

CANADA / JUDGMENT

R. v. Carlson

2024 BCSC 1281

COURT

Supreme Court of British Columbia

DECIDED

17 July 2024

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2024 BCSC 1281 R. v. Carlson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Carlson,

2024 BCSC 1281

Date: 20240717

Docket: 111267-19

Registry: Kamloops

Rex

v.

Joel Eric Carlson

Ban on publication of any information that would identify the complainants

in this matter, pursuant to s. 486.4(1) of the Criminal Code

Before: The Honourable Mr. Justice Riley

Written Reasons for Judgment on

Admissibility of Similar Fact Evidence

Counsel for the Crown:

L.A. Drake

K.E. Bouchard

Counsel for the Accused:

L.J. Helps

Place and Date of Hearing:

Kamloops, B.C.

June 13, 2024

Place and Date of Judgment with Written Reasons to follow:

Kamloops, B.C.

June 14, 2024

Place and Date of Written Reasons:

Kamloops, B.C.

July 17, 2024

Introduction

- [1] These are reasons for judgment in relation to a Crown application to rely on similar fact evidence of multiple complainants in a case involving nine counts of sexual assault. At the conclusion of the hearing, I allowed the Crown's application in part, with reasons to follow. These are the reasons.

Background

- [2] The accused Mr. Carlson is charged on a nine-count indictment, involving allegations of sexual assault made by seven different complainants.
- [3] Mr. Carlson elected trial by judge and jury. The similar fact application was argued after the Crown had called all of its evidence, but before the Crown formally closed its case.
- [4] The Crown sought a similar fact evidence ruling in anticipation of arguing before the jury that the evidence on each count can be considered by the jury in determining the accused's guilt on every other count in the indictment. The Crown argued in the alternative that even if the similar fact evidence is not ruled admissible on all counts, at the very least it ought to be admissible to support the Crown's case on certain specific issues in relation to specific counts. The Crown argued in the further alternative that the evidence in relation to a particular complainant ought to be ruled admissible in relation to all three counts involving that complainant.
- [5] As to timing, the defence understandably wanted the ruling in advance of making a final decision on whether to call defence evidence. At the point when the hearing took place, the defence did not anticipate calling a case, but reserved the right to reconsider that issue depending on the outcome of the Crown's similar fact evidence application.

- [6] On the merits of the application, the defence argued that the Crown did not overcome the rule of presumptive inadmissibility of similar fact evidence. Defence counsel submitted the common features of the allegations relied upon by the Crown were generic and lacked probative value, while the prejudicial effect of admitting the evidence across counts was high.

The Evidence

- [7] I will summarize, in very basic terms, the evidence of the seven complainants.

Count 1 [CW]

- [8] Count 1 relates to the complainant CW. CW alleges that Mr. Carlson sexually assaulted her on a single occasion, some time in the fall of 2013. She was 18 at the time. She did not say how old Mr. Carlson was but based on other evidence it would appear that he was in his early 20s at the time.
- [9] CW met Mr. Carlson at the gym. After they met, they went out a few times, dancing or to bars.
- [10] On the date of the incident in question, Mr. Carlson and CW came home from a night of dancing. CW testified that she was not intoxicated, and she believes that Mr. Carlson was drunk. They were in Mr. Carlson's apartment, in the bedroom. They were both in their undergarments and went to bed. They engaged in some consensual sexual activity. When they were both fully undressed CW made it clear to Mr. Carlson that she did not want to have sex without a condom. She told him that multiple times. Mr. Carlson would not take no for an answer. He said "oh God [C] just let me fuck you". He then had forcible sexual intercourse with her, from behind, without a condom. CW yelled and banged on the wall, trying to get the attention of Mr. Carlson's mother who was asleep on the couch in the living room. Mr. Carlson's mother simply yelled back for Mr. Carlson to go to sleep. CW was able to free herself, roll over, and push Mr. Carlson off the bed with her feet. Mr. Carlson got up, pushed CW back down on the bed, and returned to having forcible non consensual sex with her, from behind, without a condom. After he finished, he went to sleep. That is CW's allegation.
- [11] CW was cross-examined at length about a number of features of her allegation and other issues, but the cross-examination does not materially alter the facts for the purposes of the similar fact analysis. I will say, there are live issues with respect to CW's credibility and reliability, but those issues will ultimately be for the jury to resolve.

Count 2 [NR]

- [12] Count 2 relates to the complainant NR. NR met Mr. Carlson at a house party. Thereafter, they were in a relationship for some three to three and one-half years. They lived together for a time, in a basement suite at the home of NR's parents. The last 18 months of their relationship was an on-again, off-again situation.[1]

- [13] NR testified that starting in 2013, there were many incidents when Mr. Carlson had sex with her against her will. It was usually intercourse, but also other non-consensual sexual acts from time to time. The first few instances of non-consensual sex began with Mr. Carlson pushing her to do things she did not want to do. NR would say no, but Mr. Carlson would persist and end up doing whatever he wanted, without NR's consent. He would demand sex over and over again and when she said no, he would persist, saying things like, "it's fine" or "you'll be fine". Later in the relationship, when Mr. Carlson wanted to have sex and NR did not, she just froze. She learned that she could not say "no", so she said nothing.
- [14] NR said that on multiple occasions, at least two, Mr. Carlson forced non-consensual sexual intercourse upon her while she was crying. She had a vivid recollection of one such incident, in which Mr. Carlson saw that she was crying, and complained that it was turning him off. Even still, he persisted. NR was cross-examined on the details but once again I would say the evidence from cross-examination goes more to issues that will be decided by the jury.
- [15] NR also testified that there were instances when she awoke to find Mr. Carlson touching her sexually, obviously without her prior knowledge or consent. NR recounted one such incident when she awoke to find Mr. Carlson touching her bare breasts with his hand, while holding his cell phone and pointing it at her. NR believed he may have been taking a photograph, though the evidence in cross-examination suggests that this was NR's assumption, and there is no evidence of a photograph of the incident.

Count 3 [CH]

- [16] Count 3 relates to the complainant CH. She met Mr. Carlson on Tinder, in March 2017. CH was 18 years old at the time, and Mr. Carlson was about 25.
- [17] The incident that is the subject of CH's allegation took place in March 2017. She and Mr. Carlson arranged to meet in person at a local university where CH was attending school. Mr. Carlson picked her up in a vehicle and they drove to Mr. Carlson's apartment.
- [18] Once they got to Mr. Carlson's apartment, CH and Mr. Carlson went into the bedroom and proceeded to have consensual sexual intercourse, with a condom. Mr. Carlson was on top and CH was underneath him.
- [19] CH alleges that about ten minutes into the encounter, Mr. Carlson got up off the bed saying he did not want to wear a condom. He pleaded with CH to have sex with him without a condom. CH said no. She gave reasons, explaining she did not want to get pregnant. She testified that Mr. Carlson was persistent and "would not listen". He kept repeating over and over again that it would be fine. CH also got off the bed during a five minute conversation on the subject. Eventually, CH gave in and said yes. It appears that she did so after Mr. Carlson said he would not ejaculate inside of her, although CH also testified that she still did not want to have sex without a condom.

