

CANADA / JUDGMENT

R. v. Bertacco

2020 BCSC 1275

COURT

Supreme Court of British Columbia

DECIDED

28 August 2020

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2020 BCSC 1275 R. v. Bertacco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bertacco,

2020 BCSC 1275

Date: 20200828

Docket: 25578

Registry: Smithers

Regina

v.

Chiko Bertacco

Before: The Honourable Mr Justice Crerar

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Oral Reasons for Judgment

Counsel for Crown:

A.K. Reed

Counsel for Accused:

D.M. Melville

Place and Date of Trial:

Smithers, B.C.

August 24 - 28, 2020

Place and Date of Judgment:

Smithers, B.C.

August 28, 2020

I. introduction

- [1] The accused is charged with sexual assault under s. 271 of the Criminal Code, RSC 1985, c. C-46.
- [2] The assault is alleged to have taken place the morning of Saturday, September 15, 2018.
- [3] At the time of the alleged defence, the accused was 22 years old. The complainant was 16 years old. They are now 23 and 18 respectively.
- [4] I will refer to the complainant as "C". This letter is not an initial for her name. As there are only two other witnesses, and as all of the witnesses live in a small community, I have deliberately drafted these reasons to avoid identifying details.
- [5] The accused agrees that he had sexual intercourse with C.
- [6] The accused does not take the position or raise the defence that he had a mistaken but honest belief that C consented to the sexual activity on an ongoing basis.[1]
- [7] The Court must thus decide one primary issue: did C affirmatively communicate her consent to the sexual activity by words or conduct? Specifically, has the Crown proven C's lack of consent to the sexual activity, beyond a reasonable doubt?

II. facts

A. Evidence of the complainant

- [8] C had known of Mr Bertacco for at least four years, with multiple points of contact through several relatives and friends. They were connected as "friends" on the social media apps Facebook and Snapchat. They had no romantic history, or specific history of friendship.
- [9] Her mother did not like Mr Bertacco or the Bertacco family generally, and would not have approved of C meeting or having romantic or physical relations with Mr Bertacco.
- [10] In the weeks leading up to the alleged assault, Mr Bertacco and C messaged back and forth on Facebook. C recounted that in those conversations, Mr Bertacco had called her "pretty and stuff." At some point, Mr Bertacco requested to be C's friend on Snapchat, and the ongoing conversations moved to that app.

- [11] The night before the alleged assault, Mr Bertacco messaged C: "S'up Babe." C replied, "I'm not your Babe." Mr Bertacco then textually retreated with an "OK" and then "Hi." Mr Bertacco and C then communicated for a while via Snapchat messages. During that conversation, Mr Bertacco said several times that he wished to meet C for sex.
- [12] Around 5 AM the morning of the alleged assault, Mr Bertacco messaged C again. He suggested that she visit him at his friend's nearby house or sneak him into her house. C said "no". He sent several more messages. At around 6:30 AM, C thought that if she agreed to go see him, he might stop asking. She put on makeup and got dressed. Her mother asked her where she was going. She told her mother that she was having breakfast at a fast food restaurant with her best friend. This friend was such a close friend that she usually refers to him as her "brother", both in and out of Court. I will refer to this friend as "her friend."
- [13] Soon after 7 AM she met Mr Bertacco. They walked a few blocks to a complex of townhouses. When they arrived, Mr Bertacco told C that they had to be quiet as everyone was sleeping upstairs.
- [14] Mr Bertacco opened the door and entered the house. At this point, C noticed that Mr Bertacco's breath smelled strongly of alcohol.
- [15] Mr Bertacco led C downstairs to a small room used as a child's playroom. There was a small couch. Beside the couch was a plastic toy picnic table.
- [16] Mr Bertacco and C sat on the couch. Mr Bertacco was on the left; C was on the right. They talked for around 45 minutes to an hour, mostly about high school and town gossip, drama, and life.
- [17] Mr Bertacco then asked C if he could kiss her. She replied, "I don't know." She testified that by these words, she wished to convey the idea that she did not want to kiss, and was certainly not agreeing to kiss Mr Bertacco:

He turned to me and he said "can I kiss you" and I looked at him and I said "I don't know" and then he said "no?" And I said "I don't know" because I didn't want to say "no" because I didn't want to like hurt his feelings but I didn't want to say "yes" because I didn't want to. So I just said "I don't know" thinking he'd kinda take it as a hint and then when I said "I don't know" again then that's when he kissed me and I figured putting the pressure on his chest and pushing away he would have gotten you know the hint to just stop.

[quotation marks added to transcript]

- [18] Mr Bertacco proceeded to start kissing her. He leaned into her, putting pressure on her chest. At that point, she said "okay, stop," and pushed against his chest "to be like "kay stop"." Instead of stopping, he leaned more into her, putting more pressure on her chest while kissing her and causing her to lean back on the couch. At this point, he had sufficient weight on her such that she could not get up. He placed his elbow on the top of her shoulder, further pinning her down.

