

CANADA / JUDGMENT

R. v. Garnot

2011 BCSC 1814

COURT

Supreme Court of British Columbia

DECIDED

19 August 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 1814 R. v. Garnot

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Garnot,

2011 BCSC 1814

Date: 20110819

Docket: 31367-2

Registry: Prince George

Regina

v.

William Garfield Garnot

An order has been made in this case directing that the identity of the complainant or a witness and any information that could disclose the identity of the complainant or a witness should not be published in any document or broadcast in any way pursuant to s. 486.4(3) of the Criminal Code

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Judgment

August 19, 2011

Counsel for Crown:

S.K. Keyes

Counsel for Defence:

K.A. Jones

Place and Date of Hearing:

Prince George, B.C.

December 1-3, 6-8, 2010;

April 26-29, July 15, 2011

Place and Date of Judgment:

Prince George, B.C.

August 19, 2011

[1]

Introduction and Overview

- [1] William Garnot is charged with committing the aggravated sexual assault of S. M. and uttering a threat to cause death or bodily harm to Ms. M., both on or about November 21st, 2001.
- [2] No evidence emerged in the trial with respect to the threatening count, and it is common ground that Mr. Garnot should be found not guilty with respect to it.
- [3] In overview, Mr. Garnot is alleged to have encountered Ms. M., who was intoxicated at the time, in downtown Prince George and to have invited her to accompany him to a place where she could obtain more alcohol. When they reached a wooded area, he is alleged to have struck her in the face with an object and then had sexual intercourse with her without her consent.
- [4] Mr. Garnot's identity as the assailant is the critical issue in the case, and it is sought to be proven by the Crown by means of a comparison between the DNA profile obtained from a semen stain on the inside crotch of the jeans that Ms. M. was wearing during the attack and a known sample from Mr. Garnot.

Evidence

Ms. M's description of the assault

- [5] Ms. M. was 57 years old at the time of trial. She lives in Fort Ware, British Columbia, where she also lived in 2001. At the time of the offence, she was in Prince George to visit her daughter, to shop and to party. On the evening of November 20th, she was drinking at the Roadhouse Cabaret in downtown Prince George with her friend Skip. After that place closed, she and Skip were standing talking outside the Ramada Hotel. She described herself as being "pretty drunk".

- [6] A male came and stood by them. She asked him if he knew where to get a drink, by which I infer she meant to get more alcohol. The male said that he did and that he would show her where. She began to follow him. Skip did not accompany them and he was not a witness in this trial.
- [7] Ms. M.'s description of the man she accompanied was as vague as one might expect, in light of her state of sobriety and the passage of time since the incident. She said he was "native", about the same height as her (which is about 5'3"), with a big build, wearing glasses and a hooded sweater with the hood pulled over his head.
- [8] They walked along Queensway to an area of Prince George known as Connaught Hill. They left the road and went on a narrow trail that had willow trees around it. The man was in front of her. He then struck her in the face with an object, something like a board, which knocked her out. When she regained consciousness, she was lying face down on the ground with her pants around her ankles and the sock and shoe from one foot off. The man was lying on top of her having sexual intercourse with her from behind.
- [9] After he left, she got up and went looking for help. She carried the shoe that had been removed but left the sock behind. It was later recovered by the investigating police officers.

Police attendance

- [10] Corporal Washbrook of the Prince George RCMP, who was then a constable, responded to a call concerning Ms. M. that came in at 3:48 a.m. on the 21st of November. By coincidence, he had dealt with her and a male companion earlier, on the evening of the 20th, towards the beginning of his shift. He had found her heavily intoxicated but allowed her to go on her way because she did not appear to be a danger to herself or to others. He had arrested her male companion.
- [11] He met Ms. M. the second time in the lobby of the Ramada Hotel, at 4 a.m. She was crying and also bleeding heavily from her face, which was injured and swollen. Despite his request that she seek medical attention immediately, she preferred first to direct him to the place where she said the assault had taken place. She ultimately directed him to the area of Connaught Drive and Norwood. Her sock was located in the middle of the road. There is a heavily wooded vacant lot adjacent to it, but no useful evidence was obtained from it by the RCMP's subsequent forensic examination.
- [12] Ms. M provided a general description of the assailant and said that he had identified himself as "Jack".