- [20] CH got back on the bed and Mr. Carlson proceeded to have sex with her from behind. CH testified that he was having sex with her forcefully, with his hand or fist on her head, and her head banging on the headboard. She said "ow" and "can you stop, this hurts", but Mr. Carlson continued. The incident lasted 10 to 15 minutes, ending when Mr. Carlson ejaculated.
- [21] Afterward, Mr. Carlson drove CH home and they did not see each other again. They continued to communicate by text for a brief time.

Count 4 [AA]

- [22] Count 4 relates to the complainant AA. She met Mr. Carlson in October 2017, when she was 17 years old, very shortly before turning 18 later that month. They met on Tinder and thereafter they frequently went to the gym together.
- [23] AA testified about two separate incidents of non-consensual sexual activity with Mr. Carlson.
- [24] The first incident was in or about November 2017. They were in Mr. Carlson's bed. They were having consensual sexual intercourse, with Mr. Carlson on top of AA, and AA lying on the bed, face down. Mr. Carlson was having sex with her from behind. He was not wearing a condom. After about 10 minutes Mr. Carlson started moving his penis around and inside AA's anus. AA made it clear she did not want to have anal sex. She said "I don't want to do that now", and "I am not interested", or words to that effect, about ten times. AA testified that Mr. Carlson did not take no for an answer, became aggressive, and began forcefully inserting his penis into her anus. Mr. Carlson was holding her head down, pushing her into the bed. She cried quite loud for some time but Mr. Carlson did not stop. The incident lasted 10 or 15 minutes and ended when Mr. Carlson rolled over and went to sleep. She was cross-examined at length about how she had no visible injuries from the incident, and there were no messy bodily fluids, even though no lubricant was used, and Mr. Carlson did not wear a condom. AA did not mention this incident when she first went to see the police about Mr. Carlson in February 2018.
- [25] The second incident happened on 1 January 2018. AA and Mr. Carlson had been at a bar the night before. Afterward, they went back to the apartment of Mr. Carlson's friend. It was a one-bedroom apartment. AA went to sleep earlier than the others who were there, because she had to work at 11:00 a.m. that morning, New Year's Day. She went to sleep in the bedroom. At around 7:00 a.m., Mr. Carlson's friend woke her up in the bedroom and she then went to sleep on the couch. Mr. Carlson was not around at the time. AA believed he may have been outside smoking. AA went to sleep on the couch, lying on her stomach. Some time thereafter, AA awoke to find Mr. Carlson pulling her pants down. She looked over her shoulder to see Mr. Carlson's erect penis, touching her lower back, just above her buttocks. AA sat up and asked Mr. Carlson what he was doing. He said he was trying to wake her up sensually. AA slapped him. They had an argument. It was loud enough for Mr. Carlson's friend and the friend's girlfriend to come out of the bedroom to find out what happened. AA

testified that the night before, she explicitly told Mr. Carlson she did not want to engage in any sexual activity that night because she was on her period.

Count 5 [TL]

- [26] Count 5 relates to TL. She testified about an incident that occurred in 2018, when she was 20 years old. Mr. Carlson would have been around 26 years old at the time.
- [27] TL met Mr. Carlson on Tinder. Mr. Carlson said he was not interested in a sexual relationship because he was trying to get back with an ex-girlfriend at the time.
- [28] The incident in question occurred in or around March 2018. TL had just gotten off work as a nurse at local medical facility and had arranged to meet up with Mr. Carlson at a bar or night club in Kamloops. TL arrived at 11:30 p.m. Mr. Carlson was already there, with a group of friends.
- [29] TL and Mr. Carlson went to the bar. TL ordered a drink with three shots of alcohol in it. It was a kind of drink she had before. She drank about half of it and started to feel exceptionally drunk and ill. She was disoriented. She told Mr. Carlson she was not fit to drive and he offered to let her stay on his couch for the night.
- [30] TL recalls Mr. Carlson helping her down the stairs to his apartment. When they got inside, Mr. Carlson's mother was asleep on the couch. Mr. Carlson and his mother started arguing. TL went into the bedroom while Mr. Carlson and his mother continued to argue.
- [31] The next thing TL remembered is "waking up" or "coming to" as Mr. Carlson was on top of her, kissing her, on the bed. TL does not believe she was kissing him back. She tried to say no, but she is not sure if the words came out.
- [32] TL's next memory was of waking up on Mr. Carlson's bed, on top of the covers, wearing a t-shirt that did not belong to her, with no underwear on. Mr. Carlson was asleep beside her on the bed, wearing boxer shorts.
- [33] TL got up and got dressed. She found her bra, shirt, and pants, but not her underwear. She left quickly, called a cab, and went back to the night club to collect her car.
- [34] TL's vagina was sore and she noted that she had a small tear in the vaginal opening. She gave evidence that she has experienced a similar kind of injury on prior instances when she had sex without any lubricant or lubrication.[2] On this basis, TL believes that Mr. Carlson penetrated her vagina. She testified that she would not have consented to sexual intercourse with Mr. Carlson based on not wanting to have sex with him, on how ill she felt, and on her feeling of loss of control in the last moments she can remember about the incident.

Counts 6 to 8 [KT]

- [35] Counts 6 to 8 relate to the complainant KT. She met Mr. Carlson on Tinder. Mr. Carlson became her personal trainer at the gym.

- [36] KT and Mr. Carlson were in a relationship that lasted three or four years. They lived together, in a number of different apartments. One of them was an apartment at a particular building at Harrison Place in Kamloops.
- [37] After KT and Mr. Carlson broke up, KT was living in a different apartment in the same building. KT gave evidence about three separate occasions when Mr. Carlson came to the apartment, climbed onto the balcony, KT let him in, and then he sexually assaulted her.
- [38] By way of background, the climbing onto the balcony feature was not particularly alarming because the evidence reflected that when KT and Mr. Carlson lived together in another apartment in the same building, KT would sometimes let Mr. Carlson into the apartment after he climbed the balcony at night, having forgotten his keys.
- [39] In relation to the three incidents of sexual assault, KT testified that on each occasion, KT let Mr. Carlson into the apartment because, among other things, he appeared drunk and she did not want him driving in that state, for his safety and the safety of others. KT agreed in cross-examination that she had actually let Mr. Carlson drive her car drunk on multiple occasions in the past. KT agreed that allowing Mr. Carlson into the apartment on the second and third instances was irrational, but she did it anyway, somehow thinking that this time it would be different.
- [40] In any event, in relation to each incident, KT described how when she let Mr. Carlson into the apartment, she told him he could sleep on the couch, but he ignored her and went right to the bedroom.
- [41] On the first occasion he simply got undressed and went to sleep right away, but then later in the night she awoke to find him on top of her, pinning her down. She told him "no" and told him to stop it and get off her, but he did not listen. He proceeded to have forcible, non-consensual sexual intercourse with her, without a condom. She fought and tried to fend him off for about ten minutes, but in the end, she stopped resisting. KT had a bruise on her arm from this incident, and she got a friend to take a photograph of the bruise the next day. The date-stamped photograph was marked into evidence at trial.
- [42] The second instance was similar to the first, in that KT told Mr. Carlson "no" and tried to resist, but this time only for a few minutes. Once again, he pinned her down and had forcible, non-consensual sexual intercourse with her, without a condom.
- [43] The third instance was again similar to the first two, except this time KT did not fight him off at all. She yelled at him saying "no", "get off me", and "stop that", but then gave up. Mr. Carlson had forcible, non-consensual sex with her, without a condom. When he was still on top of her, KT screamed as loud as she could. She then spit in Mr. Carlson's face. This caused Mr. Carlson to move his arm, and KT was able to get an arm free. She took a swing at him, knocking him backward so that she was able to get off the bed and run toward the kitchen. In the kitchen, KT got a frying pan and waved it at Mr. Carlson in self-defence. He left the apartment.

