that she was intoxicated, I conclude that I am not in a position to make a determination as to the complainant's level of intoxication at the time of the alleged sexual assault. It would require me to reject the accused's testimony that prior to the sexual activity; he and the complainant were sitting on the couch listening to music and watching YouTube videos. I am not in a position to do so on this point. Further, as I stated above, I have concerns with

the reliability of C.F.'s evidence about the complainant's level of intoxication, and it is eroded because, in my view, she may be confusing it with other parties at the Residence.

- [164] Importantly, having accepted that the complainant guided the accused to perform oral-genital contact and that she communicated that she was "good" to the accused leads me to reject a conclusion that the complainant did not have the requisite capacity to consent to the sexual activity.
- [165] A final concern for me to accept the complainant's evidence that she was blacked out due to the alcohol prior to the alleged sexual assault is that she often referenced other events that she could not remember due to being blacked out from alcohol use. As referenced above, I have concerns with the reliability of the complainant's evidence and the impact of alcohol on her ability to function. An example of this is her testimony that, on another occasion, she was blacked out from drinking but was able to send coherent text messages to the accused and carry on a text message conversation.
- [166] Put another way, I find that I cannot put significant weight on the complainant's evidence that she was blacked out or incapacitated immediately before the alleged sexual assault because she testified that she was blacked out at other times due to alcohol and I am left with doubt in regard to the truthfulness of her accounts of those events. Specifically, I have found that, at those times, she was not so intoxicated that she did not have an operating mind capable of understanding her circumstances or that she was unable to communicate effectively.
- [167] Given the foregoing, I reject the Crown's argument that the complainant did not have the capacity to consent to sexual activity described by the accused on April 11, 2022.

The Accused's Assertion that the Complainant had a Motive to Fabricate

- [168] The accused argues that the complainant had a motive to fabricate her evidence against him. I acknowledge that, given that the accused and the complainant worked together, and it appears that the complainant and D.H. were starting a romantic relationship, there could be a motive to make allegations against the accused to have him effectively removed from the complainant's workplace and her life.
- [169] I conclude that while it could be possible that the complainant took steps to fabricate the allegations against the accused, it seems illogical that if she were attempting to hide any relationship or friendship that she had with the accused from D.H., her first call after the alleged sexual assault would have been to D.H. As such, I find that the accused's argument that the complainant had a motive to fabricate is not compelling.

- [170] While I find that the accused has not proved that the complainant had a motive to fabricate to any degree, such that I should accept it as a basis to mistrust her evidence, I am also aware that an absence of a motive to fabricate does not equate with a finding that a witness is more likely to be truthful or reliable: see *R. v. Bartholomew*, 2019 ONCA 377 at paras. 21-23.
- [171] In summary on this issue, I will not examine the argument of the complainant's motive to fabricate in any depth as, for my consideration, it has little relevance.

Determination

- [172] These proceedings are not a credibility contest between the complainant and the accused. The burden to prove the accused's guilt beyond a reasonable doubt remains entirely with the Crown. The burden is stringent, falling much closer to absolute certainty than to proof on a balance of probabilities.
- [173] Based on a careful consideration of all the evidence and applying the modified W.(D.) framework, I am left with reasonable doubt as to whether the accused committed sexual assault on the morning of April 11, 2022, in Prince Rupert, British Columbia. My determination is based on my acceptance of the reliability of the accused's evidence and my concerns regarding the credibility and reliability of the complainant's evidence. Given my conclusion, I must acquit the accused because the Crown has failed to meet its burden of proving guilt beyond a reasonable doubt.
- [174] A.R., would you please stand? On Count 1, I find you not guilty. You are free to go or stay as you please, but I would like to address you in a moment.
- [175] You are welcome to be seated.

Conclusion

- [176] I note that it appeared difficult for the complainant to testify. I accept that in going to the authorities and participating in these proceedings, the complainant has participated in an undoubtedly difficult process. I have great empathy for the complainant and there is no doubt to me that she was very upset during her testimony in court. However, I cannot reason that a complainant's evidence is sufficiently reliable merely because she has pursued a complaint and showed a willingness to undergo the "unpleasant rigours of a criminal trial": see *R. v. JC*, 2021 ONCA 131, at paras. 88-89.
- [177] I also accept that this has very likely been a difficult process and time for A.R. I understand that as a result of these proceedings, he lost his job, and he has likely had great stress imposed upon his life.

[178] While I have found that the Crown has not met the high threshold of proving guilt beyond a reasonable doubt on the charges of sexual assault, I pause to note that this verdict is not a personal reflection upon the complainant. Rather, it is the outcome of the application of the rigorous standard of proof required in a criminal trial.

[179] I wish to thank counsel for A.R. and the Crown for their well-prepared and argued submissions, as well as for the civility and cooperation they exercised during the proceedings before me.

"Gibb-Carsley J."

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