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CANADA / JUDGMENT

## R. v. Allard

2011 BCSC 587

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COURT

Supreme Court of British Columbia

DECIDED

6 May 2011

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2011 BCSC 587 R. v. Allard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Allard,

2011 BCSC 587

Date: 20110506

Docket: 31065-2

Registry: Prince George

Regina

v.

Kelsey Alexander Allard

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the Crown:

N.P. Barber

Counsel for the Accused:

B. Levine

Place and Date of Trial:

Prince George, B.C.

March 8 - 10 & 16, 2011

Place and Date of Judgment:

Prince George, B.C.

**May 6, 2011**

- [1] Mr. Allard is charged with three counts arising out of an incident in Prince George, B.C. on February 3, 2010: sexual assault causing bodily harm (s. 272(2)(b)), unlawful confinement (s. 279(2)), and attempting to choke the complainant to assist in the commission of an indictable offence (s. 246(a)).
- [2] There is a publication ban in place prohibiting the broadcast of information that could lead to identification of the complainant.
- [3] The complainant, now 19, appeared extremely nervous on the stand, crying, visibly shaking, and speaking in a voice that was almost inaudible. Time and time again the court or counsel asked her to repeat her evidence. The testimony was being picked up on the microphone and recorded, but was not amplified and was most difficult to hear. A transcript of her evidence was ordered to assist the court and counsel in submissions.
- [4] The complainant testified that she used to date Mr. Allard at some previous time. At the time of this incident she was going out with another young man.
- [5] The complainant said she was alone at home on the evening of February 2, 2010, drinking vodka. She said she had had half a mickey of vodka and was not intoxicated. She said she and Mr. Allard arranged to meet for coffee at Tim Horton's.
- [6] She met Mr. Allard at Tim Horton's about 10:30 p.m. They had coffee and talked for awhile and then went to Shooters, a nearby pub, to buy beer and whiskey, just before the liquor store closed at 11:00 p.m.
- [7] They took a cab to a house on Cherry Avenue which Mr. Allard was house-sitting for a friend. The door was locked and Mr. Allard did not have a key or had lost the key. The complainant said Mr. Allard climbed in through a window. In her later statement she said she had climbed through the window. In any event, they got into the house, which had little furniture, and lots of boxes as if someone were moving.
- [8] The complainant said the two of them sat at the kitchen table, drank whiskey and talked. After a couple of hours, they decided to play a game of hide and seek. Mr. Allard hid and the complainant found him; she then hid and he found her behind the bar downstairs. The complainant testified that she was a little bit intoxicated at that point.

- [9] There was a foam mattress on the basement floor. They sat on it. The complainant said Mr. Allard kissed her, she didn't want to, and he pinned her on the bed. She said he tried to take her pants off and once again she said she did not want to. She punched him. He told her to "shut the fuck up and don't try that shit again." She thought he put his hands around her throat at some point. She said she was struggling and she kicked him hard in the leg or crotch. He got off. He looked like he was in pain and rolled over. She ran upstairs.
- [10] She did not recall if she scratched or bit him.
- [11] The complainant said Mr. Allard came upstairs after her, pinned her against the wall by her throat, pulled her to the ground, grabbed her by the feet and dragged her down two flights of stairs and back to the bed. He pinned her again and started to take her clothes off, holding her down by her arms. She punched him in the face but he punched her in return and she gave up.
- [12] The complainant testified that Mr. Allard had sex with her for twenty minutes to half an hour. By "had sex" she said she meant he put his penis in her vagina. She says he pulled out before he ejaculated, which she thinks he did on the bed because she was told the rape kit didn't find any on her. No objection was taken to this evidence, but it is obviously conjecture based on hearsay on the complainant's part.
- [13] The complainant testified that when Mr. Allard was finished he got off, put his clothes back on, went upstairs, and she followed. She said she was "stand-offish and scared." He asked her why, as if he didn't know what had happened. She said Mr. Allard started to cry and said he was sorry. She asked why and he said he had raped her. He said he felt like a piece of shit and he was going to kill himself with his gun.
- [14] The complainant said she was afraid of what Mr. Allard would do to himself so she stayed around until about 6:00 in the morning. She said Mr. Allard called a cab for her, paid for it, and she went home. She agreed in cross examination that Mr. Allard accompanied her home. She said she never saw him again, although he texted her. She said she might have replied to his text just to see if he was okay since he said he was going to kill himself.
- [15] Her mother answered the door when she got home, and asked her what had happened. She told her mother she had been jumped and went to bed. The next morning her mother took her to the orthodontist because her lip had become stuck in her braces.
- [16] The complainant testified that after going to the orthodontist, she came home and slept until later in the afternoon when her boyfriend came to pick her up. She told him what had happened and he took her to police. Pictures were taken of bruises around her lip, which the complainant testified resulted from being punched in the mouth, a series of small bruises on her back, a bruise on the top of her wrist, and large red marks on her ear and behind it into the scalp.