- [44] Mr. Carlson left the apartment without his wallet. KT collected it and was about to leave the apartment to bring it to him at the front lobby when the police arrived. They were responding to a 911 call about a domestic disturbance. KT told them she was fine and denied being assaulted. They left.
- [45] The Crown also called the upstairs neighbour who made the 911 call. The neighbor testified that she heard a woman yelling "stop", "don't", and "get off me". The sounds were coming from an apartment on the lower level, which is the level where KT's apartment is located. The yelling continued and escalated to the point where the woman made a loud scream. At that point, the neighbor called 911.
- [46] Certain facts from the police report in relation to this incident were tendered by admission of both parties. In particular, it was admitted that the police attended to KT's apartment, that she was fully clothed when the police arrived at her front door, that she was visibly upset, that she denied any assault had occurred, and that no one else was in the apartment at the time.

Count 9 [TS]

- [47] Count 9 relates to TS. She met Mr. Carlson in 2018, when she was 21 years old. Mr. Carlson would have been in his mid-20s at the time. They met on Tinder and started seeing each other in person.
- [48] TS's allegation relates to an incident that occurred at Mr. Carlson's apartment. She and Mr. Carlson were asleep in the bedroom, at night. She awoke to find Mr. Carlson, positioned below her on the bed, pulling her legs apart at the thighs. He then started stretching her vagina out with his fingers. She told him to stop, explaining that she was tired and had to go to school in the morning. Mr. Carlson did not stop. He continued to stretch her vagina and then had forcible non consensual sexual intercourse with her. He was on top of her, and she was lying on her back. He did not wear a condom.
- [49] TS agreed in cross-examination that during the incident, Mr. Carlson told her to say things, including the name of his ex-girlfriend, KT, and TS did so. Under further cross-examination, TS maintained that she did not want Mr. Carlson to touch her vagina or penetrate her, she told him so, and she did not consent.

Other Relevant Evidence Emerging from the Crown's Case

- [50] Three other factual points or bodies of evidence that emerged from the Crown's case are relevant to the similar fact evidence application.

- [51] The first is the evidence about a Facebook group called Roastpower 2.0. The best evidence about this came from the testimony of the complainant AA, but several other complainants also testified that they were aware of Roastpower 2.0 posts pertaining to Mr. Carlson. AA described Roastpower 2.0 as a female only group chat that allows users to post things of interest to other women. Among these is the ability to post a photograph of a male subject and "roast" him for inappropriate behaviour.
- [52] AA testified that there was a Facebook Roastpower 2.0 group chat or post about Mr. Carlson. She read it and posted comments on it, although she did not post anything about the allegations that she testified about in court. She did post some allegations about Mr. Carlson, and stated, among other things, that Mr. Carlson "ruined her life for a bit", or words to that effect.
- [53] The two other complainants who were familiar with Roastpower 2.0 were CH and KT. Both testified that they had read posts about Mr. Carlson on Roastpower 2.0, but had not personally posted anything about Mr. Carlson. Both CH and KT testified that what they read on Roastpower did not cause them to alter or add to their allegations against Mr. Carlson.
- [54] The second subject is the evidence of a media release issued by the police about Mr. Carlson. The contents of the media release were not placed in evidence at trial, although at least four of the seven complainants testified that they went to the police with allegations against Mr. Carlson after seeing or hearing about the media release.
- [55] The third subject is the evidence about interactions between the various complainants. All of the complainants were specifically asked and confirmed in their testimony that they did not share the details of their allegations with any other complainants in the case. Most of the complainants were unaware of who the other complainant witnesses were and had never spoken to any of them. All of the witnesses testified that they did not alter or add to their accounts as a result of anything they were told by or learned about other complainants, or to make their accounts more similar to others, or to make their accounts seem more believable.
- [56] Having said all that, at least one witness, KT, did admit in cross-examination that in her statement to the police, she said her allegations against Mr. Carlson matched up with allegations made by other women. By way of explanation, KT testified that in saying this to the police, she was referring to the allegations in general, and not the specifics of the allegations she has testified about in court, which she says she has not shared with any of the other witnesses in this matter.
- [57] There is also evidence that some of the complainants have spoken to each other, and indeed have spoken to each other about Mr. Carlson. Specifically:
- (a) Both CW and NR admit that they knew each other, or knew of each other, as other women who were seeing Mr. Carlson around the same time. There is no evidence that the two women ever discussed their respective allegations against Mr. Carlson.

- (b) NR testified about receiving texts from KT at some point. It appears that this occurred during a time when KT and Mr. Carlson were still together, or at or around the time KT and Mr. Carlson broke up. In her trial testimony, KT initially testified to having no recollection of communicating with NR, although later in her evidence KT agreed that she may have reached out to NR, to find out whether Mr. Carlson had been cheating on her.
- (c) AA acknowledged that at some point she reached out to TL, and offered to provide support to her if she wanted it, although they did not discuss the contents of their respective allegations against Mr. Carlson.
- (d) AA also admitted that she and TL may have had a brief conversation at a party in Barriere, but once again she says they did not discuss their allegations against Mr. Carlson. TL did not recall meeting AA at a party and testified that AA must be mistaken about that.
- (e) TS admitted that she and KT, who had some very indirect connection through their affiliation with a local beauty school, discussed their relationships with Mr. Carlson at one point, although TS says she did not disclose her allegations to KT.

