

CANADA / JUDGMENT

R. v. Antonius

2020 BCSC 1360

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Antonius,

2020 BCSC 1360

Date: 20200728

Docket: 27320-2

Registry: Vancouver

Regina

v.

Karl Richard Antonius

Restriction on Publication: Pursuant to 486.4 C.C.C.

Corrected Judgment: The text of this judgment was corrected at paragraphs 5 and 13 on October 7, 2020.

Before: The Honourable Mr. Justice Cullen

Oral Reasons for Judgment

Counsel for the Crown:

A.C.L. Ip

Counsel for the Accused:

W.B. Smart, Q.C.

S.J. Humphrey

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 23 & 24, 2019

November 25-27, 2019

January 27-31, 2020

& March 9, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2020

- [1] THE COURT: Karl Antonius is charged with a single count of sexual assault of T.K. arising from events which took place in the early morning of September 27, 2015, in Vancouver.
- [2] The dominant issue in the case is whether Mr. Antonius should be found guilty of that sexual assault or whether he should be found not criminally responsible by reason of mental disorder.
- [3] My task in addressing the issue in this case differs from the task in most criminal cases where the issue is whether the Crown has met its onus of proving the essential elements of the offence charged beyond a reasonable doubt. In this case, it is not disputed that the accused had sexual intercourse with the complainant without her consent. It is only disputed that the accused's actions were voluntary, which is an essential element of the *actus reus* of the offence.
- [4] Because there is a legal presumption that an accused's actions are voluntary and not the product of a disease of the mind rendering him incapable of appreciating the nature and quality of his act or knowing that it was wrong, the onus falls upon him to prove, on a balance of probabilities, that his actions were due to a disease of the mind, in this case parasomnia, and hence involuntary: see *R. v. Stone*, [1999] 2 S.C.R. 290, and *R. v. Luedecke*, 2008 ONCA 716.
- [5] The Crown called its case on April 23 and 24, 2019, consisting of the evidence of the complainant, T.K., and her roommate, L.B., as well as two sets of admissions of fact dated April 9 and 24, 2019, respectively. When the Crown closed its case, the accused sought and was granted an adjournment to retain expert evidence to explore whether the accused was experiencing an episode of parasomnia at the time of the sexual act complained of.
- [6] The trial resumed on November 25, 2019, when Jason Harmon and Robert Anderson, two friends of the accused, testified as to their observations of him apparently sleep walking and sleep eating over the years; the accused's mother, Valda Downing, and his aunt, Susan Downing, who testified to similar observations; and the accused's girlfriend, D.H., who

testified to the accused sleep eating and on one occasion apparently experiencing an episode of sleep sex or sexsomnia while staying in an apartment in Mexico. The accused also testified as to the events of September 26 and 27, and to his background and experiences.

- [7] The trial was then adjourned to permit Crown counsel to retain an expert to respond to the accused's experts, Dr. Maureen Ceresney and Dr. Jonathan Fleming who by then had been retained.
- [8] The Crown retained Dr. Mark Pressman following the adjournment and he produced a responsive report before the resumption of the evidence on January 27, 2020.
- [9] As the trial proceeded, it became apparent that Dr. Ceresney agreed with an opinion expressed by Dr. Pressman in his report that the Mexico incident involving D.H. was not a parasomniac event. At the end of Dr. Ceresney's evidence, the accused called an additional "fact" witness, W.L., to testify as to an event presented as an episode of sexsomnia between him and her. The accused was recalled to testify about that incident.
- [10] The defence then called Dr. Fleming and closed its case, following which the Crown called Dr. Pressman in rebuttal.
- [11] Ultimately after oral and subsequent written submissions concluding April 6, 2020, due to complications arising out of the pandemic, the date for a decision was adjourned to today's date.
- [12] In terms of the evidence of T.K., the complainant, I think is fairly and comprehensively summarized in the accused's summary of evidence in the written closing submissions at paragraph 29, and rather than reviewing my own account of her evidence, I will simply incorporate by reference all the bullets in paragraph 29 of the accused's closing submissions:
- Ms. Burden and her two friends arrived at Prohibition within about five minutes of the arrival of T.K., Mr. Antonius, Ms. Lindley, and Mr. Rasekh. Shortly after, Ms. Lindley and Mr. Rasekh went outside to smoke (p. 15).
 - Mr. Antonius ordered drinks for Ms. Burden and her friends, as well as for himself and T.K. (p. 15).
 - Ms. Burden and her friends left after about 10 minutes. Before they left, Ms. Burden asked T.K. if she wanted to go with them. T.K. said she would wait for Ms. Lindley as she was staying at her and Ms. Burden's house (p. 15).
 - Shortly after Ms. Burden left, Ms. Lindley texted T.K. and said she was going back to Mr. Rasekh's house (p. 15).
 - The text was sent at 1:23 a.m. [see T.K.'s written statement, Ex. A] (p. 42).

- T.K. went to bathroom shortly before 2:00 a.m. and discovered that she didn't have her keys with her, and remembered that Ms. Lindley still had them. She began texting Ms. Lindley and Ms. Burden, and Ms. Burden suggested she come to Alena's apartment and sort things out (p. 16).
- T.K. and Mr. Antonius left Prohibition and went outside and across the street to the Four Seasons Hotel to get a cab. There were people waiting there already and they were told there was a 45-minute wait for a cab so they walked down West Georgia Street trying to flag a taxi to take T.K. to Alena's apartment (p. 17).
- It was cold out and T.K. was tired (p. 47). Her phone was also dying and needed to be recharged (p.19).
- Mr. Antonius suggested that they could sleep at his suite at the Fairmont Pacific Rim. T.K. trusted him that they would sleep and they would wake up and get her keys (p. 18).
- T.K. said that she and Mr. Antonius got to the suite probably a bit before 3:00 a.m. (p. 18).
- She said she did not "put anything out there" that would suggested she wanted to have sexual intercourse with Mr. Antonius (p. 21).
- Mr. Antonius was generally polite, respectful, and friendly from the time they met at 8:00 p.m. until getting to the Fairmont. He never talked about sex and never suggested anything sexual to T.K. (p. 49).
- Mr. Antonius showed T.K. around the suite. He did not make any overt suggestions about sex - there was no sexual touching, and he did not put his arm around her or kiss her (p. 50).
- Mr. Antonius' conduct throughout the evening gave T.K. the confidence to trust him (p. 50).
- Mr. Antonius got into bed after she did. She was lying on the right side of the bed on her left side. Mr. Antonius touched T.K.'s bottom twice over top of her clothing and she said no each time, she just wanted to sleep (pp. 21 - 22).
- He touched her a third time as he tried to take off her shorts. He reached into her shorts and she could feel the fabric moving down on one side. She smacked his hand but not aggressively, and said "no", and he said "okay" (pp. 22 and 51).
- While they were in bed there was no talking and Mr. Antonius did not try to kiss T.K. or put his hand over her breast (p. 52).
- It never crossed T.K.'s mind that she should sleep on one of the couches or ask Mr. Antonius to do so because she trusted him when she said she just wanted to go to sleep (p. 50).
- A maximum of 20 minutes passed from the time they arrived at the Fairmont until they went to sleep (p. 34).

- At some point after falling asleep, T.K. said she was "kind of in and out of consciousness" and woke up to Mr. Antonius having sex with her (p. 23).
- T.K. was in the same position she fell asleep in - on her left side, facing the wall (p. 23).
- T.K. said she was "kind of was still waking up and not really sure of what was happening." She "was like slowly coming out of sleep", "was kind of in shock", and "didn't know what to do" (p. 24).
- She said it took a moment for her to realize what was happening and she just froze (p. 52).
- By time she realized what was happening, Mr. Antonius was up and gone (p. 52).
- Nothing was said by either of them (p. 24).
- She does not recall where Mr. Antonius' hands were when she woke up and she does not remember whether Mr. Antonius had clothes on or not (p. 52).
- T.K. still had her shirt on but her underwear and shorts were not on her (p. 24).
- It wasn't very long until Mr. Antonius finished and then got up and left the bedroom. It was a very short period of time (p. 25).
- T.K. does not believe Mr. Antonius used a condom (p. 25).
- She grabbed her underwear and shorts and went into the bathroom and locked the door (p. 25).
- She sat on the toilet trying to wrap her head around what had just happened (p. 25).
- She was trying to figure out how to get out of there without upsetting Mr. Antonius (p. 25).
- Mr. Antonius knocked on the door and asked if she was okay. T.K. said she was fine and was just using the washroom (p. 25).
- T.K. came out of the washroom and got her phone from the other side of the bed. Mr. Antonius was in the bedroom when she did this (p. 25).
- She was wearing the shorts Mr. Antonius had given her when she came out of the washroom. She said she tried to act like nothing unusual had happened (p. 53).
- Mr. Antonius asked her again if she was okay and she said "No, I'm fucking mad". She did not tell him why because she assumed he would know (p. 26).
- She said it "like as a reaction." She doesn't know if she said it aggressively but she said that she was not as calm as she should have been. She immediately tried to go back to her calm demeanour (p. 53).
- T.K. then went into the living room with her phone and started texting Ms. Burden. Ms. Burden wasn't responding so she started texting Jessica Rolli. T.K. believed it was about 4:00 a.m. Ms. Rolli answered but she was in North Vancouver (p. 26).