- [17] In cross examination, the complainant acknowledged that she initiated the meeting at Tim Horton's because she missed Mr. Allard. She said she just wanted to get together, she did not want a date. The complainant agreed that she told the police she had already drunk the whole mickey of vodka before she went to Tim Horton's.
- [18] The complainant acknowledged that playing hide and seek was her idea. She was not sure whose idea it was to go to the mattress. She agreed that after the events she described, the two sat cuddling together upstairs.
- [19] The complainant acknowledged that she did not tell the police about the game of hide and seek, nor did she tell them Mr. Allard had brought her home in the taxi.
- [20] There were some significant differences in the complainant's evidence at trial and her statement to the police. The complainant testified at trial that she and Mr. Allard fought downstairs, she kicked him and got away, ran upstairs fully clothed, he came up, pinned her by the throat, dragged her back down, and had sex, vaginal only. She said she was struggling during the incident, although she may not have been tense once she gave up (evidence which is relevant to the doctor's opinion set out below).
- [21] In her statement to the police, she said Mr. Allard had his hands around her throat downstairs only; they had sex downstairs first for about 15-20 minutes, then she kicked him, grabbed her clothes and ran upstairs naked, he dragged her down the stairs and had sex again. She said she was confused and could not remember whether she had her clothes on or not when she ran upstairs. She said she was shaky when giving her statement to the police; the incident was hard to talk about, and the order of things in her statement was jumbled.
- [22] The complainant testified that Mr. Allard did not have anal sex with her, and she does not remember if he stuck his fingers in her vagina. The complainant had told the doctor who examined her that Mr. Allard had anal sex with her and did touch her vagina. She said she did not recall saying that, all she could recall of her visit to the doctor was getting a pap smear.
- [23] The complainant had cell phone records put to her which showed that she initiated the texts shortly after Mr. Allard dropped her off, with a message: "So I kinda miss you. Don't do anything stupid." Mr. Allard replied with a series of messages: "so I kinda am in love with you what am I supposed to do now. I want to die tonight. I don't deserve to live. I can't believe how much of a loser I am. I am sooooo sorry missy, I just keep hurting you, I don't deserve to live. Text me tomorrow please."
- [24] At 2:14 in the afternoon, the complainant texted Mr. Allard again: "Hope you didn't do anything stupid, and you're alright but I think we shouldn't see each other for a while. I'm sorry."

- [25] The complainant said she remembered sending a message but not exactly what she said. She said she did miss Mr Allard before it all happened and wanted to be his friend.
- [26] Defence counsel put some suggestions to the complainant: she agreed they sat at the table, drank for 2 hours, and she said she could have sat on Mr. Allard's lap at some point. She denied consensual sex and said she did not think they had anal sex. She agreed they got dressed and sat on the floor cuddling. She said she did not recall if she told Mr. Allard she wanted to go back to the way things had been when they were together. She did not recall Mr. Allard telling her that, based on the way things had been, things would never go back to the way they had been. She denied becoming angry and striking Mr. Allard in the face, including once with an ashtray, cutting his lip, causing him to defend himself. She said she did not recall hitting Mr. Allard when they were upstairs.
- [27] She agreed Mr. Allard began to cry and they began to console each other. She said she was afraid to go to the police and her boyfriend insisted, but she denied that she was pressured or that she told her boyfriend a story because she didn't want him to know she had cheated on him.
- [28] The complainant's mother testified that her daughter phoned her somewhere between 3:00 a.m. and 5:00 a.m. and said she was with Kelsey [Mr. Allard], getting a cab home. She said the complainant told her she got jumped and her cigarettes were taken, but the mother did not see her daughter's injuries until the next morning - at that time she saw her daughter's lip was swollen and was caught in her braces. Her face and ear were swollen on the left and her earrings were missing. The mother said it looked like the complainant would have a swollen eye. She took her daughter to the orthodontist to have her lip removed from her braces. She said her daughter then went to work, although the complainant had testified that she slept all day.
- [29] The complainant's boyfriend at the time, now 19, testified that he was not bothered by the complainant seeing Mr. Allard. He and the complainant were beginning to go their separate ways by this time in any event. He was concerned about her drinking, they were having disagreements and drifting apart.
- [30] The boyfriend got a text from the complainant saying she'd been jumped. He went over after work and found her curled up in bed crying. She did not want to talk in the house with her parents there. They went out to his car, pulled away from the house and parked. He testified that the complainant told him what had happened and he freaked out and insisted they go to the police, although she did not want to go. He said she had bruises on her back, a scab behind her ear, and bruising on her face.
- [31] Dr. Ferrara was qualified as an expert in examination, recognition, and treatment of physical trauma to the body, including the genital area. He is a member of the local sexual assault team. His focus is on assisting people who allege that they have been sexually assaulted.