- [19] At this point, Mr Bertacco tried to put his hand down C's track pants. C pressed her hips down into the couch to make this more difficult. At this point, Mr Bertacco began pulling on the hem of her track pants. C again pressed her hips down into the couch to try to prevent him from pulling her track pants down. She could hear a ripping sound as the seams in the track pants strained. Throughout this period, she said "stop" and "no." To this, Mr Bertacco said "yeah: you're going to like it; you're gonna be fine." He succeeded in pulling off her pants and underpants, and threw them on the floor. Her hoodie remained on her torso.
- [20] He then lay on her again. He grabbed C's waist and penetrated her.
- [21] She has no specific memory of Mr Bertacco removing his own pants, which were also sweat or track pants. He did not wear a condom.
- [22] Mr Bertacco moved his hands to grab her hips. Throughout this, C was saying "no" and "stop."
- [23] C started crying and asked him again to stop. At that point, "I didn't want him to hurt me in [any] other way because I mean how else can you really hurt someone but I didn't want to walk out of there bleeding or anything so I gave in, like I just stopped trying and I just laid there and he just, it's like he didn't even notice that I didn't want it, like he just kept going and going and going ." Later in the statement she described this moment as " that was around the time that I gave up because I was already fighting and he wasn't stopping and I was saying stop and he wasn't stopping and I was saying "no" and he wasn't stopping so I just laid there."
- [24] After about 20 minutes total on the couch, Mr Bertacco stopped and got up. C reached for her clothes and phone, but was unable to grab either. At that point, Mr Bertacco moved C to the floor and continued with the intercourse. He pushed again on her shoulder with his elbow. Exhibited photographs taken later that day show carpet burns on C's spine.
- [25] She pulled on his shirt and scratched his back several times in hopes of stopping him; exhibited photographs from later that day show the fresh scratch marks on Mr Bertacco's upper left back. At this, he became more aggressive and began thrusting harder.
- [26] At some point, C's iPhone, which was located on the toy picnic table beside the couch, began to buzz as it received text messages. C told Mr Bertacco that it was likely her mother wondering where she was, and that she would have to go home. She said that she needed to check her phone to read the messages. At this, Mr Bertacco appeared agitated. He said that he needed to "finish" first.
- [27] C's phone continued to buzz with incoming messages. C's mother sent about 13 text messages over the course of about 20 minutes, from roughly 8:25 to 8:45 AM.

- [28] After a while of constant phone message buzzing, C again said words to the effect that the texts and calls were likely from her mother, who would be looking for her after an hour's absence. Mr Bertacco moved or kneeled, apparently to glance at C's phone. C took this opportunity to grab her phone, this time successfully.
- [29] C looked at her mother's text message string. One text said, "Seriously: I don't think it takes an hour to have breakfast." In a later text, C's mother said that she knew C was not at breakfast with her friend. In between these texts, C's mother had in fact called the friend, who had confirmed that he was not at breakfast with C.
- [30] In another text, C's mother threatened to ground her. In another text, C's mother said that she would call the police to "search every house" for her.
- [31] Phone now in hand, C started texting that same friend. She asked to be picked up. While she was texting, Mr Bertacco again penetrated C.
- [32] C pushed him away. She told him about her mother's texts and her threat to call the police to search for her. She expected the prospect of the police arriving would prompt him to stop and, in fact, this time Mr Bertacco stopped.
- [33] C went up the stairs and left the house. Mr Bertacco asked if he should text her and she replied, "no."
- [34] She was very upset upon leaving the house. She saw her friend's truck. She didn't know how her friend would react to her news, and did not want to tell her mother. So instead of getting into the truck, she ran away, down the block. Her friend followed, and she soon got into the truck.
- [35] In her friend's truck, she began to cry. They made the short drive back to her home.
- [36] At home, her mother was very angry, and accused her of lying about the breakfast. C said that she had been sexually assaulted. Her mother called the police, who attended swiftly. After a brief interview, C and her mother went to the hospital, where she was examined, and a sexual assault kit test administered.
- [37] At around 12:50 PM, approximately 4-5 hours after the alleged assault, C was interviewed for about an hour on video about the incident. This videotaped statement comprised the bulk of her evidence at trial, admitted under s. 715.1 of the Criminal Code.

B. Evidence of the accused

- [38] As stated, Mr Bertacco agrees that sexual intercourse occurred in the place and at the time alleged. He agrees that there was at least one extended social media conversation before the sexual encounter. He agrees that the sexual encounter lasted between 30 and 40 minutes. He agrees that the sex first took place on the couch, and then on the floor, and that it was preceded by talking and then kissing. He agrees that C's phone was buzzing with texts during the sex. He also agrees that C said that she had to go, as her friend had arrived to pick

her up.