- T.K. said that when she was messaging Ms. Rolli, she was panicked and upset and delirious (p. 29).
 - Mr. Antonius came into the living room and T.K. said that she lied to him and said Ms. Burden was back home and she was going to go home. T.K. said she was trying to remain calm but she felt unsafe, kind of delirious and still in a state of shock (p. 26).
 - She said that Mr. Antonius was very coherent and there were no issues with his balance or walking. He didn't seem overly intoxicated. He appeared to understand where he was and what T.K. was saying and responded in an appropriate way (p. 27).
 - T.K. then went back into the bedroom and grabbed her dress and changed in the bathroom (p. 30).
 - Mr. Antonius asked T.K. if she wanted to go back to his apartment and she said, "No, I just want to go home to my bed" (p. 30).
 - T.K. did not see anything unusual in Mr. Antonius. He responded normally and was aware of his surroundings (p. 30).
 - T.K. and Mr. Antonius left the suite and were in the elevator from approximately 4:33:19 a.m. to 4:33:59 a.m. [see video - ex. 4]
 - T.K. said that when she was in the elevator she was just trying to remain calm and act as if nothing had happened (pp. 32, 55).
 - Mr. Antonius asked her to share a cab but she said, "We're going in different directions and it wouldn't make sense". When the cab pulled up he said, "Don't I get a kiss goodnight?" and she said, "No" and just got in the cab (p. 31).
 - Afterwards, Mr. Antonius called T.K. three times, left two voicemail messages, and texted her once (p. 38).
- [13] Similarly, with respect to the witness, L.B., the summary of her evidence in paragraph 30 of the closing submissions of the accused, I will incorporate by reference as well:
- Ms. Burden and her two friends arrived at Prohibition between 12:45 a.m. and 1:00 a.m. (p. 5).
 - Ms. Burden and her friends were not at Prohibition for long, maybe between 15 and 20 minutes (pp. 6, 11).
 - Ms. Burden was tipsy but not drunk. T.K. seemed entirely sober.
 - Mr. Antonius seemed like he had been drinking. He wasn't slurring his words. Ms. Burden has worked in restaurants for 10 years and she would have continued to serve him one or two more drinks and then switched him to water (pp. 6-7).

- Ms. Burden was not asked about Mr. Antonius' sobriety in her police statement on October 6, 2015 and was now trying to recall three and a half years later (p. 13).
- [14] Insofar as the admissions of fact led in the Crown's case are concerned, the pertinent ones for the purposes of these reasons are found in paragraphs 31, 32, and 33 of the accused's closing submissions and read as follows:
 - 31. Mr. Antonius' DNA was found in Ms. [K.]'s vagina.
 - 32. The RCMP Forensic Laboratory analysis of the vaginal swab concluded "semen not confirmed". This means: "A positive screening result was obtained which means semen may be present; however, the microscopic examination was negative".
 - 33. The screening tests can give positive results with other substances.

Evidence of Valda Downing

- [15] Insofar as the defence case is concerned, the accused's mother, Valda Downing, testified that both she and her husband, the accused's father, had sleep issues. She had "loud snoring and sleep apnea", her husband had the same condition, but he also talked in his sleep and ate during the night, possibly while he was asleep.
- [16] When the accused was about eight years old, after being ill, he had various sleep issues. He did not want to sleep. He would talk and move furniture in his sleep and he would sleep walk. She testified that as an adult, he also appeared to have sleep problems. He would get up and eat from the refrigerator or from the cupboards and then go back to bed. When told about it later, he would say something like, "I must have been hungry."
- [17] Ms. Downing travelled with Mr. Antonius on a number of occasions and often stayed in the same room but different beds. One time in the summer of 2018, they were forced to share a bed together, a king-size bed in a hotel in Rome. After she went to sleep she woke up to find the accused in bed, cupping her breasts quite firmly. She told him to stop it, he did, and the next day he had no recollection of the event. She recalled hearing him snoring before the incident occurred.
- [18] On another occasion during the same trip while staying in his apartment in Stockholm, she used his bed and he slept on a couch in the living room. One night, he came into the room in the nude and asked, "What are you doing in my bed?" She got up and walked him back to the couch. He had no recollection of the incident the next morning.
- [19] She was with the accused, his girlfriend, D.H., and Ms. Downing's sister Susan staying in a condominium in Mexico in November 2018. She recounted hearing about an incident that occurred in the night time involving her son and her sister, but had no direct knowledge of it herself.

- [20] On none of the occasions she described could she say what amounts of alcohol Mr. Antonius had consumed prior to the incidents.
- [21] In cross-examination, she acknowledged that in relation to the incidents in Stockholm and in Rome, she thought it could have been linked to drinking. She thought that because on both occasions the accused had been out socializing with friends after she went home and to bed.

Evidence of Jason Harmon

- [22] The witness Jason Harmon testified he knew the accused since 1994. He described him as a close friend, almost a member of his family, whom he travelled with extensively. He testified he often stays with the accused when he is in Vancouver and the accused has visited him in Alaska. He has also been to the accused's cabin in the Okanagan Valley and travelled with him to various countries. They have shared a room while travelling. He described the accused as a person who struggles to fall asleep and has substantial sleep issues. He described him as sleep walking, sleep talking, and sleep eating. He is aware that the accused is taking various medications to address his sleep issues. He is aware that the accused suffers from anxiety and uses medications to counter that. He described the accused as not drinking alcohol very much. He expressed the belief that the accused had sleep apnea and also restless-leg syndrome.
- [23] As to what he believed to be sleep eating, he described waking up one night when he and the accused were staying in the Okanagan cabin and seeing the accused in the kitchen eating. The next morning, the accused asked him why he had left the food out and Mr. Harmon told him that it was he, the accused, who had been eating. He did not appear to remember it. He said that was in the early 2000s and he had seen it multiple times over the years since then. He testified that he would steer the accused back to bed in those circumstances and put the food away. The accused has never commented that he had any recollection of those events. Mr. Harmon has also seen him standing in the bathroom staring at the wall. He has also heard the accused talking in his sleep. He did not generally associate those incidents with the accused drinking alcohol and did not see him take recreational drugs.
- [24] He agreed there have been times when they stayed together when no sleep eating or sleep walking took place, and he added that the accused was often naked when he was either sleep walking or sleep eating. He said the accused never acted inappropriately towards him.

Evidence of Robert Anderson

- [25] The witness Robert Anderson worked with the accused about 20 years ago in an investment firm. They became friends, and when Mr. Anderson retired from his role as an investment advisor, he began living on his catamaran in the Caribbean. The accused made many trips to visit with him and his partner and typically stayed about a month at a time on the boat.

- [26] Mr. Anderson testified the accused had issues with sleeping, including occasions when, after going to bed, he would see the accused in the kitchen eating in a very disorderly manner and making loud noises. He and his partner would shout at the accused to wake him up and get him back to bed. He testified it happened at least a couple of times per trip. He described the eating incidents as being quite different from when the accused was awake. The accused was also naked when those incidents occurred.
- [27] He recalled one occasion when he woke up and found two large empty tins of condensed milk in the kitchen area. He described the accused coming out of his condition and appearing to be in a dazed or confused state. He would then be shuttled back to bed. Whenever he talked to the accused about the incidents of sleep eating, he appeared not to recall them. He testified to one occasion where the accused was with them when they were docked at a marina in Antigua. He was awakened by a security guard whom he knew, who told him the accused was down at the end of the dock naked and that he should go and collect him. He went and saw the accused staring out towards the ocean. He had to repeatedly call his name. "He came to and I took him back to the boat." After that, Mr. Anderson adopted a practice of locking the accused into the area where he slept. The accused appeared to have no recollection of what had transpired the next morning.
- [28] He said the incident in Antigua was in 2010. The incident with the condensed milk cans was between December 2018 and December 2019.

Evidence of Susan Downing

- [29] Susan Downing is Valda Downing's sister, the accused's aunt. She worked for many years in education, but presently works as a tax service agent for Canada Revenue Agency. She testified that she has a close relationship with Mr. Antonius. She is aware of him having had sleep issues since he was a child. She believed it manifested itself when he was about 10 and had some kind of kidney infection, although she did not know if there was a connection.
- [30] She recalled seeing the accused sleep walking as a child and sleep talking, but was not really making sense. He would come to when she and her sister tried to talk to him. She is aware that as an adult, Mr. Antonius had issues with insomnia. She was present at a family event in Puerto Vallarta, Mexico, in November 2018. She stayed in an apartment with her two sisters, including Valda, with the accused, and with D.H. As well, her brother and another family member stayed with them in the same apartment. There were four bedrooms. Mr. Antonius and D.H. were in one and she shared one with her brother.
- [31] There was a birthday party in a restaurant on the ground floor of the building which housed the apartment. At some point, the accused and her two brothers came up to the apartment. She and her sisters were not drinking at the time, but she thought the accused and her brothers had a drink in the apartment after returning from the party. She did not think that the accused showed any signs of inebriation.

- [32] At some point she got up because she felt hot and went in to lie on a couch close to the open balcony door. When she lay down, the accused came up to her. He was wearing no clothing and asked her if she needed any blankets or a pillow. She told him he should get some clothes on, but he did not react. He acted as though it was normal. He then went around the corner, back into the room with D.H., and she did not see him any more. She mentioned the incident the next morning and the accused did not seem to have any recollection of it. She thought he was basically asleep when it happened, as he did not have any recollections of it or react as though it was unusual at the time.
- [33] She said the accused spoke in a normal speech pattern, did not appear slow or dopey, but testified it was odd he was wearing no clothing and that he was offering her a blanket when she had come up to sleep because it was so hot.