- [32] Dr. Ferrara examined the complainant, and found her to be very frightened and anxious. She had a large bruise behind her left ear, a bruise on her left clavicle, a bruise on the back of her wrist, (I note the transcript on p. 11 has the word "breast" rather than "wrist", which is a mistake), a deep bruise to her left lip, damage to the inside of her left upper lip, and a series of bruises on her back in a line down her spine, and a bruises on her left shoulder.
- [33] The complainant had a small tear near her anus that could, in the doctor's opinion, be caused by an assault or by scratching herself. Other than that, she had no observable signs of assault. Dr. Ferrara said 70% of victims with previous sexual experience have no observable signs of assault. He said one explanation is the total relaxation of the muscles because of alcohol.
- [34] When asked to give his opinion on the likelihood of observable injuries if the person is not relaxed and is fighting hard, he restated the same statistic.
- [35] Jody Webster testified that she was moving out of 272 Cherry Street and asked Mr. Allard to house sit. She tried to call him several times on the evening of February 2, 2010, but could not get an answer. She did not find that unusual as she assumed he was drinking.
- [36] The next morning she went to the house with her parents to finish packing. She had given Mr. Allard her key and banged on the door to wake him up. He let her in, looking haggard, hung-over and pale. He had scratches on his face from the inside of his eye and down his cheek. She asked him what happened. She said he appeared not to be aware of the scratches and went to the bathroom to check. He told her he did not know what had happened.
- [37] Later, Ms. Webster asked Mr. Allard about what had happened because the police had questioned her boyfriend who was in jail about an assault at the house. Mr. Allard said he and his former girlfriend had gotten into a fight because she wanted to get back together and he would not agree, given what had happened in the past.
- [38] On the Friday before the trial was to begin, Mr. Allard asked Ms. Webster if she remembered his black eye and cut lip. She told him she only remembered scratches on his face.
- [39] Cst. Pescolla, the investigating officer, obtained the address of the Cherry Avenue residence from the taxicab company. She knew Richard Prince lived there. She called Mr. Prince and told him the house was completely empty and asked him about Mr. Allard. Mr. Prince told her he did not know where Mr. Allard was living, although he had been house sitting for him. Mr. Prince told the constable that he had given Mr. Allard a cell phone. The constable called the cell phone and Mr. Allard answered. After hanging up on her several times, Mr. Allard spoke to a colleague of hers and agreed to come in to the police station the next day. He did not do so.
- [40] Mr. Allard came in five days later on February 9, 2010, asking to speak to another officer who was not on duty. He was referred to Cst. Pescolla who took a warned statement from him which was declared to be voluntary after a voir dire on which defence took no position.

- [41] In the statement, which Crown tendered as part of their case, Mr. Allard said he and the complainant had had consensual sex, and there had been no violence of any kind. He said the complainant had become upset when he told her they would not be getting back together, and he had taken her home. He said he had no knowledge of any injuries to her and she had none when they left the house. He said there were other matters that were relevant to this event that he wanted to talk about to the officer whom he had originally asked for.
- [42] Cst. Pescolla turned off the tape and Mr. Allard told her there was some conflict arising out of someone the complainant's mother was going out with, and with Richard Prince. Cst. Pescolla did not, apparently, take notes of this, and could not remember the details of this exchange.
- [43] Cst. Pescolla did not note any injuries to Mr. Allard. She interviewed Jody Webster at Mr. Allard's request.
- [44] That concluded the case for the Crown. The defence did not call evidence.