- [39] In direct examination, Mr Bertacco asserted that he asked C whether she wanted to have sex before the sexual encounter, and at every stage of the sexual encounter, and every time they changed position, and that, at each time, C said "yes". He said that at all times he understood that she was consenting to the sexual intercourse.
- [40] Mr Bertacco testified that his restaurant employment shift had ended early the previous evening, a Friday. He bought a bottle of whisky. He went to the townhouse in question, where his friends lived. He talked with his friends and played Fortnite on the Xbox. They drank. That evening and early morning Mr Bertacco drank about five glasses of whisky. He did not consider himself drunk, but was "buzzed" from the alcohol.
- [41] Over the late evening or early hours of September 15th, he had an extended conversation over Snapchat with C. Mr Bertacco is unsure whether there was one or two series of conversations: he is certain that there was a series of textual conversations around 4 or 5 AM, although he acknowledges that there may have been an earlier series of textual exchanges around midnight or 1 AM. He believes that the text message exchange lasted approximately 30 minutes.
- [42] He says that later in the text conversation, C sent him a video of her smoking marijuana from a bong. While Mr Bertacco cannot be entirely sure, he believed that it was a video filmed just before sending, based upon the context, and based upon arrow indicators on the Snapchat screen.
- [43] The textual conversation eventually turned to the subject of sex. Mr Bertacco stated that he wanted to have sex with C. She said "no." In the first instance, or perhaps later, he said words to the effect of "I just want to talk. I really want to have sex with you. But now I'm just kinda sad." He also invited C over for a drink. C said "no" to his suggestion that she come over, or that he visit her house. All of these latter facts were first elicited on cross-examination, and not volunteered on direct examination.
- [44] C and Mr Bertacco agree that there was discussion about whether he would visit her, or whether she would visit him. Eventually they agreed to meet halfway between the houses, and then walk to Mr Bertacco's friend's townhouse. Upon arrival, he asked her to be quiet, as his friend's children were sleeping upstairs. He led her downstairs to the basement room. They sat on the couch and talked for a while.
- [45] Towards the end of their conversation on the couch, Mr Bertacco says that the following exchange took place:

Mr Bertacco: "What do you want to do?"

C: "I want to do what I came here to do."

Mr Bertacco: "Sex?"

C: "Yeah." [nods]

Mr Bertacco: "Are you sure?"

C: "Yeah." [nods]

Mr Bertacco: "Are you sure you're sure?"

C: "Yeah."

[46] They then started kissing. In contrast to C's account, he says that they leaned in towards each other to kiss.

[47] He says that he tried to remove her track pants, but had trouble as they were tight, and fastened with a drawstring at the waist. He then heard a ripping sound. At that point, he asked her to remove her own pants. She willingly did so, and then removed her panties herself as well. He then removed his own pants.

[48] They then had penile-vaginal sexual intercourse for some 20 minutes. The couch was too small for both of them, so they both agreed to move to the floor. C moved herself to the floor and made herself comfortable there.

[49] At that point, Mr Bertacco requested oral sex. C replied that he should have asked earlier, "before you put it in", and declined. C agreed that he had asked for oral sex (although she did not agree with the words just attributed to her): "I said no and that was about the only thing he listened to." Mr Bertacco then recommenced penile-vaginal sex.

[50] With respect to the scratches on his back, he said that she had both of her arms in a hug around his back. She began scratching him in what he considered to be a sexual manner. He found the scratching strange and painful. The scratching was of such a magnitude that he said he was worried that it would leave scars.

[51] His memory of the phone buzzing from the messages is vague, although he acknowledges that it may have been buzzing. Some time after feeling the scratches, he heard a loud truck outside the townhouse. C said words to the effect of "that's my friend." Mr Bertacco asked if he could "finish." C said that she had to go, and so he stopped. C left.

C. Evidence of the other witnesses

[52] C's mother and friend gave brief testimony. I accept their evidence on all material points.

[53] Their evidence was consistent on a point favourable to the accused and emphasized by defence counsel. They both confirmed that when C was confronted by her mother upon their return home, her mother was furious, and threatened both to confiscate C's iPhone, as well as "kick her out of the house" for her deception. I accept this evidence, favouring it over the account provided by C, who denied that her mother had said these things upon her return to the house.

III. law

[54] The leading authority on sexual assault is the Supreme Court of Canada decision in *R v. Ewanchuk*, [1999] 1 SCR 330. That decision firmly establishes that there is no such thing as implied consent in Canadian law. At para. 23, the Court sets out the legal principles applicable to sexual assault offences:

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the actus reus and that he had the necessary mens rea. The actus reus of assault is unwanted sexual touching. The mens rea is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

[55] With respect to the actus reus, or physical element of the offence, the Court stated:

25 The actus reus of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any mens rea with respect to the sexual nature of his or her behaviour: [citations omitted]

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

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

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

31 [T]he trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the actus reus of sexual assault is proven.

[56] With respect to the mens rea, or mental element of the offence, the Court stated:

42 the mens rea of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. [citations omitted].

49 In the context of mens rea - specifically for the purposes of the honest but mistaken belief in consent - "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.