Evidence of D.H.

- [34] At the time of her testimony in November 2019, Ms. H. was 20. She had been dating the accused for about two years, although she lives in Copenhagen and he in Stockholm. They travel together and visit one another in their respective cities. She has been to his cabin in the Okanagan. She is aware he has sleep problems. She recounted an incident when she was visiting him in Stockholm. One night he appeared to have eaten half a loaf of heavy Swedish rye bread. When she asked him the next morning about it, he appeared confused and said he must have eaten it in his sleep. She is aware of various sleep medications he has taken.
- [35] She described an incident that took place when she and the accused were staying together in an apartment in Mexico with other family members. She went to bed first. He then came to bed and appeared to fall asleep. She described a series of events through the night, which included her waking up and finding him kneeling in front of her, spreading her legs apart. She had never experienced that before. When she told him to stop, he got upset about something. He then looked at his phone and read aloud a text on his phone. He threw the phone on the bed and said, "What is that supposed to mean?" She read the text herself; it seemed innocuous.
- [36] The accused was saying things that did not make any sense to her. She managed to calm him down. She believed he was sleep walking. She felt he was not in control of himself. Later she heard noises from the kitchen and woke the accused up. He was naked and went out to the living room and spoke to his aunt, Susan Downing. She heard him ask his aunt if she wanted their blanket. She found that strange because it was hot and they only had one blanket. He then came back to bed and began touching her, wanting to have sex. He was upset when she refused. He was talking but it made no sense to her. He was talking about random things which made no sense to her. He went out on the balcony until she persuaded him to come back to bed. He fell asleep but she did not.

- [37] About 7:00 a.m., she awakened him. His eyes seemed open. He started touching her again, but she started crying and he appeared to really wake up and did not understand why she was crying. He seemed confused and did not appear to remember anything at all.
- [38] After the incident in Mexico, she told the accused not to take the sleeping pills he had taken because they concluded it was maybe because of the pills he was acting strangely. She testified when going to sleep, he would sometimes put his hand in the waistband of her panties while holding her.
- [39] In cross-examination, she testified that she just learned he had been charged with sexual assault in this case when they returned to Vancouver from Mexico in November 2018. He told her, "It was made up."
- [40] She agreed that when she started crying after he touched her at 7:00 a.m., he seemed to have snapped out of it. There was no hesitation. She had never seen him act that way before.
- [41] As far as the accused's evidence is concerned, once again I will rely on and incorporate the defence summary of his evidence in paragraph 39 of their closing submissions:
- Mr. Antonius described growing up in Abbotsford, problems he had with school, dropping out after grade 9, wanting to be a stock broker like his great uncle, going to Toronto and working in construction, taking night courses at Ryerson, eventually getting into the business as a stock broker at National Bank, moving to the Kootenays where his parents were then living after the market recession in the late 1980s, unsuccessfully trying to upgrade his education at Selkirk College in Castlegar, moving to Vancouver where he obtained employment at a brokerage firm, selling clothes to supplement his income, moving to Canaccord, and eventually transitioning into employment where he researches investment opportunities, usually in the resource industry, raises money and/or invests his own money, and brings in qualified individuals to get the businesses up and running before transferring ownership and management to others to continue with the project (pp. 46, 50-62).
 - In 2015, he was involved with a Canadian company, Boreal Metals, that had mining operations and assets in Sweden. He was President and CEO of Boreal until 2018 when he stepped down because of this charge (p. 63).
 - He also leased a suite at the Fairmont Pacific Rim from which he operated a business providing corporate services to public companies. In 2015, he had six people working from that business suite (pp. 63-64).
 - He explained the medications he has taken over the years to deal with insomnia, anxiety, and ADHD. These medications included Ativan and zopiclone (pp. 48-50).
 - He described his low self-confidence, which he believes stems from his problems with school and dropping out after grade 9 when he was 17 years of age (pp. 51-52).

- He was married in the early 2000s to a lawyer at McCarthy Tetrault, but that relationship ended within a few years as he was living in Europe for business reasons and they were not seeing much of each other and grew apart (pp. 64-65).
- He testified that he had no memory of the various incidents of sleep walking and sleep eating described by Dr. Harmon, Mr. Anderson, D.H., his mother, and his aunt (Nov. 27, pp. 3-18).
- He said there have been other incidents where he would wake up and find he was in the kitchen getting something to eat but had no memory of how he got there. He said just assumed that it was because he was tired and half asleep (Nov. 27, p. 46).
- He was concerned by these events and about ten years ago called the sleep disorders clinic at UBC but was unable to get an appointment because of the waiting list (Nov. 27, pp. 8-9).
- He testified that in 2015, he was spending most of his time in Europe and had returned to Vancouver from London on September 15, 2015 with the intention of moving to London permanently. He had a return flight to London booked for October 10, 2015 (pp. 66-68, ex. 7).
- After returning to Vancouver on the September 15, 2015, he was busy getting his business and personal affairs in order before he moved to London (p. 69).
- He described a typical day for him at this time as getting up at 5:00 a.m., taking his dog for a run in Stanley Park, and then going to his office at the Fairmont to work. He said he was communicating and doing business with people in London and Germany, who were eight to nine hours ahead in terms of time zones (pp. 69-70).
- He said that approximately three days prior to September 26, 2015, he was asked by a work acquaintance, Mr. Rasekh, to go on a double date with him, his girlfriend, and one of her friends (p. 70).
- On the morning of September 26, 2015, he got up at his usual time and took his dog for a run for a couple of hours, returned to his apartment, worked on packing for Europe, and then went to his office at the Fairmont at around 4:00 p.m. where he worked for a few hours. He met Mr. Rasekh in the lobby of the Fairmont at 7:30 p.m. for a glass of white wine and they talked for about half an hour before he drove them in his vehicle to the Boulevard Restaurant at the Sutton Place Hotel (p. 71).
- He described meeting T.K. and Ms. Lindley, their dinner, his conversations with T.K. during dinner and back at his apartment, and the amount of alcohol he consumed at Boulevard, his apartment, and Prohibition (pp. 71-79).
- He agreed that he had touched T.K. on her arm or shoulder once or twice at dinner and that this was intended to be flirtatious. He said that he wanted to demonstrate his interest in her. He said that she also seemed interested in him (Nov. 27, pp. 55-56).

- He said that he has occasionally used cocaine in the past, but usually only about once a year. Back at his apartment, Mr. Rasekh put some cocaine on the kitchen counter when they were talking about leaving for Prohibition and offered him some. He had not planned on using cocaine and hesitated, but was feeling tired and thought it might give him a bit more energy before they left. He said that this was the effect it usually had on him (pp. 75-76; Nov. 27, pp. 59-60).
- He knows he consumed cocaine only once that night because he recalls it giving him a bad feeling and making him anxious. He said he took very little (pp. 76-77; Nov. 27, pp. 59-60).
- While at his apartment, he and T.K. talked about a vintage scarf he had shown her, and she jokingly told him that she was going to take it home with her (p. 77).
- He said that he really liked T.K. and that he put his arm around her a few times and kissed her on the cheek once while they were sitting on his couch in his apartment. He said he planned on asking her out again (p. 77).
- He said there was no discussion between them about sex. He does not usually have sex on a first date as he wants to get to know the person better before having sex so that he has an emotional connection with them (pp. 77-78).
- When they were at Prohibition and learned that Ms. Lindley and Mr. Rasekh had left, he and T.K. were both pretty disappointed. They thought it was rude of them not to come and say goodbye. He said they were both a bit angry (p. 79).
- He said that when T.K. realized Ms. Lindley had left with her keys, she was quite upset because she did not have any way to get into her apartment, her phone battery was low, and she was worried about not being able to get in touch with her friends (p. 80).
- They left Prohibition just before 2:00 a.m. He does not recall if it was closing time but that was not why they left. They went outside to look for a taxi with the intention of going their separate ways. He intended to go back to his apartment alone (pp. 81-82).
- They looked at the taxi queue at the Four Seasons across the street and there were no taxis so they walked across street and spoke to a bellman who said there was a 45-minute wait. They looked for a taxi on the corner of West Georgia but didn't find one. They waited for 10 to 15 minutes for a taxi without success. He told T.K. that if she was stuck, they could go back to his work suite at the Fairmont where there is a bedroom, charge her phone, stay the night, and sort out everything in the morning. She agreed. He agreed that they could have waited longer than 10 to 15 minutes for a cab, perhaps 20 to 25 minutes, but probably 20 (pp. 81-82; Nov. 27, pp. 70-72).
- He said it was probably about a five or ten minute walk to the Fairmont. They entered via the residence side of the building on West Cordova Street and took the elevator to his suite. He believed that they walked at a fairly brisk pace because it was cold out (pp. 82-83; Nov. 27, p. 73).