Legal Principles

- [58] The general rule, as stated by Justice Binnie in the leading case of *R. v. Handy*, 2002 SCC 56 at para. 55, is that similar fact evidence is presumptively inadmissible, and that the onus lies on the prosecution to rebut that presumption by establishing on a balance of probabilities that, in the context of a particular case, the probative value of the evidence in relation to a particular fact in issue outweighs the prejudicial effect of the evidence so as to justify its admission. The fact that propensity evidence is said to be admissible based on its relevance to some other issue at trial does not mean that it ceases to be propensity evidence: *Handy* at para. 59-68.
- [59] The rule applies to both evidence of uncharged similar acts, and to similar acts between counts in a multi-count indictment, although the assessment of prejudice may differ slightly between these two scenarios. See *R. v. Mostowy*, 2019 BCCA 216 at para. 35, citing *R. v. J.H.*, 2018 ONCA 245, where the Court took into account that the similar fact evidence related to "the counts in the information and the evidence was already before the court". In short, the prejudicial effect is greater where the similar fact evidence comes from conduct "outside the allegations in the [i]ndictment": *R. v. J.M.*, 2010 ONCA 117 at para. 87.
- [60] The determination of probative value requires an identification of the material issue to which the similar fact allegations are said to relate. Identifying the material issue is "essential", because probative value cannot be assessed without doing so: *Handy* at para. 73. However, the identification of the material issue ought not to be treated as establishing any kind of "pigeon hole" or categorical basis for admission of similar fact evidence: *Handy* at para. 57. It is simply the first step in ascertaining whether the probative value of the evidence exceeds its prejudicial effect.

- [61] In sexual assault cases, similar fact evidence is sometimes relevant to the actus reus, that is, proof that the accused engaged in a sexual act without the consent of the complainant: Handy at para. 78, 119-120. In Handy, the issue was proof of "the consent component of the actus reus". Evidence of prior acts demonstrating the accused's "sexual intransigence in closely comparable circumstances", in other words, his "refusal" to "take no for an answer" was probative of that issue.
- [62] Similar fact evidence may also be relevant to prove the mens rea component of the offence of sexual assault, and more precisely, to prove that the accused knew that the complainant did not consent and yet proceeded anyway. By way of example, the Crown cites Mostowy, where the trial judge's ruling admitting similar fact evidence across counts was upheld on the basis that the evidence was relevant to both the actus reus and the mens rea on each count. With regard to the mens rea, the reasoning was that the evidence of all of the complainants was probative of the assertion that the accused was "reckless or wilfully blind" with regard to the lack of consent of the complainant on each count: see Mostowy at para. 40.
- [63] There is some case law suggesting that similar fact evidence that is sufficiently probative may be tendered solely to bolster the credibility of multiple complainants: R. v. B.(C.R.), [1990] 1 S.C.R. 717 at 738-739. However, the weight of authority would seem to auger against admission of similar fact evidence solely for this purpose because, as explained in Handy at para. 115, credibility is an issue that "pervades most trials", and "[c]are must be taken not to allow too broad a gateway for the admission of propensity evidence".
- [64] Thus, the safer view would be that evidence properly admitted as being probative of some other material issue may ultimately have the effect of bolstering or reinforcing a complainant's credibility. As Justice Hall helpfully put it in R. v. P.E.L., 2013 BCCA 542 at para. 30 (in dissent, but not on this point), similar fact evidence that is "probative of the commission of the offences (the actus reus)" may "serve to enhance the credibility of the various complainants".
- [65] Again, to draw upon the reasoning in Handy at para. 120, the issue "broadly framed" may have been credibility, but the issue more precisely framed was proof of "the consent component of the actus reus". Evidence of similar acts demonstrating the accused's "sexual intransigence in closely comparable circumstances", in other words, his "refusal" to "take no for an answer" was probative of that issue. Of course, while not tendered primarily for credibility purposes, the admission of the similar fact evidence served to enhance the credibility of the complainant in her assertion that she did not consent: Handy at paras. 115-116.
- [66] The trial judge, in the capacity of gatekeeper over the evidence that is properly placed before the trier of fact, must also consider the possibility of collusion. Because the probative value of the evidence often turns on the unlikelihood that multiple witnesses or complainants would independently advance allegations that are similar or share unifying

features by mere coincidence, it is important to assess whether the allegations are truly independent from one another, as opposed to being the product of collusion between similar fact witnesses: Handy at para. 104; R. v. Shearing, 2002 SCC 58 at para. 40.

- [67] Where there is an air of reality to the issue of collusion, then the burden shifts to the Crown to establish, on a balance of probabilities, that the similarities in the evidence are not the product of collusion: Handy at para. 112; Shearing at para. 41. If the Crown cannot meet that burden, then similar fact evidence will not be admitted, or cannot be considered across counts in the indictment.
- [68] It is important to keep in mind that at the end of the day the issue is "concoction or collaboration", not "contact": Handy at para. 111; see also Shearing at paras. 41, 45. Finally, even where the Crown meets its burden of proving that the similarities in the evidence are not the product of collusion, the trier of fact must still be instructed to consider the possibility of collusion in the weighing of the evidence.
- [69] When assessing probative value, the trial judge must consider the nexus between the alleged similar acts and the offence that is the subject of the charge. To paraphrase from Handy at para. 76, the "connectedness" or "nexus" between the similar fact evidence and the charged conduct is a "principal driver of probative value".
- [70] The strength of the nexus required to justify admission depends on the nature of the issue to which the similar fact evidence is said to relate. Where the Crown relies on similar fact evidence to prove identity, a high degree of similarity, that is, a degree of distinctiveness or uniqueness akin to a "signature" is generally required to justify admission: Handy at para. 77, citing R. v. Arp, [1998] 3 S.C.R. 339. Where the evidence is relevant to some other material issue, the degree of similarity or strength of the nexus is not necessarily less demanding, but "different", and the "drivers of cogency" will not be the same: Handy at para. 78. Thus, "it is not an invariable requirement that there be a strong peculiarity or an unusual distinctiveness" in the features that are said to unify the allegedly similar acts: J.M. at para. 91.
- [71] In Handy at para. 82, Binnie J. cited seven factors relevant to assessing the nexus or connectedness between similar fact allegations, which I would adapt or re-phrase for the purposes of a count to count similar fact evidence analysis as follows: (i) the proximity in time of the allegedly similar acts, (ii) the extent to which the acts alleged in the different counts are similar to each other, (iii) the number of similar acts, (iv) the circumstances relating to the similar acts, (v) any distinctive features of the incidents, (vi) any intervening events, and (vii) any other factor tending to support or rebut the "underlying unity" of the allegedly similar acts.
- [72] When it comes to assessing the nexus or degree of connectedness between similar fact allegations, the court is not to simply tally up the similarities and differences in the various acts in issue as if conducting an accounting exercise: Shearing at para. 60. Differences between the acts are not necessarily fatal to the case for admissibility: R. v. S., 2005 BCSC

1915 at para. 60. What is important is whether there are sufficient unifying features such that the probative value of the evidence exceeds its prejudicial effect. A key consideration will often be the extent to which the similarities or unifying features in the evidence diminish the possibility of mere coincidence.