[57] In the more recent case of *R v. Barton*, 2019 SCC 33, the Supreme Court reaffirmed and summarized these principles:

(a) The Role of Consent in the Sexual Assault Analysis

[87] A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the actus reus and had the necessary mens rea. A person commits the actus reus of sexual assault "if he touches another person in a sexual way without her consent" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). The mens rea consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched" (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 42).

[88] "Consent" is defined in s. 273.1(1) of the Code as "the voluntary agreement of the complainant to engage in the sexual activity in question". It is the "conscious agreement of the complainant to engage in every sexual act in a particular encounter" (*J.A.*, at para. 31), and it must be freely given (see *Ewanchuk*, at para. 36). This consent must exist at the time the sexual activity in question occurs (*J.A.*, at para. 34, citing *Ewanchuk*, at para. 26), and it can be revoked at any time (see Code, s. 273.1(2)(e); *J.A.*, at paras. 40 and 43). Further, as s. 273.1(1) makes clear, "consent" is not considered in the abstract. Rather, it must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and "the identity of the partner", though it does not include "conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" (*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55 and 57 (emphasis deleted)).

[89] Consent is treated differently at each stage of the analysis. For purposes of the actus reus, "consent" means "that the complainant in her mind wanted the sexual touching to take place" (*Ewanchuk*, at para. 48). Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent -- plain and simple (see *Ewanchuk*, at para. 31). At this point, the actus reus is complete. The complainant need not express her lack of consent, or revocation of consent, for the actus reus to be established (see *J.A.*, at para. 37).

- [90] For purposes of the mens rea, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused" (Ewanchuk, at para. 49). Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" (ibid., at para. 47).
- [91] This Court has consistently referred to the relevant defence as being premised on an "honest but mistaken belief in consent" (see e.g., *R. v. Esau*, (SCC), [1997] 2 S.C.R. 777, at para. 1; Ewanchuk, at para. 43; Darrach, at para. 51; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 57; *R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627, at para. 32; J.A., at para. 24), and the Code itself refers to the accused's "belief in consent" (s. 273.2(b) (heading)). However, this Court's jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct (see *R. v. Park*, [1995] 2 S.C.R. 836, at paras. 39 and 43-44 (per L'Heureux-Dubé J.); Ewanchuk, at para. 46; J.A., at paras. 37, 42 and 48). As L'Heureux-Dubé J. stated in *Park*, "[a]s a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary" (para. 44 (emphasis in original)).
- [92] Therefore, in my view, it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in communicated consent". This refinement is intended to focus all justice system participants on the crucial question of communication of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.
- [emphasis added]
- [58] Barton emphasizes at para. 107 that "an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent."
- [59] In *R v. W(D)*, [1991] 1 SCR 742, the Supreme Court of Canada set out a three-part approach to the assessment of credibility by both juries and judges. In *R v. CWH*, (1991) 68 CCC (3d) 146 at 155 Wood JA of the British Columbia Court of Appeal added a fourth consideration, to be considered second in the sequence; this addition is generally accepted in the jurisprudence. That approach is synthesized and summarized as follows:
1. if you believe the evidence of the accused, you must acquit;
 2. if, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit;

3. if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit;
4. even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[60] The Crown must establish lack of consent beyond a reasonable doubt. The burden never shifts from the Crown to the accused to prove any element of the offence beyond a reasonable doubt: W(D). At no point does the accused bear any burden of persuasion to contradict the testimony of the complainant, or to affirmatively establish consent. The Court is not to simply compare the evidence of the complainant and the accused, and decide who is worthy of belief and who is not: R v. Horton, 1999 BCCA 150 at paras. 16 and 20. As stated in Horton at para. 20:

It is not a question of asking "why would the complainant lie?" or "which witness do I prefer?" In the circumstances here, where there is no finding against the truthfulness of the complainant, the ultimate question becomes "having regard to all of the evidence, or the lack of it, can the trier of fact be satisfied of guilt beyond a reasonable doubt?"

[61] Our Court of Appeal very recently summarized the proper approach to evaluate the complainant's assertion of non-consent in R v. Roth, 2020 BCCA 240:

[100] Whether a judge accepts an assertion of non-consent is "a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct" (Ewanchuk at para. 30). As such, in defending a charge of sexual assault, it "is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place" (at para. 29). In deciding that claim, the trial judge will consider "whether the totality of the complainant's conduct is consistent with her claim of non-consent" (at para. 30).

IV. DISCUSSION AND decision

[62] The defence theory of the case is that the sexual encounter was at all times consensual. When C's lie about breakfast and the fact that she had met with the forbidden Mr Bertacco was revealed, C sought to obtain sympathy and to redirect her mother's anger from herself to Mr Bertacco by a concocted allegation of sexual assault. C was worried about having her new iPhone confiscated, being grounded, or being potentially kicked out of the house and forced to live with her father.