Medical examination

- [13] Ms. M. was taken to the hospital and examined by Dr. Byrne, the on-call emergency physician. He found fractures to her nose and to the zygomatic arch, which is a bone in the front of the face. He referred her for follow-up with a plastic surgeon. In his opinion, it would have taken a strong physical blow to inflict these injuries.
- [14] Because she was confused about the time of day, Dr. Byrne gave her a lower score on the neurological test that assesses a patient's level of consciousness than he otherwise would have. Such confusion is unusual, he said, even in the case of moderately intoxicated patients. He was fairly convinced that she had suffered a concussion, which can cause forgetfulness for a period of time around the traumatic event, either before or after it. More typically it occurs after, he said. Alcohol consumption can increase this memory loss. Typically, he finds that such lost memories are later recovered to a degree, but sometimes they are not.
- [15] Dr. Byrne also conducted a sexual assault examination of Ms. M. He examined her perineum and found debris in that area. It was not in his notes but he recalled at trial that the debris consisted of dirt and leaves. Her anal/rectal area was sore and tender, to the extent that he was unable to perform a rectal examination, the usual practice in these examinations. There was a fresh lesion at the anus, a fresh abrasion at the bottom of her vagina and the vagina itself was also very sore.
- [16] Such injuries were, in his opinion, unlikely to have resulted from consensual sexual intercourse.

Forensic examination and loss of evidence

- [17] Dr. Byrne took samples for the forensic sexual assault kit, consisting of swabs from the vagina and rectal areas, the product of an irrigation of the vagina with solution and combings from the pubic area. His practice would have been to place Ms. M.'s underpants in the kit as well, but there is no specific note of that in his report, nor did he recall doing it. He agreed with the suggestion that the panties could potentially be important evidence, because they are the most likely to have semen in them, I infer from leakage of it from the vagina.
- [18] Dr. Byrne's own examination of the samples from Ms. M. did not reveal the existence of motile sperm but he said that this is not unusual. He finds it only in about one of 20 sexual assault examinations that he conducts. Similarly, it was not unusual, in his view, that he did not find evidence of semen on Ms. M.'s body through visual examination or the use of a blue-light test. Again, he said he seldom finds it in these situations.

- [19] Ms. M. testified that she had purchased her jeans new two days before and she had not worn them before that evening. She had been wearing panties under her jeans at the time of the assault, but contrary to the evidence of Dr. Byrne she recalled that she still had them with her when she left the hospital.
- [20] Corporal Washbrook said that he did not believe that he was ever presented with panties to seize as evidence.
- [21] He seized Ms. M.'s other clothing and the sexual assault kit and secured them as police exhibits at the RCMP detachment. Because he had little experience with sexual assaults at that time, being quite junior in service, he followed the advice of an experienced colleague who had dealt with numerous sexual assault investigations and only sent the clothing for examination by the RCMP forensic lab. The idea was to find out first if an examination of the clothes yielded results before "possibly" sending the kit for analysis later.
- [22] Robert Groves of the RCMP forensic lab received Ms. M.'s clothing, which consisted of a sock, jacket, jeans, bra, and T-shirt. The finding he made that is relevant to this case was on the inside crotch of her jeans. In his evidence, he defined the crotch as consisting of the area well below the fly and towards the back along the middle seam and towards both leg holes. This is a typical target area in forensic examination, he said, because of the likelihood of drainage of semen from the vaginal area.
- [23] Two areas were positive on Mr. Groves' presumptive test for the presence of semen in this area. He examined one of them microscopically and found evidence of sperm heads. This confirmed the presence of semen.
- [24] The second crotch area that had tested presumptively positive for semen was not analyzed, in light of his findings with respect to the first area. Mr. Groves did not identify where specifically within the crotch area, as he had defined it, these two areas of semen were located. The practices in the forensic lab at that time did not require taking the kind of detailed photographs of exhibits that would have shown these areas, as is now the practice.
- [25] The first area in which semen was definitively found by the microscopic examination was subjected to forensic DNA analysis. It was found to contain a mixed DNA profile, which consisted of both a male and a female contributor. The female profile was later matched to a known sample from Ms. M. The male sample could not be identified immediately, but was placed in the crime scene index of the national DNA databank in case a match could be found later.
- [26] In 2008, a match was identified between that male profile and another profile that had been obtained from a sexual assault investigation in High Prairie, Alberta, in which Mr. Garnot was a suspect. That led to further investigation of the present offence and the taking of a known sample of a bodily substance from Mr. Garnot by warrant in 2010. It was admitted as a fact in this trial that the DNA profile obtained from that sample of Mr. Garnot's bodily substance "matched" the male profile found on Ms. M.'s jeans. That match is the foundation

of the present charge.