- [73] On the other side of the scale, the trial judge must consider the prejudicial effect of the similar fact evidence. The prejudice flows from the "potentially poisonous nature" of propensity evidence: Handy at para. 58. The court must consider both moral prejudice and reasoning prejudice. Moral prejudice entails the risk that the trier of fact may conclude on the basis of the similar fact evidence that the accused is a bad person and is therefore more likely to have committed the offence charged: Handy at paras. 31, 100, 139-140. Reasoning prejudice entails the risk that the trier of fact may become distracted by or overwhelmed by the evidence of alleged similar acts so as to produce an "unfocussed trial" that could yield an improper or unsound conviction: Handy at paras. 31, 100, 139, 144-145.

Applying the Legal Principles in this Case

(i) Identifying the Material Issues

- [74] The Crown's primary position on this application is that the similar fact evidence is probative of two material issues in each count, namely: (i) proof of the actus reus, and (ii) proof of mens rea of the offence of sexual assault.
- [75] With regard to the actus reus, the Crown says the similar fact evidence is relevant to the issue of proof of sexual touching without the consent of the complainant. The Crown acknowledges that in some sense, it seems awkward to rely on the conduct of other complainants in relation to completely unrelated allegations to prove that the complainant did not consent on a particular count, since the basic question is whether the complainant, in her own mind, consented to the sexual activity in issue with the accused. However, at a more nuanced level, the feature of the actus reus that is the focal point of the Crown's argument is the conduct of the accused in engaging in sexual touching without the consent of the complainant. The Crown says that the fact of the accused engaging in sexual touching of seven women of comparable age, without their consent or regardless of their lack of consent, weighs in favour of a finding that the accused engaged in non-consensual sexual touching of the complainant who is the subject of each count on the indictment. Crown counsel says that if the similar fact evidence is ruled admissible on this basis, the Crown will argue before the jury that the evidence shows that "when Mr. Carlson feels like having sex, he does not take 'no' for an answer". This is the same reasoning that was invoked in Handy. It is the idea of the accused's alleged "sexual intransigence", or in other words the accused's refusal to take "no" for an answer in comparable circumstances, that is probative.
- [76] With regard to mens rea, the Crown's argument rests on similar reasoning. The Crown says the fact of the accused engaging in sexual touching of seven different women, without their consent, and in most cases with verbal or physical protestations, is compelling evidence that in respect of each individual count, the accused knew or was recklessly blind to the

complainant's lack of consent. This is akin to the reasoning in *Mostowy*. In that case, the Crown's case was based on evidence from multiple complainants who were former employees of the accused, all of whom testified that they were victims of unwanted sexual touching that began with massages. The Court of Appeal upheld the trial judge's ruling that the evidence was admissible across counts, on the basis that it was "highly relevant" to both the *actus reus* and *mens rea* elements of sexual assault. With regard to the *mens rea* element, the Court reasoned that the evidence was probative of the assertion that the accused "knew or was reckless or wilfully blind" to each complainant's lack of consent: *Mostowy* at para. 40. In the case at bar, Crown counsel says that if the similar fact evidence is ruled admissible on this basis, the Crown's closing argument to the jury will be that "when Mr. Carlson feels like having sex, he simply does not care if his partner is consenting".

- [77] The Crown also advanced a series of alternate or secondary positions, that the similar fact evidence is relevant to more specific issues in relation to certain counts or groups of counts on the indictment.
- [78] One of the Crown's alternative or more refined theories of relevance pertains to count 3, which involves the complainant CH. Crown counsel says the jury should be able to consider the similar fact evidence of the other six complainants when assessing the question of whether there is any doubt that Mr. Carlson had an honest but mistaken belief that CH communicated consent. CH's testimony was that after persistence and pressure from Mr. Carlson, she ultimately said yes to having sex without a condom. There is also evidence that she got back onto the bed, of her own volition, in a position that would allow for Mr. Carlson to have sex with her from behind. The Crown concedes that on the basis of this evidence, there is an air of reality to the defence of honest but mistaken belief in communicated consent. Crown counsel says the jury should be able to consider the evidence of the other six complainants about Mr. Carlson's conduct in relation to them in considering whether he can meet the reasonable steps requirement of the honest but mistaken belief in communicated consent analysis. Crown counsel also points out that there is an argument in CH's case for "withdrawal of consent", based on CH's testimony that after getting back on the bed, while Mr. Carlson was having sex with her from behind, she said "ow" or "ouch" and "can you stop, that hurts". Crown counsel says that in assessing this issue, the jury should be able to consider the fact that Mr. Carlson had non-consensual sex with six other women, in circumstances where Mr. Carlson "would not take 'no' for an answer".
- [79] Another alternative theory of relevance relates to count 5, which pertains to the complainant TL. Recall her allegation that she was asleep or unconscious and at one point she came to and found Mr. Carlson kissing her. The Crown's position is, among other things, that TL could not consent to kissing while she was asleep or unconscious. TL also believes that Mr. Carlson penetrated her vagina, while she was unconscious, leaving the vaginal tear that she observed the next day. Crown counsel says its case on count 5 is at least in part circumstantial (because there is no direct evidence of touching or lack of consent to vaginal penetration), and in determining whether the Crown can prove that guilt is the only

reasonable conclusion from all the evidence, the jury should be able to consider the evidence of other complainants who testified that Mr. Carlson initiated sexual contact with them while they were sleeping. The complainants NR, AA, TK, and TS, all gave evidence to that effect.

[80] A final, narrower theory of relevance relates to counts 6 to 8, all of which involve the complainant KT. The Crown says that even if its argument on similar fact evidence between multiple complainants fails, then at the very least the jury should be able to consider KT's evidence in relation to all three allegations of sexual assault advanced by her. Recall KT's testimony that Mr. Carlson had forced non-consensual sexual intercourse with her on three different occasions, in very similar circumstances. The Crown points out that there is at least some independent evidence bearing on the first allegation (when KT took a photograph of a bruise she claims to have received when Mr. Carlson held her down) and the third allegation (when an upstairs neighbor heard KT yelling "stop", "don't" and "get off me", called 911, and the police responded). However, there is no independent evidence bearing on the second allegation. The Crown says that in these circumstances, the jury should be able to consider the evidence of KT in relation to all three allegations, in determining whether each of them has been proven beyond a reasonable doubt. In relation to these counts, the material issues to which the similar fact evidence relates would once again be proof of *actus reus* (in showing that Mr. Carlson committed the act alleged, forcible non-consensual sexual assault), and *mens rea* (in showing that in each case, Mr. Carlson knew that KT did not consent, or was wilfully blind to the lack of consent). What makes the case for admission of similar fact evidence in relation to counts 6 to 8 different is: (i) the fact that the evidence in relation to all three counts comes from the same complainant, and (ii) the fact that the allegations all fit a similar overall pattern, hence the degree of similarity is said to be higher than the degree of similarity as between the allegations in relation to the other six counts on the indictment.