- He estimated that they got to his suite at approximately 2:30 a.m., or between 2:30 and 2:45 a.m. (p. 83; Nov, 27, p. 73).
- He said that he did not feel intoxicated. He had a glass of white wine at the Fairmont before dinner, approximately three glasses of white wine at dinner, approximately one glass of white wine at his apartment, and a vodka and soda at Prohibition. He weighed approximately 200 lbs. at the time and had consumed the alcohol over the course of many hours (pp. 85-86).
- He testified that he showed T.K. around the suite, gave her a pair of his boxer shorts and a t-shirt, and that she went into the ensuite bathroom to change while he went into the bedroom and took his zopiclone and Ativan. He said that he was really tired but knew that if he did not take the pills he would probably wake up within an hour of going to sleep and that he did not want to have a tough time sleeping (pp. 86-87).
- He testified that he had no thoughts of having sexual intercourse with T.K. that evening and did not take any Viagra, which he would have needed to take if he wanted to have sex with T.K. (p. 87).
- His recollection is that she got into bed after he did. She laid on her left hip facing towards the balcony. He said that he had not suggested sex or tried to kiss her in the suite. After she got into bed, he moved closer to her and put his right hand on her bottom to be affectionate. He said that he was planning on cuddling her and hoping to fall asleep holding her. He said that is what he does with D.H. and has done with many other people in the past (pp. 88-89; Nov. 27, pp. 84-85).
- He remembers putting his hand on her bottom once, her moving his hand away, and then putting his hand more on her hip and slipping it under the waistband of her boxer shorts but not under her underwear. He said in doing so he moved her shorts down about two inches. He said his purpose was to secure his hand on her hip before falling asleep. She said no and he said okay. He said that he understood her to mean that she just wanted to go to sleep. He said he did not touch her in a sexual way or with the intention of having sex with her (pp. 89-90; Nov. 27, pp. 76-79, 84).
- He disagreed with Crown counsel's suggestion that he invited T.K. back to his suite because he wanted to see if she was interested in having sex with him. He said he brought her back to his suite because she didn't have her keys and had nowhere else to go (Nov. 27, p. 85).
- He said that he does not remember touching T.K.'s bottom twice, but it may have happened (p. 90).
- He testified that he went to sleep and that his next recollection is standing in the kitchen staring at the open refrigerator. He was just kind of standing there, staring at the refrigerator, wondering if he was going to get something to eat. He has no memory of how he got there (p. 90).

- He said he got some water and walked back into the bedroom. When he did, he saw light coming from the ensuite bathroom. He thinks he sat on the bed for a few minutes. He then knocked on the door of the bathroom and asked T.K. if she was okay because he did not hear any noise coming from the bathroom. She said that she was. She came out and went around the bed, he thinks maybe to get her phone, and then went back into the bathroom. She told him when she came out of the bathroom the second time that her friends were home and she was going to go home and meet them (p. 91, 11/27 p. 27)
- He said that he had taken a sleeping pill and at that point had just awoken and was kind of half asleep. He recalls her saying that she was fucking mad but his recollection is that she said this later when they were in the kitchen (pp. 91-92).
- He said that when she came out of the bathroom the first time "she was wearing her shorts and stuff she went to bed in" (p. 91).
- When she came out of the bathroom the second time, she went into the living room and was on her phone while he was standing in the kitchen waiting for her to get off her phone. It is here that he recalls her saying, "No I am fucking mad" in response to his question, "Is everything okay?" He said that he did not say anything in response because he thought she was upset about being locked out of her apartment (pp. 92-93).
- They then both got changed and discussed getting a taxi (p. 93).
- He testified that T.K. seemed no different at this point from when they went to bed. When she said she was pissed off or fucking mad she did not raise her voice, so it didn't seem like she was really that upset or mad and her demeanour wasn't really any different. He said that he did not think that he had done anything wrong and there was nothing to indicate to him that he had just had sexual intercourse with her (p. 93). He did not see any moisture of the sheets of the bed or on his underwear or his penis or anywhere on his body. He said it never even crossed his mind that they had had intercourse (Nov. 27, pp. 19-20).
- He said that he has never knowingly had sexual intercourse with someone when they were asleep or not consenting (Nov. 27, p. 39).
- He denied that he has a memory of sexually assaulting T.K. and D.H. He said that he would never have sex with D.H. or anyone else without their consent (Nov. 27, p. 88).
- He said that after T.K. left in a taxi, he took another taxi to his apartment and went to sleep. He said he tried to contact her later in the day to see if she wanted to go out for dinner before he left for England. He did not think she was angry at him or that anything was wrong (Nov. 27, p. 21).
- He said that if Ms. Lindley had not taken T.K.'s keys, they would have gone their separate ways when they came out of Prohibition and he would have asked to go for brunch the next day (Nov. 27, p. 21).

- When T.K. did not respond to his numerous attempts to communicate with her, he said that he assumed she was not interested in seeing him again (Nov. 27, pp. 21-22).
- He explained being contacted by the VPD on October 5, 2015, retaining a lawyer who tried to contact the police on his behalf, being contacted again by the police in July 2016, going to the police station, being arrested and released on a promise to appear, and eventually being charged in October 2016. He said he received copies of the report to Crown counsel sometime after that. He thought T.K. was lying because he did not believe he had sex with her. He attributed the finding of his DNA on her to the fact she was wearing his boxer shorts and the absence of semen being consistent with his belief that she was not being truthful (Nov. 27, pp. 22-25, 81).
- He disagreed with Crown counsel's suggestion that T.K. did not seem attracted to him. He said that he thought she was, but that she was just reserved. He disagreed that he felt the evening had been a bust because she was not interested in him and was not going to go home with him. He said the evening was not a bust, that he was not looking for anyone to go home with him, and that he did not ask her to go home with him. He said it was late and he was happy to go home and go to sleep. He said that he had no intention of having sex that evening, that he thought it had been a nice evening, and that it had been the opposite of a bust with the exception of them being a little bit angry at the way their guests had left (Nov. 27, pp. 82-83).
- He said that when T.K. got into bed at the suite and turned away from him, he did not take that as a signal she did not want anything to do with him physically. He said he took it as her being shy and tired (Nov. 27, p. 83).
- He explained that in March 2019, his belief that T.K. was lying changed because, after speaking with his counsel several times, he began to wonder if there was some alternative explanation. He said he thought that maybe she had dreamed that the sex had occurred so he began researching this possibility and this led him to an article about sexsomnia and sleep eating. He said he knew about sleep eating, but had never heard of sexsomnia before. He learned more about sexsomnia and how it was "lumped together" with "sleep eating, of insomnia and all of the other things that I can identify with" (Nov. 27, pp. 22-25, 81).
- As a result of what he has learned about sexsomnia, he now accepts that he did have sexual intercourse with T.K. He said that he feels terrible for her, terrible for himself, but especially for her (Nov. 27, p. 25).
- He testified that he had never connected the incident with D.H. in Mexico in 2018 with what had occurred with T.K. in 2015 because they seemed totally different. He believed that what occurred in Mexico was caused by the sleeping medication he had purchased at a drug store in Mexico (Nov. 27, p. 18).

- He said that he told D.H. about the sexual assault charge after they returned to Vancouver from Mexico. He told her that he had not had sexual intercourse with T.K. and that she must be lying for financial gain. He said that he had not told her previously because he was embarrassed (Nov. 27, p. 19).
 - When he went to see Dr. Ceresney at the end of June 2019, he thought it was just for a psychological evaluation and he had not read anything to refresh his memory about what had occurred on September 26-27, 2015. He said that there were some factual errors in the report that had been made either by Dr. Ceresney or by him (Nov. 27, p. 26).
 - He has now purchased a CPAP machine at Dr. Ceresney's recommendation and it has helped his sleeping. He has also stopped taking all sleep and anti-anxiety medications (Nov. 27, p. 38).
- [42] As I earlier noted, after Dr. Ceresney finished her evidence but before Dr. Fleming took the stand to testify, the defence asked for a brief adjournment to explore some newly-acquired evidence. Following that adjournment, counsel for the accused in effect brought an application to adduce additional evidence relating to the accused's interaction in this case with a person by the name of W.L. over the course of several days in August 2019. The application was granted.

Evidence of W.L.

- [43] W.L. was a friend of Robert Anderson's partner, Liz Ewing. She flew from Canada to Sicily on July 29, 2019, to join Ms. Ewing and Mr. Anderson in a rental house for a holiday. The accused was also there, as was a friend of hers named Brett. The group went to Athens in Greece where Ms. L. ended up sharing a room with the accused and they became involved in a sexual relationship. She noticed that the accused appeared to suffer from sleep apnea and restless leg syndrome. She also noted that he seemed to sleep walk. She described several events where the accused appeared to be experiencing episodes of parasomnia. She described the second day they were in Athens sightseeing and then going for dinner. The accused had maybe three drinks over six to seven hours. He did not appear under the influence of alcohol.
- [44] When they got back to the hotel around midnight, they had two to three hours of sexual activity. They then went to sleep. Both were naked. She awoke to the accused putting his hands onto her vagina and she said, "Karl, what are you doing? Go to sleep." She was on her right side, but rolled over onto her back. The accused then rolled on top of her and started to have intercourse. It lasted about a minute and then he rolled off and "started sleeping". Within two minutes he started snoring.
- [45] During the sex act he did not appear to be engaging or responding. There was no interaction. He was "not present". There was no kissing or intimate touching. He did not have a full erection and did not ejaculate. She thought he was sleeping. She thought this was one and a half to two hours after they went to sleep.