[63] I will consider this theory in light of the evidence, and, in so doing, consider whether the Crown has acquitted its burden of proving beyond a reasonable doubt that at least some of the sexual activity occurred without C having affirmatively communicating consent, by words or conduct, to the accused.

- [64] For the most part, I believe and accept C's testimony. She was an articulate and careful witness. Her testimony was not shaken under cross-examination. She did not exaggerate, and, if anything, downplayed her evidence. She candidly admitted facts that would bolster the case for the defence. Were her evidence exaggerated or fabricated, it is unlikely that she would have described her response to Mr Bertacco's request for a kiss in the potentially ambiguous manner of "I don't know." When asked how many times she said "no" before he attempted to pull down her pants, she said "probably 3 or 4 at most." She admitted that Mr Bertacco had indicated to her several times in their social media chats that he hoped to have sex with her, and that she that agreed to visit him despite that stated ambition.
- [65] She also candidly admitted facts that assisted the defence and that would have been difficult for the defence to rebut. For example, she admitted that her mother was angry, and did not like the Bertacco family. She admitted that she had been punished in past for lying to her mother. A mendacious witness could have readily downplayed or evaded these facts internal to her family.
- [66] Her demeanour and intonation in the hours after the alleged incident are consistent with sexual assault (and by this I do not mean to imply that an emotionally flat or stoic complainant in other sexual assault case is by that factor less credible). The video of the police interview shows that she is trying to hold her emotions together while she provides the officer with her statement; she displays no histrionics or emotional exaggeration. The video also captures her weeping, but only after the officer leaves, and she is alone, and there is no audience to persuade.
- [67] In this regard, I also place weight on the testimony of C's friend, who probably knows C better than anyone else. He confirmed that C appeared emotionally distressed when she left the townhouse, and confirmed that she at first ran away from his truck rather than getting in. He also confirmed that she told him right away that she had been sexually assaulted. There is no evidence that C expressed concern that her mother would be angry, as would have been expected in a conversation between friends. At this point, C knew that her mother would be upset, but C's emotional appearance in the immediate aftermath of the alleged incident exceeded that which would be expected of a teenager facing parental displeasure for a deception about her whereabouts.
- [68] C's account of the assault is corroborated by the objective physical evidence: the scratch marks on Mr Bertacco's back and the carpet burn on C's back. The objective physical evidence also makes plausible C's testimony that Mr Bertacco picked her up and moved her to the floor. As revealed in the photographs taken the day of the incident, C was very slight in build; Mr Bertacco was about a half-foot taller and considerably heavier than C. He was and is muscular, and regularly works out. His shoulders and upper back are broad. He is five-and-a-half years older than C.
- [69] In contrast, there were several difficulties with the testimony of the accused.

- [70] First, it is implausible that this young man, earlier or presently "buzzed" on alcohol and eager for sex, would so carefully and repeatedly confirm C's consent at every stage of the sexual encounter, even asking her "are you sure that you're sure." Nor is it plausible that he remembers doing so, so clearly, especially in light of his overall imprecision in recalling details of the morning, as discussed later in these reasons.
- [71] Second, on a related point, in direct examination, Mr Bertacco claimed that he asked C whether she wanted to have sex before the sexual encounter, and at every stage, and at every time they changed position during the sexual encounter. Cross-examination undermined Mr Bertacco's evidence: he was able to identify only two moments when he sought consent: before the first kiss, and when he asked for oral sex.
- [72] Third, also related: I agree with the Crown's characterization of the evidence of Mr Bertacco's repeated confirmation of consent as "tidy". It came off as a prepared and rehearsed blanket statement rather than as recollection of specific inquiries. Mr Bertacco took pains to repeat it, verbatim, at several points during his testimony. Oddly, he expressly uttered the phrase "question mark" in quoting the questions he claims to have posed to C: that is, he literally said, in Court, several times, "are you sure you're sure question mark." While I do not put as much weight on this oddity as does the Crown, the overall impression of this repeated testimony, in the context of his otherwise generally imprecise recollection, was that these -- the most important words in this case -- were a rehearsed mantra rather than a genuine recollection of words actually uttered.
- [73] Fourth, his description of C's consent is at least partly contradictory. On one hand, Mr Bertacco recounted C as providing a series of clear "yes" responses to the repeated consent inquiries referred to in the previous paragraph, and quoted above. At the same time, he described her tone and demeanour as "iffy" and "shy": "like people when they meet for the first time."
- [74] The next two problems with Mr Bertacco's evidence, importantly, concern physical evidence that corroborate C's account of the sexual encounter. In other words, the Court is not simply relying upon the relative demeanour of each party, or even upon consistencies and inconsistencies within their own testimony, but on external objective facts. I turn to those two points now.
- [75] The fifth point concerns the evidence concerning C's track pants. A young male person would not have been flummoxed on how to remove track pants: a drawstring is readily undone on oneself or on another person. He was wearing such pants himself at the time, and he had no trouble swiftly removing them. Further, his admission that he heard the track pants ripping matches and corroborates C's evidence, and confirms the likelihood of both excessive force by Mr Bertacco and resistance by C.