(ii) Collusion

[81] I need not dwell on this aspect of the analysis, in light of the positions of the parties.

[82] Crown counsel concedes that in view of the evidence about contact and at least some communication between various complainants, there is an "air of reality" to the issue of collusion on the facts of this case. However, the Crown maintains that the ultimate issue is actual collusion, not merely opportunity to collude or mere contact between complainants. The Crown says that it has disproven collusion on a balance of probabilities, relying on the testimony of the complainants that their allegations have not been altered or influenced by anyone, including other complainants. In support of this position, Crown counsel cites the fact that most of the complainants were not even aware of who the other Crown witnesses were, much less were any of the complainants aware of the details of the allegations made by other complainants.

- [83] For her part, defence counsel concedes that the Crown has met its burden of proving on a balance of probabilities that the substance of each complainant's allegations against Mr. Carlson is not the product of collusion with other complainants.
- [84] On the evidence that emerged from the Crown's case, I accept both positions as reasonable and supported by the facts. All of the complainants gave unequivocal evidence that they did not tailor their allegations against Mr. Carlson to make them similar or more similar to any other complainant's allegations. Indeed, for the most part, with the exception of a single statement from KT which I will discuss below, the complainants did not appear to have knowledge of the substance of anyone else's allegations. The majority of the complainants were not challenged in cross-examination on their assertion of having no knowledge of the substance of the other allegations. There are two exceptions which I must address briefly.
- [85] The first exception relates to the complainant CH, who was confronted in cross-examination with the suggestion that her claim about non-consensual sex without a condom became a more central theme of her evidence only after media coverage describing the testimony of the first witness, CW. However, while CH readily accepted that the "focus" of her initial complaint to the police was more on non-consensual sex from behind than it was on non-consensual without a condom, it is also clear from CH's testimony that her initial police statement did in fact include an assertion that she did not agree to, or did not want to have sex without a condom. In very broad terms, CH's description of the encounter itself, in terms of body positions and sexual acts, did not change from the giving of her police statement to the time of her trial testimony. This, of course, does not make the allegation any more credible, because the giving of a prior consistent statement cannot have that effect. The point is that there is no direct evidence that the substance of CH's evidence has changed based on anything she was told or learned about from any other complainant. I acknowledge that direct evidence is not required to establish collusion. A finding of collusion could arise on the basis of adverse credibility findings and inferences. However, on the facts of this case, I find on a balance of probabilities that none of CH's trial testimony is the product of collusion with other complainants.
- [86] The other exception relates to KT, who acknowledged at trial that in her statement to the police, she said her allegations matched up with other allegations against Mr. Carlson. However, it is not clear from the record that the other allegations to which KT was alluding her in statement were from any of the other complainants who are now witnesses in the case against Mr. Carlson. Further, one must consider KT's explanation for the assertion in her statement to the police that her allegations 'matched up' with other allegations against Mr. Carlson, namely that KT was aware in a general way of other complaints, but not the details. Perhaps more importantly, the allegations advanced by KT are quite specific or unique to her situation. The details do not bear much similarity to the details of any other complainant's allegations. Considering all of this together, I am satisfied on a balance of probabilities that KT's allegations against Mr. Carlson as advanced at trial are not the product of collusion.

[87] Thus, with regard to all seven complainants, I find on all the evidence, and in light of the positions advanced by the parties, that the similar fact evidence is not tainted by collusion.

(iii) Probative Value Versus Prejudicial Effect

[88] I first address the Crown's primary position that the evidence of all seven complainants ought to be admitted to prove the actus reus and mens rea elements of sexual assault in relation to all nine counts on the indictment.

[89] Defence counsel says the probative value of the similar fact evidence is not high in this case, for several reasons. First, defence counsel says that the Crown's characterization of similarities or unifying features in the evidence is exceedingly generic, to the point where those features would be common to many if not all allegations of sexual assault. Second, counsel says that in fact there are many differences between the allegations of the various complainants.

[90] I find considerable merit in the defence position. Recall that in Handy, Binnie J. spoke of the probative value of "sexual intransigence" in "closely comparable circumstances". The reference to "closely comparable circumstances" is important because, as Binnie J. cautioned in Handy at para. 115, "[c]are must be taken not to allow too broad a gateway for the admission of propensity evidence".

[91] A similar point was made in R. v. Blake (2003), 181 C.C.C. (3d) 169 (Ont. C.A.) at para. 64, where the Court cautioned against reliance on "generic similarities to support an inference that the actus reus occurred", citing two specific concerns.

[92] The first concern identified in Blake was that reliance on "generic similarities" involves a level of generalization that "approaches bad personhood": Blake at para. 64. Of course, in Handy, Binnie J. pointed out that to some extent, similar fact evidence that is admissible is still, at a basic level, propensity evidence. But the point is that the more generic the similarities in conduct relied upon by the Crown, the lower the probative value of the evidence, and the greater its prejudicial effect.

[93] The second concern outlined in Blake was that "generic similarities may mask underlying dissimilarities that could be important in a particular case": Blake at para. 64. As noted above, dissimilarities do not necessarily make the evidence inadmissible, but they are still relevant in the weighing of probative value versus prejudicial effect. Framing the similarities in abstract or generic terms tends to "mask" or obscure any such dissimilarities.

[94] The case law recognizes that a key driver of probative value is the unlikelihood of similar allegations arising as a matter of mere coincidence. There are other considerations, but the unlikelihood of coincidence is certainly an important factor that tends to increase the probative value of the evidence. The more specific, unusual, or unique the similarities, the greater the unlikelihood of those similarities being attributable to coincidence. This increases the probative value of the similar fact evidence. By contrast, the more generic, generalized, or non-descript the similarities, the lesser the unlikelihood (or, to avoid the

double negative, the greater the likelihood) that multiple allegations against the same person are the product of mere coincidence. This weighs in favour of an inference that, with respect to two or more complainants who come forward with allegations against the accused, the similarity of their allegations (being quite generic) is attributable to mere coincidence rather than being attributable to the fact that the allegations are true. (This does not mean that the allegations are untrue; it simply means that, in such circumstances, comparing one allegation to another would not be probative of anything).