- [46] Later she woke up and saw the accused standing at the side of the bed facing the wall. She hit him on the buttocks and he sat down. That was about an hour after the earlier incident.
- [47] The next day she mentioned to him about standing at the side of the bed. He professed no memory of it, saying, "Yeah, I do that sometimes." Ms. L. did not mention the sexual intercourse incident to him. She testified, "I didn't feel I needed to. I consented to it. I didn't feel uncomfortable. I was fine with it."
- [48] The next night they went out again. They had no sex that night. Ms. L. described an incident in which the accused got out of bed and went to the hotel hallway without any clothes on. She heard him knock and let him back into the room. When he came in, he did not look at her. She told him about that incident the next morning and he appeared to have no recollection of it.
- [49] On the next night nothing unusual happened. They then went and stayed on a boat for about four nights. She recounted one night when the accused got up and got some food and brought it back to bed. It was spread all over the bed. The next morning they talked about it as there was a mess on the bed, but he appeared not to remember the incident.
- [50] She is aware that the accused was in a relationship with D.H. She had not talked to the accused about testifying on his behalf before the week she testified. She thought he had all the witnesses he needed. She just told him about the sexual intercourse incident on the Monday before she testified.
- [51] In cross-examination, she testified she was only aware of the accused taking one medication, Vyvanse, in the evening. She was not aware if he took any Viagra.
- [52] She testified that he told her about the basics of this case he was facing in the context of a discussion about sex. She testified that he did not tell her he was sleep walking during the incident for which he was charged. They did talk about sleep walking after talking about this case, but it came up after she told him she thought he had sleep apnea. That conversation was in a cab sometime in the first two days in Athens.
- [53] He did not tell her about engaging in sexual behaviour while he was sleep walking. She was not aware that he engages in sexual behaviour in sleep before she began sharing a room with him, although she was aware that he sleepwalked.
- [54] In re-examination, she said that she was aware someone was charging him with some allegations and it was from a date he had some four or five years ago, but he gave her no more information than that.
- [55] After Ms. L. testified, the accused was recalled to testify about his interactions with her and about how the evidence of the sleep sex came to his attention. He explained how he came to share a room with her in Athens. Ms. Ewing asked him to because she had booked one less room than she thought. He explained that he and Ms. L. had been sitting together on the plane and developed an interest in each other over the prior days. He agreed they had sexual

intercourse the first night they were together. He testified he "felt obligated" to tell her about the trial and the sleep walking. He said he told her he had been charged and there was apparent sleep walking. He thought that conversation took place in the hotel room.

- [56] He had no memory of the apparent sleep sex, standing by the bed, facing the wall, walking out of the hotel room naked, or eating in bed while on the boat. He said that initially he asked Ms. L.'s friend Liz, Mr. Anderson's partner, if Ms. L. might be enlisted as a witness because of the incidents other than the apparent sleep sex, and she, that is Liz, did not seem that comfortable with it, so he did not feel right to ask.
- [57] On the previous Sunday after discussing the case with his counsel, he understood that the evidence of the sexual event in Mexico "was not quite as clear as he thought". He tried to get someone else who he allegedly slept with to testify, who had previously agreed to, but she then declined. He then contacted Ms. L. to ask if she would talk about the incident where he was naked in the hallway, "because it looked like we needed more evidence." He met her after court. That was when he learned that he had non-consensual sleep sex with her. She agreed to testify. He said he told her that there was sleep walking involved in his charges. He did not know why she remembered it differently.

The Evidence of the Experts

Dr. Ceresney

- [58] She was qualified as an expert in the field of sleep medicine, including sleep disorders, interpretation of sleep studies, parasomnias, and the effects of alcohol, drugs, and medications on sleep disorders and parasomnias. She conducted a two-hour clinical interview with the accused on June 27, 2019 and arranged for him to have a two-night diagnostic polysomnogram on October 7 and 8, 2019. She relied on trial transcripts, police statements of T.K. and L.B., and a memorandum from the accused's counsel outlining expected evidence from witnesses. The accused told her he had a history of parasomnias "that included sleep eating and sexual behaviours." He also reported that "previous girlfriends have told him that he initiated intercourse during the night but he didn't remember having done so the previous evening."
- [59] Following the polysomnogram, Dr. Ceresney diagnosed severe sleep apnea and insomnia disorder. She noted a clinical history of non-REM sleep wake disorder, sleep walking type, with sleep related sexual behaviours and sleep-related eating.
- [60] Dr. Ceresney described sexsomnia as "a specialized form of sleep walking according to DSM-5 and can include even sexual intercourse." She noted, "Many patients with sexsomnia have also been diagnosed with a non-REM sleep parasomnia . . . occasionally sleep walking . . . or sleep-related eating disorder." She noted, "Obstructive sleep apnea is also a recognized precipitant of sleep-related abnormal sexual behaviours."

- [61] It can trigger incomplete arousals from sleep, which creates a condition where parasomnia behaviours are likely to occur. She concluded in the context of the untreated sleep apnea and the other factors (alcohol and cocaine consumption), "the accused would be at a greater risk of a non-REM parasomnia episode . . . including sleep-related sexual activity."
- [62] She could not "rule out" that "a sleep disorder played a role in the genesis of the events that occurred in the early morning hours of September 24, 2015."
- [63] She was not persuaded, however, that the evidence presented of the accused's sexual interactions with Ms. H. was an episode of parasomnia, citing the duration of the events and how they occurred over the course of the whole night. She testified an alternate explanation might be that the accused's alcohol and sedating medication consumption caused him to be intoxicated and/or disinhibited. She did not regard the alcohol, cocaine, and medications taken by the accused on September 27 to eliminate the possibility of parasomnia, it would, only if it provides a better explanation.
- [64] She said in this case there are three possibilities: (1) the accused is not being truthful; (2) the accused had more to drink than we are aware of and this was "brought on by a state of intoxication"; and (3) this could be an episode related to parasomnia.
- [65] Dr. Ceresney agreed that it is less typical for people to walk after a sexual parasomnia event, but that it has been reported. She agreed that a person taking various drugs, Zopiclone, Ativan, cocaine, and alcohol, could cause him to be disinhibited and amnesic, but not parasomniac. She agreed malingered and blackouts induced by alcohol or drugs are differential diagnoses for parasomnia. She agreed the accused's asserted amnesia is an important factor to consider, but that it is for the court to decide whether the accused was being truthful about having no memory of the events. She agreed how the event ended in this case was atypical and that it was atypical to have one isolated episode of sexual behaviours during sleep.
- [66] She agreed with the statement:

In the case of sexual behavior in sleep, individuals most often are reported to roll over and return to sleep, even when the object of their sexual behaviors refuses their advances.

- [67] She agreed the Mexico incidents were atypical of parasomnia because Mr. Antonius had a memory of what happened earlier in the course of events, recognized his aunt, had "a contextually meaningful" conversation with her and was able to read a text message. She could not rule out that the way the accused acted in relation to T.K. was not because of a parasomnia, but because of the intoxicants in his system.

Dr. Fleming

- [68] Dr. Fleming testified as an expert on the same basis as did Dr. Ceresney. He did not participate in a clinical interview or testing of the accused. He did not write a report, but did furnish a summary of his anticipated evidence before looking at any trial transcripts. His

opinion, which suggested a diagnosis of non-REM parasomnia, including sleep-related sexual behaviour, was based on an assumption that the witnesses are telling the truth "in terms of what they recall happening," including the accused's evidence that he fell asleep with T.K. and "his first memory was standing by an open fridge in the kitchen."

- [69] Dr. Fleming does not believe that the presence of alcohol eliminates the possibility of diagnosing parasomnia. He agreed with the description of parasomnia as "an episode in which one part of the brain is active (the motor part) while the other part of the brain is asleep (the executive or cognitive part)."
- [70] Sleep apnea is not causative, but it is a factor to consider. He viewed the descriptions of the various events given by Valda Downing, Jason Harmon, Robert Anderson, and D.H. in Sweden were likely parasomnias. He did not believe that what Ms. H. or Susan Downing described in Mexico was a parasomnia. He thought it was a delirium, an altered state of consciousness, usually caused by the ingestion of substances that affect the brain directly. Both delirium and parasomnia have some disturbances of executive function of the brain.
- [71] He believed that what was described by Ms. L. was a sexsomnia and the other incidents, episodes of parasomnias. He opined that he believed "it is possible" that what occurred with T.K. was a parasomnia. The alternative is that "it is wilful, it is a conscious act".
- [72] He explained "he could not be more enthusiastic about that diagnosis" because there is no evidence from Ms. K., as "she woke up slowly." He contrasted that with Ms. L. who woke up and adapted to what was going on.
- [73] Dr. Fleming explained that his caveats about the incident with T.K. arose because there is no evidence from T.K. about the accused's behavioural state immediately after she awoke and because she was unable to give an exact description of his body position and what physical effort he would have had to make to penetrate her, or whether he manifested a glazed or uncommunicative expression or unresponsiveness.
- [74] He testified if there is evidence of the accused being dozey, confused, not making sense, not being his normal self after the incident, he would have concluded it was highly likely the incident was a sexsomnia. He agreed with various aspects of Dr. Pressman's report concerning parasomnia, but did not agree that sleep walking and related disorders occur only out of deep sleep. He did agree that with sexsomnia, most patients are reported to roll over and go back to sleep, and that when a person does return to consciousness, he may appear confused and disoriented for several minutes or longer. He did not generally agree that the medications the accused took would suppress his sleep walking behaviour. He agreed with Dr. Pressman that it was atypical for the supposed sexsomnia to follow three earlier episodes of conscious, non-consensual touching, but that it does not exclude it as a sexsomnia.