- [76] Sixth, his account of the scratches on his back is implausible. He described the scratching as "really hard" and painful. He said that he flinched, worried about scarring, and didn't like it. He could not have reasonably have brushed the scratching off as "sexual scratching," unambiguously reflective of enthusiastic and consensual participation.
- [77] Apart from this implausibility, at a minimum, the severe scratching should have prompted him to pause and re-confirm C's ongoing consent. This expectation and requirement is confirmed by both statute and jurisprudence. In *R v JA*, 2011 SCC 28, the Supreme Court of Canada stated the following, in response to the argument that the accused had received advance consent to sexual activity on the complainant while she was unconscious:
- [37] The provisions of the Criminal Code that relate to the mens rea of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering these provisions, however, it is important to keep in mind the differences between the meaning of consent under the actus reus and under the mens rea: *Ewanchuk*, at paras. 48-49. Under the mens rea defence, the issue is whether the accused believed that the complainant communicated consent. Conversely, the only question for the actus reus is whether the complainant was subjectively consenting in her mind. The complainant is not required to express her lack of consent or her revocation of consent for the actus reus to be established.
- [38] With this caution in mind, I come to the three provisions that relate to the mens rea that are relevant to the issue in this case: s. 273.1(2)(d), s. 273.1(2)(e) and s. 273.2(b).
- [39] Section 273.1(2)(d) provides that there can be no consent if the "complainant expresses, by words or conduct, a lack of agreement to engage in the activity". Since this provision refers to the expression of consent, it is clear that it can only apply to the accused's mens rea. The point here is the linking of lack of consent to any "activity". This suggests a present, ongoing conception of consent, rather than advance consent to a suite of activities.
- [40] Section 273.1(2)(e) establishes that it is an error of law for the accused to believe that the complainant is still consenting after she "expresses . . . a lack of agreement to continue to engage in the activity". Since this provision refers to the expression of consent, it is clear that it can only apply to the accused's mens rea. Nonetheless, it indicates that Parliament wanted people to be capable of revoking their consent at any time during the sexual activity. This in turn supports the view that Parliament viewed consent as the product of a conscious mind, since a person who has been rendered unconscious cannot revoke her consent. As a result, the protection afforded by s. 273.1(2)(e) would not be available to her.
- [41] According to my colleague, Fish J., s. 273.1(2)(e) "suggests that the complainant's consent can be given in advance, and remains operative unless and until it is subsequently revoked" (para. 104 (emphasis in original)). With respect, I cannot accept this interpretation. The provision in question establishes that the accused must halt all sexual contact once the complainant expresses that she no longer consents. This does not mean that a failure to tell the accused to stop means that the complainant must have been consenting. As this Court has repeatedly held, the complainant is not required to express her lack of consent for the

actus reus to be established. Rather, the question is whether the complainant subjectively consented in her mind: *Ewanchuk*; *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3.

[emphasis added]

[78] In this case, even though the accused is not raising a defense of mistaken but honest belief, I have nonetheless hypothetically considered that defence in light of the evidence presented at its most favourable to the accused. Even then, the defence would not assist the accused in the face of words or actions by C that could reasonably indicate a lack of or a revocation of consent. Mr Bertacco's shrugging off of the scratching amounts to recklessness or wilful blindness to the fact that something might be wrong and any consent previously communicated was now being revoked, or that consent was no longer being provided for further sexual activity. As stated in *Ewanchuk* at para. 65:

Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's mens rea, the charge is not proven.

[emphasis added]

[79] While on the point of potential mistaken but honest belief, I also note that Barton would impose a high threshold for satisfying the reasonable steps requirement for the defence of mistaken but honest belief. Mr Bertacco and C did not know each other very well. It was their first sexual encounter, and their first real meeting. As stated at para.108:

It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.

[80] Further, the scratches are only on the upper left side of Mr Bertacco's back. This is consistent with C's version of events: Mr Bertacco had his elbow pinned on her shoulder, making the upper left portion of his back lower and closer to her body, such that she was only able, or more readily able, to reach that area of his broad, muscular back. Further, were both of C's arms and hands embracing his back, as Mr Bertacco claimed, there would likely have been scratches on both sides of his back.

[81] Finally, Mr Bertacco was a less reliable witness and recalled events less precisely in several key respects. He could not recall whether there were one or two series of Snapchat communications: one the previous evening, and one just before the early morning meeting.

In contrast, C was clear and precise in this regard. At one point in his testimony, he believed that he may have started the Snapchat communication before he started drinking. This was highly improbable even on his own recitation of the facts. He had a fuzzy recall of the text messages, and the moment when C was able to pick up her iPhone and read them, and her request that her friend pick her up. The fact that he had been "buzzed" as the result of multiple drinks of whisky, and appears to have stayed up much of the night, coupled perhaps with the distraction of potential impending sex, and his later focus on the sexual act, may explain the imprecision of his recollection. In contrast, C was sober, and was in a better position to recall the events of the evening, as reflected in her more precise testimony at trial and as provided to the police within hours of the alleged sexual assault.