- [95] I agree with defence counsel that, for the most part, the similarities identified by the Crown are quite generic, and might easily apply to many allegations of non-consensual sexual touching. For example, the fact that the complainants are all in the same age group is, in my respectful view, not particularly probative of anything, especially considering that Mr. Carlson was in more or less the same age group as the complainants. He was older than some but younger than others, and they were all within no more than four or five years difference in age. Similarly, I do not find it very telling that five of the seven complainants might be characterized as "gym goers". While all of the complainants have similar demographic backgrounds, I do not find that particularly probative in the context of this particular case.
- [96] Other similarities relied upon by the Crown are slightly less generic, but also not in my view unifying. For example, the Crown says that five of the complainants allege that on at least some occasions, they were sleeping or awoke to find Mr. Carlson touching them in a sexual manner. However, when one examines the particulars of the allegations, the probative value of this superficially similar feature is not particularly high. Specifically:
- (a) NR testified about several years of non-consensual sexual assaults of many different descriptions, and referred to one specific incident in which she awoke to find Mr. Carlson touching her sexually (obviously, on her account, without consent). NR alluded to a second such incident, but gave no details.
 - (b) One of the two allegations made by AA involved her waking up to Mr. Carlson touching her sexually (obviously, on her account, without consent), but the act that AA described is fundamentally different from the act described by NR, or any of the other women.
 - (c) TL testified that at one point during the single incident described in her testimony she "woke up", or "came to", to find Mr. Carlson kissing her. However, TL's allegation is more in the nature of being sexually assaulted while heavily intoxicated, not being sexually assaulted while sleeping in the more common meaning of the term.
 - (d) KT testified that one or perhaps two of the three alleged sexual assaults that Mr. Carlson committed against her began with her awaking to Mr. Carlson being on top of her and holding her down. However, once again, KT's allegations are quite different in their nature from the allegations of NR and AA.

- (e) Finally, TS alleges that on the occasion when Mr. Carlson sexually assaulted her, she awoke to him touching her sexually, without her consent. Once again, the substance of TS's allegation bears little similarity to the allegations made by the other complainants.
- [97] I do not see much in the way of either common detail or a unifying theme in any of these allegations. Four of the five involve the complainant awaking to find Mr. Carlson engaged in non-consensual sexual touching, but the context and detail of each allegation is quite different from the others.
- [98] One feature that is present in all of the allegations but one is that the complainant clearly expressed her non-consent, and in many cases the expression of non-consent was accompanied by physical resistance. (The only allegation that does not include this feature is that of TL, who testified that she was too impaired to actually utter any words.) Of course, a person is not obliged to express non-consent, and silence does not constitute consent. Nonetheless, the Crown points out that in this particular case, six of the seven complainants expressed their lack of consent. In all but CH's case, the lack of consent was expressed in unambiguous and unwavering terms. The Crown says this evidence is probative of the reasoning that "when Mr. Carlson feels like having sex, he does not take 'no' for an answer" and, "does not care if his partner is consenting". I agree that the evidence is probative of that issue, but I find the evidence less probative because of the absence of unifying details or unifying context in the underlying allegations.
- [99] The Crown also emphasizes the sheer number of complainants who have come forward to make allegations against Mr. Carlson. The greater the number of complainants who have come forward to make allegations of sexual assault against an individual, the greater the unlikelihood that those allegations are the product of mere coincidence. However, one must consider this point against the backdrop of the Roastpower 2.0 group chat about Mr. Carlson, and the fact that at least four of the seven complainants came forward after hearing about a police media release regarding Mr. Carlson.
- [100] There are also, in my view, many differences in the allegations. Some complainants allege that they were held down, while others do not. Some allegations relate to unwanted sexual activity that started consensually, while other allegations do not. In fact, Mr. Carlson is facing a diverse set of allegations, from a total of seven complainants, all within the same demographic group. In this particular case, the fact that all of the complainants and the accused come from the same demographic group is not particularly surprising, given the evidence about the Facebook Roastpower 2.0 page referring to Mr. Carlson, and the police media release pertaining to Mr. Carlson.
- [101] I do not find that the allegations made against Mr. Carlson "arise from the repetitive and predictable nature of an accused's conduct in closely defined circumstances" as described in J.M. at para. 91, drawing on the reasoning in Handy. In my view, the allegations advanced in this case do not fit within "closely defined circumstances".

- [102] I turn next to the prejudicial effect of admitting the evidence of all seven complainants as proof of the actus reus and mens rea of each count on the indictment. In a cross-count similar fact evidence application such as this, the issue is the prejudice arising from allowing the jury to consider the evidence of all seven complainants in deciding whether the Crown has proven its case on each individual count. Even though the nature and magnitude of the prejudice is necessarily lower than it would be in the case of uncharged similar acts, the admissibility of the evidence across counts still engages concerns about both moral prejudice and reasoning prejudice.
- [103] I refer once again to Blake. The issue there was admissibility of similar fact evidence relating to two prior incidents in which the accused had sexually assaulted two other children, one a six year old boy whom the accused was previously convicted of assaulting by touching his genitals in a van, and the other a ten year old girl whom the accused was convicted of assaulting by touching her genitals while giving her a piggy back ride from one part of his apartment building to another. The Crown sought to adduce this evidence in a trial involving an allegation that the accused assaulted an eight year old girl by blowing on and kissing her vagina, in the accused's bedroom, after they had returned from swimming in a pool at the accused's apartment building. The trial judge admitted the evidence, finding among other things that all three allegations involved "a component of privacy created by [the accused]": Blake at para. 23.
- [104] On appeal, the majority set aside the accused's conviction and ordered a new trial, on the basis that the trial judge erred in ruling the evidence of the two prior incidents admissible. The majority found five interrelated flaws in the trial judge's similar fact evidence analysis. One of these errors was in framing the question in issue "too widely", thereby allowing too broad a "gateway" for admission. Another error was in relying on "generic similarities" in the evidence: Blake at para. 49.
- [105] With regard to the latter point, the similarities identified by the trial judge were that: (i) the complainants were all children 10 years of age or younger, (ii) all of the incidents involved "genital touching", (iii) all of the incidents occurred "in private", and (iv) in two of the three incidents, the accused said he was sorry and that it would not happen again: Blake at para. 62. The majority in the Court of Appeal explained that the risk in relying on generic similarities to support an inference that the actus reus of the charge occurred is twofold. First, the initial inference arising from the prior conduct was so general that it approached mere "bad personhood". Second, the "generic similarities" relied upon by the trial judge masked "underlying dissimilarities" in the evidence: Blake at para. 64.
- [106] I find that both of the risks articulated by the majority in Blake arise in the case at bar.
- [107] The first risk articulated in Blake, that is, propensity reasoning approaching "bad personhood", concerns the potential moral prejudice of the similar fact evidence. In this case, if the evidence is ruled admissible on all of the counts, the Crown's position will be that when Mr. Carlson feels like having sex, he does not take "no" for an answer, and he

simply does not care if his partner is consenting. While it may be entirely justified to advance these propositions based on evidence of multiple similar acts in "closely comparable circumstances", in the present matter I do not find that the similar acts are "closely comparable". The nexus between the acts is simply not strong enough. I do appreciate that because this is a trial on multiple counts involving different complainants, the jury has already heard the evidence. I also appreciate the Crown's argument that there is not one particular allegation that is so much more serious or morally reprehensible than the others that it would overwhelm the analysis. However, even after taking both of these points into considering, in my view the moral prejudice here is significant, while the probative value is not as high as it would be in a case where the nexus between the allegations was stronger.