## CROWN'S POSITION

- [45] It is the Crown's submission that the complainant was credible, consistent in her essential evidence, and that her evidence is supported and corroborated by independent evidence. That is, after a friendly evening with alcohol consumed, Mr. Allard made advances which she rejected, he attacked her, chased her upstairs, pinned her by the throat, dragged her downstairs by her feet, punched her, whereupon she gave up, and he sexually assaulted her.
- [46] The Crown says the independent evidence of the injuries to the complainant's face, ear, back and shoulder support her evidence. The lack of trauma to the vaginal area is not significant, according to Dr. Ferrara. The complainant testified that she gave up before the actual penetration, so was not still fighting at that time, which is consistent with the doctor's opinion that a person being assaulted may not show an apparent injury if the muscles are relaxed.
- [47] The complainant's mother testified to the injuries on her daughter when the complainant returned home, although the mother did not examine them until the next morning. The complainant had no other opportunity to become injured. The boyfriend testified to her distressed demeanour when he came to pick her up.
- [48] The Crown says the complainant's demeanour on the stand was that of a frightened young person reliving an event over which she feels guilt and shame. When confronted with cross examination, she did not retract her evidence, and denied the suggested version.
- [49] The Crown says the complainant's conduct in remaining with Mr. Allard, consoling him as he cried and expressed remorse, is explainable - he told her he was going to kill himself and she knew he had a gun.

- [50] The Crown acknowledges some inconsistencies - she told the police she was attacked sexually twice, grabbing her clothes and running up the stairs naked, whereas at trial she said no sexual assault took place on the first altercation and she was clothed when she ran upstairs. As well, she told Dr. Ferrara there was anal penetration which she did not testify to at trial. The complainant explained that she was frightened giving her statement to the police and it is scrambled.
- [51] In the Crown's submission, the important point is that the complainant was violently attacked over a period of time - the incident was traumatic as a whole and she would not think to divide it up into parts.
- [52] As for the exculpatory statement tendered by the Crown, Crown says Mr. Allard is obviously not telling the truth when he said nothing happened and the complainant had no injuries. The independent evidence shows that not to be the case. The complainant has injuries consistent with her evidence. Mr. Allard had only a couple of scratches on his face when Jody Webster saw him. Later, he told Jody Webster he and his ex-girlfriend had had a fight in order to explain the scratches. Since a different scenario was put to the complainant on cross-examination, Crown says it cannot be directly compared to her evidence in order to assess it.
- [53] The Crown says all three counts are proven beyond a reasonable doubt.

## DEFENCE POSITION

- [54] Defence says no supportive inferences should be drawn from the complainant's demeanour in the witness box, nor should the court conclude that consoling the alleged attacker is consistent with an attack. It is consistent with the opposite - that there was no attack and that the sex was consensual.
- [55] Defence says the complainant is simply not reliable. She had been drinking that evening. She initiated the contact with Mr. Allard. She could not say with certainty whether she sat on Mr. Allard's lap and whether there was kissing. There are inconsistencies between the complainant's evidence at trial and her sworn statement to the police. Was there one attack or two? Was she naked when she ran up the stairs or clothed? She did not mention anal sex to anyone but Dr. Ferrara. She did not tell the officer she initiated the game of hide and seek. She did not tell the police Mr. Allard told her he raped her when she questioned why he was crying. She did not tell the police she initiated the texts to Mr. Allard after the incident and in fact told the police she did not text him at all. In the witness box she said he texted her, and then recalled that she possibly texted him back. She told her mother she got jumped.
- [56] Although the complainant testified that she was afraid and did not want to see Mr. Allard again, the phone records show she texted him shortly after being dropped off telling him she missed him. Later in the day she texted him to say she was sorry and she hoped he was alright, but they should not see each other again for awhile.

- [57] Defence questions why the Crown put in exculpatory statements as part of their case, and then argue that the statement should not be accepted.
- [58] Defence says the complainant is simply not reliable. She prevaricated or could not remember things going to crucial issues and her evidence cannot be relied on to support a conviction.