- [75] He agreed with Dr. Ceresney's articulation of the three possibilities at play: (1) the accused is not being truthful; (2) the alcohol and drugs caused the accused's lack of memory; and (3) this was an episode of parasomnia.
- [76] He thought, of the last two possibilities, the parasomnia was the more likely. Assuming the accused is telling the truth, the parasomnia is the most likely explanation. He did not think the accused's behavioural expression would support a claim of delirium brought on by the cocktail of drugs in his system.
- [77] In his summary of anticipated evidence, Dr. Fleming wrote that there was no indication that the accused was "sexualizing the environment". At the time he wrote the summary, he was unaware of the incidences of touching while the accused and the complainant were in bed. He agreed that the touchings were an expression of sexual interest and that he "would be concerned about the fact . . . that he could have stayed awake and taken advantage of Ms. K. while she was asleep."
- [78] He did not agree that what happened in 2015 was more similar to what happened with Ms. H. in Mexico than with Ms. L. in Athens. He could not rule out that what happened in 2015 was a result of the cocktail in Mr. Antonius's system, whether by intoxication or by having some adverse effects on his brain.
- [79] Dr. Pressman, who has a PhD in experimental psychology, was qualified on the same terms as Dr. Ceresney and Dr. Fleming. He agreed with Dr. Fleming that Ms. L.'s evidence sounds like a typical episode of sexual behaviour in sleep, although he had never heard of it happening following consensual intercourse.
- [80] He then said the other evidence appears to be episodes of parasomnia, that is the evidence from Mr. Harmon, Mr. Anderson, and the accused's mother and aunt.
- [81] He does not regard alcohol as a trigger for parasomnias. He agreed that the various drugs and medications would result in the accused being drugged in some way and could have had disinhibiting and amnestic effects. He is unconvinced that the September 2015 incident was a parasomnia. The sexual interaction before sleep could mean that the accused did not go to sleep between that and the intercourse. He did not agree with Dr. Ceresney and Dr. Fleming that a person would immediately transition from one parasomnia to another. Sleep eating is a different form of parasomnia than sleep sex. Transitioning from one to the other does not seem consistent with what is known about parasomnias.
- [82] He assumed going to the kitchen and opening the fridge door was presented as an instance of sleep eating.
- [83] As to the incident in Mexico, he clarified that a person in a state of parasomnia would not remember anything that occurred during the parasomnia episode, even while still in a state of parasomnia, so the accused would not react to being "rejected" by Ms. H. by getting upset.

- [84] He testified how alcohol consumption could interfere with parasomnias by increasing a chemical in the brain that would inhibit potential or partial arousals. He was asked assuming that the accused was being truthful about not sexually touching the complainant and not recalling the incident, what his opinion was of the incident on September 27. He questioned how the episode ended. He said it was inconsistent with the episode with Ms. L. and with "what we know about sexual behaviour and sleep".
- [85] He surmised it was likely "a drug effect resulting from some combination of medications, alcohol, and cocaine." He said it is taking a lot of things at the same time that are not supposed to be taken at the same time. He said the main factor that supports the diagnosis of parasomnia indirectly is "the impressive array of different parasomnias", but each episode has to stand on its own and "past episodes are not necessarily a predictor of future episodes."
- [86] He agreed that in his report, he mischaracterized some portions of Dr. Fleming's interpreted summary of evidence and may not have fully distinguished between the accused's and the complainant's evidence about timelines. He agreed that the period of confusion during a transition from parasomnia to wakefulness varies from person to person, and it is possible for parasomnia to occur at a less deeper stage than the deepest stage. He agreed that very elaborate behaviours can occur in parasomnia and that atypical conduct can and does occur.
- [87] He accepted that there were different views about alcohol being a trigger for parasomnia and he was resistant to diagnosing a parasomnia in the presence of alcohol consumption, but his position is based on there being some evidence of intoxication.
- [88] He agreed the accused's pending move to London could be an instance of situational stress, possibly triggering or provoking an episode of parasomnia. He thought Zopiclone and Ativan might have treatment or suppressive effects on the accused's tendency to parasomnia.

DISCUSSION AND CONCLUSION

- [89] As I noted at the outset of these reasons, the task which confronts me in this case is not the usual one in a criminal case in which the onus is on the Crown to prove the essential elements of the offence beyond a reasonable doubt. Here the issue is whether the accused, through the evidence he has adduced, has rebutted the presumption that he acted voluntarily in having sexual intercourse with T.K. without her consent. If I am persuaded on the balance of probabilities by the accused's evidence that he acted involuntarily during an episode of parasomnia, then convicting him "would undermine the foundations of the criminal law and the judicial system": see *R. v. Bouchard-Lebrun*, [2011] 3 S.C.R. 575 at para. 51 per Justice LeBel.
- [90] In *R. v. Ghiorghita*, 2017 BCSC 1469, aff'd 2019 BCCA 59, Mr. Justice Pearlman explained the legal analysis at paras. 143 and 146:

[143] A defence of automatism amounts to a denial of the voluntariness component of the *actus reus* of the offence. A person who is unable to control the performance of the act cannot be said to have committed the act voluntarily. Conduct which is involuntary cannot be criminal: [R. v. Stone, [1999] 2 S.C.R. 290] at para. 170; [R. v. Leudecke, 2008 ONCA 716] at para. 56; and R. v. Alexander, 2015 BCCA 484 at para. 28.

...

[146] Because the law presumes that people act voluntarily, and a defence of automatism is a claim that the accused's actions were non-voluntary, the accused must rebut the presumption of voluntariness. Automatism is a "reverse onus" defence, for which the accused bears both an evidentiary burden to rebut the presumption, and a persuasive burden, on a balance of probabilities, to prove he acted involuntarily: Stone at paras. 171 and 179.

[91] In R. v. S.H., 2014 ONCA 303, Justice Watt speaking for the Court set forth the legal burden which confronts an accused in such circumstances and explained how that burden can be met at paras. 65 to 71 as follows:

[65] The term "burden of proof" is used in two senses. The first, often described as the "evidentiary burden", refers to the obligation of a party to adduce evidence sufficient to warrant consideration of an issue by the trier of fact. The second, referred to as the "legal burden" or "persuasive burden", describes the obligation of a party to prove or disprove the fact at issue. Both apply to claims of automatism. As a matter of general principle, the legal burden follows the evidentiary burden. This is so for automatism: [R. v. Stone, [1999] 2 S.C.R. 290], at paras. 173 and 182.

[66] Where automatism is advanced in answer to a charge, the evidentiary and legal burdens of proof settle on the person charged.

[67] To satisfy the evidentiary burden, an accused must adduce evidence upon the basis of which a properly instructed jury could find, on a balance of probabilities, that his or her conduct was involuntary: Stone, at para. 182.

[68] To meet the legal burden, an accused must satisfy the trier of fact, on a balance of probabilities, that his or her conduct was involuntary: Stone, at para. 179.

(3) Discharging the Burden of Proof

[69] To satisfy the evidentiary burden in automatism cases, in other words, to put the claim of automatism in play, an accused must

- i. claim that she or he acted involuntarily; and
- ii. adduce expert evidence to support the involuntariness claim.

Stone, at paras. 183-184.

[70] The court in *Stone* makes it clear that a mere assertion of involuntariness will not be enough to meet the evidentiary burden: *Stone*, at para. 183. The claim must be confirmed by expert evidence, sometimes described as "psychiatric evidence" (para. 184), and on other occasions as "expert psychiatric or psychological evidence" (para. 192).

[71] The *Stone* majority offered some guidance about the nature of the additional evidence that may be relevant for consideration in deciding whether an accused had satisfied the evidentiary burden to put automatism in play before the trier of fact. That evidence includes, but is not limited to:

- i. evidence of a documented medical history of automatistic-like dissociative states (para. 189);
- ii. evidence of a bystander about the appearance of the accused before, during and after the alleged involuntary conduct (para. 190); and
- iii. evidence of motive or absence of motive (para. 191).

[92] In *Stone*, what was at issue was primarily the evidentiary burden; that is, whether the defence had put forward adequate evidence to satisfy the test that a properly-instructed jury could find that the accused acted involuntarily on a balance of probabilities.

[93] In this case, although I am confronted with the issue whether the legal or persuasive burden has been met, the considerations in *Stone* are nevertheless applicable to that analysis. In *Stone*, in relation to the question of a documented medical history of the dissociative behaviour, the Court noted at para. 189:

189 . . . Furthermore, the more similar the historical pattern of dissociation is with the current claim of automatism, the more persuasive the evidence will be on the issue of involuntariness. . . .