[82] I turn now to the arguments advanced by the accused.

[83] I do not accept the accused's theory that the alleged sexual assault was presented as a buffer against C's mother's anger at the discovery of C's untruth. C immediately admitted her lie. She did not claim that she was forced to go with Mr Bertacco, physically or emotionally or through blackmail or otherwise. It is true that her claim of sexual assault might procure some sympathy, but it would not excuse or hide her deception about meeting Mr Bertacco, but rather emphasize it. In any case, in the end, despite the sexual assault, C's mother did punish her for the deception with grounding; the tenor of the evidence from C and her mother was that C would have expected punishment, regardless of the sexual assault. Finally, if C hoped to gain sympathy with a lie, once that alleged strategy failed, it is unlikely that C would continue with it. C has had almost two years to say, "I do not wish to proceed with this complaint and prosecution, with its attendant stress, aggravation, and subjection of my sexual activities and character to the scrutiny of a public trial" (let alone with the commission of a crime by procuring the conviction of an innocent man through perjury). That said, I do not rely heavily on this observation in deciding this case.

[84] I am not troubled by the contradiction in evidence between C's mother and C's friend, on one hand, and C, on the other, about her mother's threats to kick her out of the house and confiscate her iPhone. It is understandable that a person who had just been sexually assaulted would have a diminished and less precise recall of that moment than would the friend or the mother. As stated in *R v MB*, 2016 ONSC 6480:

[96] This case is all about an assault, a sexual assault. In most cases of sexual assault only two people really know what happened, the victim and the accused. While I recognize the importance of inconsistencies in testimony and the defence's argument in regards to M.J.'s delay in reporting to the police and attending at her doctors, in assessing the evidence of any victim/witness in matters of sexual assault, other considerations are in play, as noted by Zuker J. in *R. v. Ururyar* 2016 ONCJ 448.

[97] Zuker J., at paragraph 374 wrote, "It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse."

[85] The Supreme Court of Canada made a similar, broader, statement in *R v DD*, 2000 SCC 43:

65 A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

[86] See also Roth at para.129. DD speaks directly to the timeliness of reporting a sexual assault, but, as evidenced by Ururyar, confirms that a court should be alive to the special constraints and circumstances that may affect how a sexual assault victim makes a report. These observations also speak to some extent to the other claimed inconsistencies in C's evidence, discussed below.

[87] Ultimately, however, I am not relying upon generalizations about stereotypical or expected responses or non-responses to a sexual assault to reconcile this aspect of the evidence. I have preferred the evidence of the friend and the mother to that of C on this point, on the basis that their circumstances made them the more reliable witnesses, and on the basis that they both recall those subjects being raised by the mother. In the end, I do not accept the inference urged by the accused that C's testimony on this point was dishonest, and should corrode her credibility in general. C simply did not remember her mother saying these things when she walked in the door.

[88] Counsel for the accused argued that C provided inconsistent evidence on the reason Mr Bertacco stated he wanted to meet, between the trial evidence, on one hand, and the police statement and the preliminary enquiry on the other. In the police statement and in the preliminary inquiry, in contrast to the trial evidence, C did not overtly state that Mr Bertacco had indicated that he wanted to have sex with her. When pressed, C said that "it never came up," and that she was not specifically asked in the police interview or preliminary inquiry.

[89] I do not place much weight on this disparity, or even see it as an inconsistency. In the police statement, C did in fact make indirect references to Mr Bertacco's desire to meet C for sexual purposes. For example, she says that "Chiko Bertacco messaged me and I saw him as a friend so I messaged him back and then he kept asking me to go down to his friend's house or sneak him into mine and I kept saying no that I wasn't gonna because if my mom knew that, you know, he wanted to touch me and stuff, that she would, if he even laid a finger on me, that she would have been mad and he knows that because he knows our family and just persisting ." [emphasis added]. Her reference to Mr Bertacco's statements --- "he called me pretty and stuff," and "S'up Babe" --- also indicates a romantic or carnal interest. C disclosed all of these statements to the police within hours of the alleged sexual assault.