## DECISION

- [59] Both the complainant and Mr. Allard were drinking that night. The offence of sexual assault causing bodily harm is one of general intent. Self-induced intoxication is not a defence (s. 33.1 of the Criminal Code). The intentional application of sufficient force as to be capable of causing injury that is more than trivial, as is the case here, cannot be consented to (R. v. Jobidan [1991] 2 S.C.R. 714).
- [60] The complainant sustained injuries which are consistent with being held down by her wrist, being struck in the face, and with being dragged down the stairs - that is the bruises to her back and the injury to her ear, which consists of extensive abrasions to the ear and behind it. These injuries are not trivial.
- [61] According to her mother, the complainant did not have the injuries before she went out to meet Mr. Allard that night. She returned home with Mr. Allard, told her mother she got jumped, and went to bed. When she woke in the morning, her mother saw the injuries. It is clear from the photographs of the injuries and from the evidence of Dr. Ferrara that the complainant was in a physical altercation and sustained fairly severe injuries, particularly to her left ear and to her mouth.
- [62] The first element the Crown must prove beyond a reasonable doubt is that the injuries were caused by Mr. Allard.
- [63] The analysis in R. v. W.(D.) [1991] 1 S.C.R. 742, is relevant to Mr. Allard's statement to Cst. Pescolla. If I believe Mr. Allard's statement to Cst. Pescolla, or I have a reasonable doubt arising from it, or if I am unable to decide whom to believe, I must find Mr. Allard not guilty.
- [64] Mr. Allard's statement to the police is vague and exculpatory. He claims to have had consensual sexual intercourse with the complainant, said there was no violence of any kind, and he knew nothing of any injuries. That cannot be true. The complainant was not, according to her mother, injured when she left the evening of February 2, 2010. The complainant and Mr. Allard spent some time at Tim Horton's before going directly to the Cherry Avenue house. The complainant spent the evening and most of the night with Mr. Allard. There is no evidence that anyone else was with them or with her. Mr. Allard brought the complainant home. She was injured when her mother saw her first thing the next morning. There is no other possible explanation than that Mr. Allard caused the injuries. This is further supported by his text messages the next day.

- [65] In the context of all of the evidence, I do not believe Mr. Allard's statement that he knew nothing of any injuries and never struck the complainant, nor does it raise a reasonable doubt.
- [66] When the principles of *R v. W.(D)* are considered in relation to Mr. Allard's statement to Ms. Webster, I do not believe that the complainant's injuries were caused in the context of a scrap with an ex-girlfriend who wanted to get back together, nor do I have a reasonable doubt about it, arising from that statement. The complainant has injuries to her mouth, back, clavicle, wrists and shoulder. The injuries to her ear and mouth particularly are significant. She is a slightly built girl. Mr. Allard is a normal sized well-built man. While an injury to the complainant's wrists might be explained by holding her arms to prevent her from hitting or scratching him, the additional injuries to her mouth, ear, clavicle and back support the complainant's evidence that she was assaulted by Mr. Allard. On a consideration of all the evidence, I am satisfied beyond a reasonable doubt that these injuries were caused by Mr. Allard. Given all the circumstances and the nature and extent of the injuries, I am satisfied beyond a reasonable doubt that they were inflicted intentionally.
- [67] As well, if the statement to Ms. Webster is an attempt to raise the defence of self-defence, then I am satisfied beyond a reasonable doubt that that defence must be rejected for the same reasons - the relative sizes of the complainant and Mr. Allard, and the location and extent of the complainant's injuries.
- [68] I am satisfied beyond a reasonable doubt on all of the evidence that there was a physical assault by Mr. Allard upon the complainant and that it caused bodily harm. That leaves the issue of whether the assault took place in a sexual context, that is, in a context that would violate the sexual integrity of the complainant.
- [69] The complainant says the assault was sexual in nature, and she did not consent to sexual intercourse.
- [70] There was no sign of forced sexual intercourse on the examination done by Dr. Ferrara, although he said it is very common to have no physical sign of force in cases of sexual assault. The complainant acknowledged that she was struggling during the attack, but said once she gave up, she may not have been tense. Mr. Allard admitted in his statement to Cst. Pescolla that he had sexual intercourse with the complainant, although he says it was consensual.
- [71] The complainant has given three versions of the events in the house. In her statement to the police she said there were two incidents of assault, both vaginal. To Dr. Ferrara, she said there was vaginal penetration and anal penetration as well. In the witness box she said there were two stages to the fight but only one sexual assault, which was vaginal.
- [72] The complainant was admittedly intoxicated at the time of these events. As well, there is evidence of ambiguity on the complainant's part regarding her feelings for Mr. Allard. She initiated the contact that night with Mr. Allard, as well as the game of hide and seek. She was

equivocal about other contact - perhaps sitting on his lap and kissing. The complainant, despite her injuries, admittedly consoled Mr. Allard after the assault, first in the house, and then by text message after getting home. Mr. Allard, by crying and apologizing and threatening to kill himself, was clearly and successfully manipulating the complainant.