[94] In dealing with the issue of whether the offence has a motive or not, the Court in *Stone* noted as follows at para. 191:

191 Another factor which trial judges should consider in assessing whether the defence has raised evidence which would permit a properly instructed jury to find that the accused acted involuntarily on a balance of probabilities is motive. A motiveless act will generally lend plausibility to an accused's claim of involuntariness. Indeed, in the present case, Dr. Murphy, the Crown psychiatrist, testified that since the mind and body of a person in a dissociative state have been split, she would expect that there would usually be no connection between involuntary acts done in a state of automatism and the social context immediately preceding them. Dr. Murphy also noted that if a single person is both the trigger of the alleged automatism and the victim of the automatistic violence, the claim of involuntariness should be considered suspect. I agree that the plausibility of a claim of automatism will be reduced if the accused had a motive to commit the crime in question or if the "trigger" of the alleged automatism is also the victim. On the other hand, if the involuntary act is random and lacks motive, the plausibility of the claim of

automatism will be increased. A question that trial judges should ask in assessing whether the defence has raised evidence which would permit a properly instructed jury to find that the accused acted involuntarily on a balance of probabilities is therefore whether or not the crime in question is explicable without reference to the alleged automatism. If this question can be answered in the negative, the plausibility of the accused's claim of involuntariness will be heightened. Such was the case in [R. v. Parks, [1992] 2 S.C.R. 871], for example, where there was no explanation for why the accused would attack his "in-laws", with whom he otherwise had a good relationship, except automatism induced by a state of somnambulism. In contrast, if this question invokes a positive response, the plausibility of the claim of involuntariness will be decreased.

- [95] Dealing with the medical history, although in the present case, the accused has no prior documented medical history of parasomnia, he has led evidence through family, friends, and intimate partners of other instances of parasomnia and there appears to be a consensus among Dr. Ceresney, Dr. Fleming, and Dr. Pressman that mainly, apart from the incidents in Mexico described by Ms. H. and Susan Downing, the accused's aunt, the episodes are consistent with the accused experiencing parasomnia episodes.
- [96] Of those episodes, the only one of any similarity to the event involving Ms. K. was the incident testified to by Ms. L. in August 2019, nearly four years after the alleged offence. The incident with Ms. L. differs in various ways with that involving Ms. K. Ms. L. and the accused were both at the time naked, they had been having consensual sexual relations prior to the incident, the accused reached over and touched Ms. L.'s vagina. Ms. L. awakened immediately and moved her body to facilitate sexual intercourse with the accused by allowing him to roll on top of her. The accused withdrew from Ms. L. before ejaculation and rolled over, resuming sleeping.
- [97] By contrast, in relation to Ms. K., the accused had to undress himself, undress her by removing her boxer shorts and her panties, and initiate sexual intercourse with her without awakening her. The complainant's evidence was that when she awoke to find the accused having sex with her, she was in the same position as when she went to sleep, and that supports a conclusion that the accused made no attempt to move her, even when undressing her.
- [98] In my view, the accused's interactions with Ms. K., unlike those with Ms. L., appear somewhat stealthy. Undressing Ms. K. and initiating sexual intercourse with her without moving her and without awakening her implies a cautious approach and a conscious purpose, quite unlike the essentially unorganized interaction described by Ms. L.
- [99] I accept that those experiencing parasomnia episodes can perform relatively complex tasks. However, the accused's interaction with Ms. K. seems more than simply complex. It appears to involve consciousness of the context in which it was occurring.

- [100] On balance, although I accept that over the years the accused has experienced what Dr. Pressman described as "an impressive array of parasomnias", I do not find that what happened with Ms. K. fits readily into a similar pattern of dissociation sufficient to prove, without more, his claim of involuntariness on that occasion.
- [101] In coming to that conclusion, I have regard for the evidence of Dr. Ceresney and Dr. Fleming, neither of whom could say that it was more than possible that Mr. Antonius was experiencing a parasomnia at the time he had sexual intercourse with Ms. K.
- [102] I also have regard to the evidence of Dr. Pressman, whose view it was that Mr. Antonius was not experiencing a parasomniac episode at the time.
- [103] While the accused's experts and the Crown expert were not agreed on the significance of all the evidence, it is apparent that none of them concluded that Mr. Antonius's history alone, nor the circumstances prevailing at the time of the alleged offence, were sufficient to dispose of the question in his favour. In other words, his history and the precipitating factors, although undoubtedly relevant, need to be placed in the context of all the other relevant evidence.
- [104] As is apparent from the authorities, evidence about the appearance and demeanour of the accused before, during, and after the conduct at issue is a relevant consideration. In *Stone*, the Court (at para. 190) noted that evidence "that the accused appeared uncharacteristically glassy-eyed, unresponsive and . . . distant", will also be relevant to the assessment whether the defence has raised evidence on which a properly-instructed jury could find that the accused acted involuntarily on a balance of probabilities.
- [105] In *R. v. T.W.*, 2015 ONSC 960, for example, the accused was described as being "very disoriented and confused". Here there is no such evidence. Its absence does not prove that the accused was not acting in an involuntarily state, but it does not advance or support his claim that he was.
- [106] Before moving on to consider the evidence of motive or absence of motive, it is perhaps important to note that none of the experts attempted to make a determination of the credibility of the accused. What they were concerned with primarily were the objective or clinical indications of the presence or absence of a parasomniac episode.
- [107] Counsel for the accused in their full and comprehensive submissions acknowledge that Mr. Antonius's credibility is the central question in this case. The accused also acknowledged that it was his burden to establish that his conduct was involuntary, but emphasized that "it remains a fundamental principle that innocent people must not be convicted", and a court must be cautious, particularly where there is an absence of critical evidence (e.g., the demeanour of the accused at the time of or immediately after the alleged offence) in approaching the issue of the accused's complicity.

- [108] I accept that where, as here, there is an absence of evidence of the accused's demeanour, despite the burden and onus of proof, the court must be careful not to weigh that absence of evidence heavily in the balance in determining the accused's credibility or lack of credibility.
- [109] Turning to the issue of the evidence of motive or absence of evidence of motive, as I see it, the question whether the accused's acts at issue had a specific motive, that is a desire to have sexual intercourse with the complainant that morning, or had "no connection [to] the social context immediately preceding them" (Stone, para. 191), is one which directly engages the accused's credibility, as well as the objective likelihood of him acting involuntarily.
- [110] The accused presented the preceding evening as essentially platonic. He testified that he did not generally have sexual relations with someone on a first date. He presented himself as being tired. He relied on the absence of evidence throughout the evening of any discussion with Ms. K. about being in a sexual relationship. As well, he testified that without taking Viagra, he would be unable to perform consciously. In other words, he denied having a specific motive to do what he did do; that is, have sexual intercourse with T.K. that early morning.
- [111] In effect, by presenting what happened as being incongruous with the immediately preceding social context, the accused enhanced his claim that his actions were involuntary.
- [112] In my view, the evidence which is more relevant to the question of motive is not what happened before the accused and the complainant ended up in bed together, but what happened after. Ms. K. testified that the accused put his hand on her buttocks two times, the second time just after she told him no in response to the first time. When she again told him no, he then attempted to pull down the boxer shorts she was wearing by putting his hand in the waist and pulling downward.
- [113] The accused agreed he touched Ms. K. at least one time on the buttocks, and that he again touched her by putting his hand on her waist, under the waistband of the shorts she was wearing. He conceded he may have put his hand on her buttocks twice, before putting his hand under her waistband.
- [114] He denied any sexual element to or intention behind touching the complainant. He said that he moved close to her in the bed, about six inches away, and was just trying to "cuddle her"; in other words, to be affectionate. He testified he only put his hand on the waistband of her shorts to keep his hand in place when they went to sleep.
- [115] I accept Ms. K.'s version of the events that the accused touched her three times, twice in the buttocks and one time by putting his hand on her hip, under the waistband, and pulled down on her shorts. Ms. K. was clear on her evidence. I could detect no indication that she was embellishing or exaggerating. Mr. Antonius's concession that it may have been three times supports the reliability of her evidence.

- [116] I do not accept the accused's evidence that he lacked any sexual motive in touching Ms. K. as he did. In the first place, every time he touched Ms. K., she resisted him. He never offered any explanation that he only wanted to "cuddle" her, nor did he seek her permission. Rather, he persisted despite her resistance.
- [117] In the second place, where and how the accused touched Ms. K. was sexual rather than affectionate. He could have put his hand on her arm, her side, or on her back. The way he touched her would only convey an incipient sexual interest and it would be reasonably seen by her as a sexual advance.
- [118] I conclude that Mr. Antonius was taking advantage of an opportunity that sharing a bed with Ms. K. presented to him and attempted to initiate a sexual encounter. What he did or did not do earlier in the evening was governed by other circumstances and has little or no bearing on what he did in the later circumstances.
- [119] The significance of Mr. Antonius's sexual interest in Ms. K. while conscious and acting voluntarily has a bearing on the plausibility of his claim. In his evidence, Dr. Fleming agreed that if the accused harboured sexual feelings towards Ms. K. when they were together in bed, it would reduce the likelihood that the subsequent episode was a parasomnia because it was "atypical" for the supposed sexsomnia to follow three earlier episodes of conscious sexual touching. Dr. Fleming said, however, that such a circumstance did not exclude sexsomnia.
- [120] He testified that if the conscious touchings were "an expression of sexual interest", he "would be concerned about the fact . . . that he could have stayed awake and taken advantage of Ms. K. when she was asleep."
- [121] In his evidence, Dr. Pressman held essentially the same view. He testified that if the court found that the accused interacted with the complainant in a sexual way before going to sleep, it could mean that the accused did not go to sleep between that and the intercourse.
- [122] To put the issue as framed in Stone, is the crime in question explicable without reference to the alleged automatism? If it is, then "the plausibility of the claim of involuntariness will be decreased."
- [123] Apart from the evidence of motive which the accused's interactions with the complainant reveals, it also demonstrates that he did not regard her lack of consent to intimate touching as a consideration. Although non-consensual intercourse is a much more serious act of violation than non-consensual sexual touching, both reflect to different degrees an indifference to the feelings and bodily integrity of another. The accused's strong denial under cross-examination that he would attempt to have sex with someone without their consent must be considered in light of that evidence.