- [90] The transcript also shows that C made no attempt to hide the electronic textual trail leading to her meeting Mr Bertacco. At one point in her police interview, C offers to show the officer the messages on her iPhone. This offer is not consistent with someone trying to hide evidence or deceive the police.
- [91] Similarly, C's statement to the police that the plan was to "hang out" is consistent with her evidence and is not indicative of suppression of the communications of the sexual invitation. In the social media exchange, Mr Bertacco did ask for sex, which C declined. Over the course of a long exchange of messages, Mr Bertacco retreated from the immediate sexual request, and instead proposed drinking, stating that "I just want to talk. I really want to have sex with you. But now I'm just kinda sad."
- [92] I decline defence counsel's suggestion that C deliberately concealed or downplayed the sexual content of Mr Bertacco's messages, or that her credibility should suffer as a result.
- [93] Counsel for the accused also emphasized inconsistencies in C's evidence about whether the communications to and from her mother and her friend at the house were oral telephone calls or typed texts. I accept that in colloquial terms, particularly among young people, a communication on a telephone, even a textual one, is sometimes referred to as a "call," and that typing words in a text communication is often referred to as "saying," and that memory of the specific mode of communication conveyed through a singular smartphone device can sometimes be blurred. The important and uncontroversial fact is that C communicated with her friend and requested a ride, and he came. I do not find these inconsistencies to be material, or undermining of the credibility or reliability of the complainant.
- [94] Finally, counsel for the accused argues that two gaps in evidence ought to raise a reasonable doubt. Neither the Snapchat records nor the phone text messages were in evidence before the Court. Nor was there any medical evidence, including the results of the sexual assault examination. I infer from references during trial that these records were to some extent reviewed by the accused, the extent of which I am unaware.
- [95] With respect to the phone and social media records, it is regrettable that they were not before the Court. The key communications in question occurred on Snapchat, the primary appeal of which is that the messages generally auto-delete after a certain time and are not preserved. Ultimately, however, again, the content of the key Snapchat and text messages was not controversial, and was agreed upon by both sender and recipient. C agreed that Mr Bertacco had asked her for sex. Mr Bertacco agreed to the content of the Snapchat messages just referred to, and referred to above, in the summary of his testimony ("I just want to talk"). C and her mother agreed on the contents of her mother's text messages to C.

[96] The medical evidence was also uncontroversial. There is no dispute that Mr Bertacco had sex with C: the usual DNA inquiry is unnecessary. C agreed that Mr Bertacco's elbow left no visible bruises on her body, although she testified that her shoulder was tender from internal bruising. Again, the medical evidence would not have added anything to the trial, and its absence is of no import.

V. conclusion

[97] As stated, I believe the testimony of the complainant, and I do not believe the testimony of the accused on the key facts concerning consent in this case. This conclusion is not simply based upon the relative demeanour of the complainant and accused, as set out above, but is based upon the totality of the evidence, including the objective physical evidence, as well as the credibility and reliability considerations set out in *Faryna v. Chorny*, [1952] 2 DLR 354 (CA) at 356 and *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.

[98] This conclusion in itself is not of course sufficient to find the accused guilty. A sexual assault trial is not simply a credibility contest. At all times, the Crown bears the burden of proof of showing guilt beyond a reasonable doubt. At no point does the accused bear any burden of persuasion, to contradict the testimony of the complainant, or to affirmatively establish consent.

[99] Neither the affirmative evidence of the accused, nor the inconsistencies in the evidence of the complainant, which I have found to be inconsequential, nor any other aspect of the evidence, raise a reasonable doubt in my mind. The Crown has proven beyond a reasonable doubt that the complainant did not consent, and did not provide consent, by either her words or conduct, to the ongoing sexual activities. Guided by the principles in *W(D)* and *R v. Vuardin*, [2013] 2 SCR 639, the Crown has acquitted its evidentiary burden of proving beyond a reasonable doubt the mental and physical elements of the charge.

[100] Specifically, with respect to the *actus reus*, I accept the complainant's testimony and am satisfied beyond a reasonable doubt that she did not consent to the activity. With respect to the *mens rea*, I accept the complainant's testimony and I am satisfied beyond a reasonable doubt that the complainant did not affirmatively communicate consent, in words or in conduct, to the sexual activity, and indeed affirmatively communicated a lack of consent. The accused could not have honestly believed that the complainant was consenting in the circumstances: see JA at paras. 39-40.

[101] For the sake of argument, even if C did consent to sexual activity at an early stage of the sexual encounter, C's scratching of his back, which Mr Bertacco found painful, worrisome, and strange, ought to have prompted him to make further inquiries and confirm ongoing consent. He had no basis to shrug off these scratchings as a sexual garnish, or to assume ongoing consent to continued sexual activity. At a minimum, his ongoing sexual activity after the scratching, without renewed confirmation of consent, constituted sexual assault.

[102] Mr Bertacco, please stand. For the reasons I have stated, I find you guilty of the charge of sexual assault.

"Crerar J"

[1] This position is consistent with authorities such as *R v Park*, [1995] 2 SCR 836 at para. 26: "To summarize, when the complainant and the accused give similar versions of the facts, and the only material contradiction is in their interpretation of what happened, then the defence of honest but mistaken belief in consent should generally be put to the jury, except in cases where the accused's conduct demonstrates recklessness or wilful blindness to the absence of consent. On the other hand, courts have generally refused to put the defence of honest but mistaken belief in consent to the jury when the accused clearly bases his defence on voluntary consent, and he also testifies that the complainant was an active, eager or willing partner, whereas the complainant testifies that she vigorously resisted. In such cases, the question is generally simply one of credibility, of consent or no consent."

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Prepared on 28 October 2026 · Esheria