- [73] The complainant said the incident was difficult to talk to the police about and she has some things scrambled. She says she does not remember what she said to Dr. Ferrara. Her evidence has some discrepancies but she is consistent in several aspects - she was dragged down the stairs and she was forced to have sexual intercourse. The injuries, particularly the injury to her ear and the bruises on her back, are consistent with being dragged down the stairs. Her behaviour afterwards in consoling Mr. Allard and in being concerned at his threats to commit suicide is an indication of how young and easily manipulated she is, especially under the influence of alcohol.
- [74] Despite the discrepancies in her evidence, the complainant's account of the events in the house was generally consistent - a struggle downstairs, running upstairs, being chased and dragged back down the stairs, with another struggle culminating in sexual intercourse. The complainant, despite her obvious discomfort on the stand and her difficulty with some of the details, was responsive and not evasive. She was not shaken in her assertion that she had been forced to have sexual intercourse by being dragged downstairs and punched, which caused her to give up. Her evidence at trial was of a less extensive sexual assault than she had previously recounted, but considering all of the evidence, I am satisfied beyond a reasonable doubt that the Crown has proven that Mr. Allard assaulted the complainant, that the assault took place in a sexual context, and that the sexual intercourse was not consensual.
- [75] I find Mr. Allard guilty of Count 1.
- [76] I will now turn to Count 2. Counsel did not address the three counts separately in argument, concentrating their submissions almost exclusively on issues of credibility.
- [77] Obviously, any victim of sexual assault will have been confined against her wishes for the period of the assault, but it does not necessarily follow that every charge of sexual assault permits a second charge of unlawful confinement under s. 279(2) to be laid. Although I have not been referred to any cases on this point, it seems to me that there must be a separate element arising from the evidence that would allow the trier of fact to find that the accused had the mens rea for the charge of unlawful confinement, as well as for the charge of sexual assault.
- [78] The offence of unlawful confinement requires the victim to be physically restrained for a significant period of time, contrary to her wishes, so she cannot move about from place to place. *R v. Gratton* (1985) 18 C.C.C. (3d) 462 (Ont. C.A.). The accused must intend to confine the person, in the sense of intending to prevent the victim from leaving (*R. v. B.(S.J.)* (2002) 166 C.C.C. (3d) 537 (Alta C.A.).

[79] In the circumstances here, while Mr. Allard had the mens rea for sexual assault during the assault itself, in my view he also had the separate mens rea for unlawful confinement when he pursued the complainant up the stairs when she managed to free herself the first time, captured her and dragged her back downstairs again. The complainant said the incident lasted 20 - 30 minutes which is a significant period of time. I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Allard unlawfully confined the complainant during this time. I find him guilty of Count 2.

[80] I now turn to the third count under s. 246(a) which provides:

**Everyone who, with intent to enable or assist himself ... to commit an indictable offence**

(a) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance, is guilty of an indictable offence and liable to imprisonment for life.

[81] No particular argument was addressed to this count, except a reference by the Crown to the complainant's evidence that at some point, Mr. Allard put his hands on her throat.

[82] The complainant testified that Mr. Allard "pinned me against the wall by my throat" before he pulled her to the ground and down the stairs. She said she tried to fight him off but he was too strong. She agreed she had not mentioned to the police that she had been pinned by the throat while upstairs. She said later "he put his hands around my throat too I think downstairs, but I don't really remember," after she had punched him. She also said he "pinned" her and held her down by her arms when they were downstairs the second time. At one point in her testimony she did say she stopped struggling when he had his hands on her throat, but she also testified that she stopped struggling and gave up when he punched her face. The complainant had no marks on her throat. She did not testify that she felt herself lose consciousness.

[83] Section 246(a) carries with it the possibility of life imprisonment, which, while not relevant to proof of the offence, demonstrates how serious a charge this is. The phrase "render another person insensible, unconscious or incapable of resistance" indicates that the Crown must prove an intent beyond a momentary application of hands or arm (if that is what the complainant meant by "pinned") to the throat.

[84] There is some evidence that the accused applied force for an undetermined amount of time to the complainant's throat at some point in this incident, although the timing, nature, and extent of the contact is not clear. I am not satisfied on the basis of that evidence that the Crown has proven the elements of s. 246(1)(a) beyond a reasonable doubt. I find Mr. Allard not guilty of Count 3.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries

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Prepared on 30 October 2026 · Esheria