- [124] Ultimately, the evidence of the accused's touching of the complainant weighs against his claim of involuntariness, but it does not preclude it. There is other evidence and there are other considerations to take into account which bear on the credibility of the accused's claim of involuntariness.
- [125] In submissions, counsel for the accused emphasized that it would be an extraordinary risk for the accused to have had sexual relations with the complainant while she was asleep. He had to know or at least believe that she would awaken and that it could lead to serious consequences for him.
- [126] The accused submitted through counsel:
- ... it would ... be a remarkable and inherently improbable coincidence for the person who is alleged to have engaged in this extremely risky behaviour to be a person with a long history of parasomnias, who was sleep deprived ... [who] suffers from insomnia, snoring, and sleep apnea.
- [127] The accused further argued, while conceding that the evidence of Ms. H. about the accused's attempts to initiate sex with her while she was asleep was not parasomnia, that it was not evidence of a propensity.
- [128] Although Ms. H.'s evidence was initially presented as an instance of sexsomnia, by the trial both Crown and defence experts agreed that it was not. One defence expert, Dr. Fleming, opined it might have involved the accused acting in a state of delirium. The other defence expert, Dr. Ceresney, agreed it may have been an example of the accused's inhibitions being lowered by consuming alcohol and medications. In other words, the accused, while conceding that the Mexico evidence did not support the accused's claim of involuntary action due to parasomnia, contended that neither did it undermine it.
- [129] It is difficult to conclude precisely what influenced the accused's conduct with Ms. H. in Mexico. Dr. Fleming's hypothesis is somewhat speculative, and of course relies on Mr. Antonius's claim that he did not remember any of the events testified to by Ms. H. or his aunt Ms. Downing. It also relies on Ms. H.'s description of the accused acting uncharacteristically and strangely over the course of the evening and morning.
- [130] As to Mr. Antonius's claim of being amnesic with respect to the Mexico incident, it is worth remembering, as was pointed out in *Stone*, that such claims are easily feigned. Although it does not appear that Mr. Antonius was exhibiting the same kinds of erratic behaviour with Ms. K. as he did with Ms. H., to claim that two entirely different mechanisms would cause him to have involuntary sexual relations with two different sleeping women on two different occasions relies heavily on the mechanism of coincidence. In my view, that proposition is objectively improbable. It is inherently more likely that the events are linked by a common conscious impulse than the product of different, unconscious, psychological mechanisms.

- [131] The accused's argument that the riskiness of the actions made it more likely he was acting involuntarily because choosing to do them would jeopardize his future is essentially an argument that he was more likely governed by an unconscious impulse than by a conscious one. The evidence establishes that the accused consumed both alcohol and cocaine during the evening and took some medications. It establishes he got into bed in his apartment with a woman for whom he felt a sexual attraction, moved close to her, and fondled her with some persistence and over her resistance. That is some evidence of the accused giving into rather than controlling a conscious impulse.
- [132] While logic would certainly support a conclusion that initiating sexual intercourse with a sleeping woman would have serious consequences, logic is not always in the driver's seat in circumstances such as those confronting the accused.
- [133] On balance, I am not persuaded by the argument that the accused's pursuit of acts entailing a risk to him significantly favours a conclusion that he was acting unconsciously and involuntarily, as opposed to consciously but impulsively.
- [134] In the present case, the remaining evidence to consider, apart from the factors enumerated in Stone as relevant, is that which consists of the accused's utterances and conduct in the aftermath of the non-consensual intercourse. In particular, the issue is whether the accused's behaviour is more consistent with knowing that he had non-consensual intercourse with the complainant than it is with him having no consciousness of it. It is significant that although the event took place in September 2015, the accused asserted in his evidence that until March 2019, when he stumbled across parasomnia while researching whether Ms. K. might have dreamt the encounter, he firmly believed that the complainant was lying and that he was the victim of an extortion attempt.
- [135] He testified he believed that, even though he became aware through disclosure that his DNA was matched to DNA taken from a swab of the complainant's vagina, and despite the fact that there was no evidence of any attempt by the complainant to extort money or anything else from him. On the contrary, there is evidence that when, after the incident, the accused left the complainant a telephone message, he offered her a gift and she never called back or responded to him in any way.
- [136] The accused's explanation for believing the complainant was lying was that since he had no recollection of having sexual intercourse with her, it could not have happened, and she must therefore be lying. That explanation of his mindset has some flaws, however. In the first place, in support of his claim of parasomnia, the accused led evidence of what Dr. Pressman referred to as "an impressive array of parasomnias".
- [137] Significantly, in his interview with Dr. Ceresney, the accused claimed there were other prior occasions, that is before the alleged offence, where he was told by "previous girlfriends" he had initiated sexual intercourse that he had no recollection of the next morning.

- [138] He also had the December 2018 experience with Ms. H. of which he claimed to have no recollection.
- [139] If Mr. Antonius was telling the truth about learning of his prior amnestic sexual encounters with prior girlfriends or with Ms. H., it begs the question why, in the face of the DNA evidence and in the absence of any evidence of an ulterior motive of Ms. K., he would not conclude or at least consider that what had happened before had likely happened again.
- [140] Although he offered an explanation for the DNA match that the complainant was wearing his boxer shorts and sleeping in his bed, in context it is a weak explanation, not likely to sustain a belief that he was the victim of an extortion attempt.
- [141] I conclude that the accused's asserted belief about the allegations against him was not genuine and it undermines his credibility.
- [142] There are other aspects of the accused's conduct in the aftermath of the event which bear on the issue of his state of knowledge and credibility. Both Ms. K. and the accused agree that after she went into the bathroom, at some point the accused knocked on the door and asked if she was okay. She said she was fine. Both agree that after she came out of the bathroom, the accused again asked her if she was okay and she responded, "I'm fucking mad." Both agree that the accused said nothing in response to that.
- [143] The accused's sequence is a little different from the complainant's. While the complainant testified that the latter exchange occurred immediately after she left the bathroom and came into the bedroom to get her telephone, whereas the accused testified that he thought it occurred later in the kitchen after she had been on her phone for a while. On his evidence, the accused asked her two to three times if she was okay, before he got the answer she was "fucking mad."
- [144] It is curious that the accused would ask the complainant two to three times if she was okay, if he had no particular reason to think she was not. It is even more curious that after inquiring as to her well-being more than once and getting a negative answer, he made no attempt to follow up to find out what was amiss. His explanation at trial that he took her comment about being mad as referring to being left without keys by Ms. Lindley seems contrived. The complainant had no obvious reason for being any more upset at that point about the keys than when she first discovered it.
- [145] The accused's explanation seems convenient rather than logical. It is also different from what he told Dr. Ceresney in June 2019 at the interview. His explanation then was that "he didn't know what it was about" and he "didn't press it" because she "didn't look like she was really alarmed". The accused's evidence on this point is different from what he said before and is incongruous. It would make no sense that he would ask Ms. K. at least twice if she was okay, and when she signalled she was not, simply ignore it. A more reasonable explanation is that the accused was gauging the complainant's knowledge of and reaction to what had transpired, but was unwilling to say or do anything to acknowledge it himself.

- [146] In the circumstances, when the accused initiated sexual intercourse with the complainant while she was asleep and where she did not react due to fear or shock after awakening, the accused may have counted on her being unaware of what had happened, and that may explain why he asked if she was okay but did not want to pursue a conversation about why she was not.
- [147] The accused's subsequent attempts to call Ms. K. and to offer her a gift are more in keeping with an attempt to appease her than to pursue any sort of relationship as he claimed. He was scheduled to move to the United Kingdom in under two weeks, and Ms. K.'s departure at the end of the evening would not have encouraged another encounter.
- [148] In my view, the accused's evidence of having amnestic intercourse with Ms. K. while she was asleep does not "[harmonize] with the preponderance of the [possibilities] which a practical and informed person would readily recognize as reasonable in that place and in those conditions", to quote from Voith J. in *Joba v. Basant Holdings Ltd.*, 2013 BCSC 1469 at para. 17.
- [149] In coming to that conclusion, I do not find that the accused's consumption of alcohol or cocaine, or any other drug or medication, was a significant factor. The accused's inhibitions may have been lessened, but I am not satisfied that his memory of what occurred was affected in any significant way.
- [150] I do not rely on Dr. Pressman's evidence that consuming alcohol precludes a finding of parasomnia, nor do I find that the timing of the sexual activity to be inconsistent with an episode of parasomnia. The evidence of timing is, at best, uncertain. I do accept that the accused's behaviour immediately after the sexual assault was atypical, in that usually a person in a parasomniac state would simply resume sleeping. I accept, however, that atypical behaviour does not preclude a diagnosis or a finding of parasomnia, and there may be valid explanations for what is considered atypical.
- [151] My conclusion that the accused has not rebutted the presumption of voluntariness does not rely primarily on the expert evidence of Dr. Pressman, Dr. Ceresney, or Dr. Fleming. While all three experts provided helpful insights into the nature and characteristics of parasomniac behaviour, my conclusion that this was not a parasomniac event rests on finding that the accused's evidence is not credible in light of the evidence considered as a whole. I therefore find him guilty as charged.

"Cullen, J."

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