[108] With regard to the second risk articulated in Blake, namely the risk that reliance on generic similarities could have the effect of obscuring dissimilarities in the evidence, this would appear to be a concern about reasoning prejudice, in other words, the risk of an unfocussed trial. I find that this risk is also substantial in the case at bar, because while there are in fact seven complainants who have alleged that the accused committed acts of sexual assault against them, their allegations are in many ways quite different from one another. The broad propositions advanced by Crown counsel would invite the jury to consider all of the evidence tendered by the Crown as proof of every single count on the indictment, when in fact there are many differences between the allegations. This in turn could cause the jury to overlook issues with respect to the credibility or reliability of each complainant in deciding whether the allegations are proven. In some cases, the Crown may well be permitted to rely on similar fact evidence with the effect of bolstering or reinforcing the credibility of each complainant's testimony. However, in this case the risk of reasoning prejudice is too great. While I appreciate that differences between alleged similar acts are not necessarily fatal to admissibility, what is missing here is any kind of overall unifying feature, theme, or context that is present in all or even a majority of the allegations. The similarities are generic, and not sufficiently probative to overcome the risk of reasoning prejudice.

[109] This brings me to a consideration of the Crown's alternative positions.

[110] One of the Crown's alternative submissions was that the jury ought to be permitted to consider the similar fact evidence of the other six complainants when assessing the issue of honest but mistaken belief in communicated consent in relation to the complainant CH. Once again, the Crown would be inviting the jury to draw the inference from the evidence of all seven complainants that when Mr. Carlson feels like having sex, he does not care if his partner is consenting. Again, I say the strength of that inference is not particularly compelling on the facts, given the absence of similarity in detail, and lack of unifying features in the similar fact allegations. As for the prejudicial effect, in my view, allowing the jury to consider the evidence of six complainants who testified that the accused proceeded to force sex on them over their unequivocal protestations has the potential to distract the jury from a critical evaluation of the specific issues that they must decide in order to reach a

verdict on count 3. That is whether, on this particular count, the accused had an honest but mistaken belief in communicated consent, in the context of an encounter in which there is some evidence that CH communicated her consent by words and by actions to the acts in question, namely penetration from behind, without a condom. In the result, I would not rule the evidence of the six other complainants admissible to prove the mens rea element of count 3.

- [111] Another alternative submission advanced by the Crown was that the jury should be allowed to consider the similar fact evidence of the complainants NR, AA, KT, and TS, in considering whether the Crown has proven the actus reus and mens rea of count 4, relating to the complainant TL. Recall that TL testified about "waking up" or "coming to" on Mr. Carlson's bed, to find Mr. Carlson kissing her. The Crown says the jury ought to be able to consider the evidence of other complainants who testified about waking up to the accused forcing non-consensual sex upon them, to assist in proving both the actus reus and mens rea elements of sexual assault in relation to this particular non-consensual act, that is, kissing TS while she was "asleep". However, as I have already explained above, in my view the evidence about TL "waking up" is not evidence of her waking up from being asleep, but rather, evidence of her coming to or regaining consciousness while under the influence of drugs or alcohol. The context is quite different from the allegations of NR, AA, KT, and TS. Furthermore, the alleged sexual acts and the other contextual factors relating to the allegations of the other four witnesses are quite different from the testimony of TL. For all of these reasons, I once again conclude that the prejudicial effect of this evidence outweighs its probative force in advancing the theory or line of reasoning urged by the Crown.
- [112] The Crown's final alternative submission is much more focused. The Crown says the jury should be permitted to consider the testimony of KT with respect to all three incidents of sexual assault alleged by her, in considering whether the Crown has proven the actus reus and mens rea in relation to each of counts 6, 7 and 8. Crown counsel submits that the evidence of all three incidents is quite similar, in terms of both the context and the conduct in issue. Crown counsel also points out that there is at least some independent evidence in relation to the first incident (count 6), namely the photograph that KT took of the injury to her arm, and the last incident (count 8), namely the evidence of the upstairs neighbor hearing sounds of a struggle from KT's apartment. By contrast, there is no independent evidence with respect to the middle incident (count 7). If the Court grants the Crown's similar fact evidence application in relation to these three counts, the Crown will rely on testimony of KT, together with the independent evidence on counts 6 and 8, to argue that the jury should be satisfied beyond a reasonable doubt as to both the actus reus and mens rea elements of all three counts.
- [113] Defence counsel argues that even the evidence on these three counts does not meet the test for admission of similar fact evidence, because the probative value of the evidence is not particularly high, and its prejudicial effect is substantial.

- [114] With respect, I agree with the Crown that the probative value of the similar fact evidence in relation to these three counts is substantial. Since the evidence on all three counts comes from the same complainant, any reasoning based on inferences about unlikelihood of coincidence is not particularly apt or probative. Nevertheless, the nexus between these counts is compelling. All three incidents occurred within a matter of three months of each other. KT gave evidence that on each occasion, Mr. Carlson appeared on the balcony of her apartment, was apparently drunk, was allowed into the apartment by KT, and proceeded to go into KT's bedroom without permission and then forcibly sexually assault her in more or less the same manner on each occasion. Hence, all three counts are connected in time, place, and context, and the underlying allegation of sexual assault is very similar on each occasion. Indeed, there were a number of points in KT's evidence in which she testified that it was "the same thing as before", or Mr. Carlson's conduct on the second and third occasions was "the same" as it had been on the first occasion.
- [115] I also find that the prejudicial effect of admitting the similar fact evidence on these three counts is relatively low. The allegations are from the same complainant and involve the same kind of conduct, so the risk of moral prejudice is lower than it would be in some other scenarios. Further, the jury will have to consider very similar issues related to proof of actus reus, proof of mens rea, and the credibility and reliability of the same complainant on each count, such that the risk of reasoning prejudice associated with an unfocussed analysis of the evidence is also relatively low. I do acknowledge the evidence that in some respects KT was unable to distinguish between the events, or recall which details were associated with which event. Although this does suggest some potential for reasoning prejudice in conflating one incident with another, the jury will be instructed to consider these issues in their assessment of the credibility and reliability of KT's testimony. So, this is an issue that arguably goes more to the weight of the evidence than to its admissibility under a similar fact analysis.

Conclusion

- [116] I would allow the Crown's application in part, but only insofar as counts 6, 7, and 8 on the indictment are concerned. The Crown will be permitted to rely on the evidence in relation to these three counts (6, 7, and 8) to prove the actus reus and mens rea elements of sexual assault in relation to each of them.

"Riley J."

- [1] Such "relationship evidence" may or may not raise concerns under s. 276 of the Criminal Code. In this particular case, out of an abundance of caution, the Crown brought a successful application to adduce such evidence as contemplated in *R. v. Barton*, 2019 SCC 33 at para. 80.
- [2] This evidence was admitted based on a successful application for Crown-led evidence of "other sexual activity" as contemplated in *Barton* at para. 80.

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Prepared on 26 October 2026 · Esheria