- [27] Corporal Washbrook returned Ms. M.'s clothing to her after the male DNA profile was found on the jeans, including the jeans themselves with the sample areas cut out of them. His evidence was that the exhibits were no longer required because a sample had been recovered. He gave a direction to the exhibit custodian on December 30th, 2002, to have the sexual assault kit, which had remained at the Prince George RCMP detachment, destroyed. Heather Foot, the exhibit custodian, testified that it was destroyed on January 3, 2003.
- [28] It appears from his evidence that Corporal Washbrook applied the same reasoning to the destruction of the kit as he had to the return of the clothing exhibits.
- [29] It is common ground that the kit was never sent for an analysis of its contents before it was destroyed. It appears from Ms. Foot's evidence that all returned laboratory exhibits are also destroyed as part of the same process and I infer this would have included the swatch from the jeans' crotch that had been cut and analyzed by the lab.
- [30] Ms. Foot indicated that, because of severe pressure on the amount of available storage space for exhibits that require refrigeration, the Prince George Detachment had to institute a "risk management" process after she took up her position in the year 2000. Previously, such exhibits were not routinely destroyed, even when it was clear they were no longer required, and as a result the four storage refrigerators then in use had become packed with such items as sexual assault kits.
- [31] The risk management practices that were instituted to deal with this problem included repacking exhibits to make better use of available space, sending exhibits back to their originating detachment if Prince George was not that detachment, and, most relevant to the present case, diarizing files more rigorously so that the investigator would eventually be required at the so-called "Diary Date 3" to indicate whether the exhibits were still required. If they were, a diary date a longer time in the future would be assigned. If they were not, the investigator would request destruction, as Corporal Washbrook appears to have done in this case.
- [32] Since that time, the exhibit retention process has been refined to allow members to request a very long deferral of the next diary date for cases that remain open. The initial risk management policy had led to investigators being saturated with requests from the exhibit custodian to decide on the fate of exhibits.
- [33] Homicide exhibits were during that period (and continue to be) exempt from the requirement that their ongoing retention be requested.

Defence evidence

- [34] Mr. Garnot gave evidence in his own defence. It can be divided into three general categories. He denied having committed the assault on Ms. M. and ever having gone by the name Jack, which she had attributed to her assailant when she spoke to the police. Secondly, he

described a sexual encounter earlier in the evening of the 20th with a woman who could have been Ms. M. in which he was masturbated to ejaculation in return for a payment of \$20. Finally, he indicated that since the age of 17, when he was kicked in the testicles, he has been unable to produce an erection sufficient to engage in the act of sexual intercourse.

- [35] With respect to the sexual encounter, Mr. Garnot testified that on the evening of the 20th he was drinking a few beers and then went downtown by the Croft Hotel. It was about 9:30 p.m. A man asked him the time, and then a woman, whom he now recognizes as Ms. M., asked him if he had any money. When he said that he had \$20, she asked him if he wanted sex for it. He said he did.
- [36] She took him to a van in an alley off Fort Street. She masturbated him to ejaculation with one hand while using her other hand to masturbate herself. He walked home after that, to his residence on Quince Street.
- [37] He had not met this woman before. He said when Ms. M. walked into the courtroom to give evidence, he recognized her as that woman. He had not previously recognized her from photographs that the police had been showing to him during his police interview because "she was short and that." In cross-examination, he added that in the photos her face had been all puffed up and swollen and that was a reason that he did not recognize her.
- [38] With respect to his ability to have an erection, he related having been in a fight with an older male when he was 17 years old - he is now 52 - that resulted in him being kicked in the genitals with steel-toed boots. Since then he has not had an erection other than "a little one of about two inches" and his sexual encounters must consist of being fellated or masturbated. He can ejaculate however.
- [39] In cross-examination, Crown counsel raised several issues that are potentially relevant to Mr. Garnot's credibility.
- [40] He has 26 previous convictions for offences of dishonesty, such as theft and breaking and entering, as well as a conviction for perjury in 1982.
- [41] Although Mr. Garnot described having gone to meet a friend at a crack shack to have three of four beers at about 6 p.m. on the 20th, he was unable to recall any other particular activities that he would have engaged in on or around that date, other than to assert repeatedly that he did not go out of the house much. He said he would walk downtown to have a drink but decided to spend his money on what he called a "hand job" on this occasion instead because the woman asked him. He had never purchased a sexual act from another person before, has not done so since and said that he had no idea why he did it on that night. He believed that he requested a hand job as the specific sexual service to be received in return for the \$20.
- [42] In response to further questions, he elaborated that the van to which he and the woman went in the alley was a cube van, which had its back door open. The woman sat on the edge of the back of the van and he stood in front of her. It was her idea to open her own pants and

masturbate herself while masturbating him. He had no reason to believe that her interest in him went beyond obtaining the \$20. He described the process as her masturbating him, then masturbating herself, then going back to masturbating him all with the same hand. He only knew that his ejaculate ended up on her hand because she said, "Shit, I got it on my hand."

- [43] He agreed that in his police statement he had denied the possibility that he and Ms. M. had had sex earlier in the evening before the assault when that was put to him by the investigating officer. He also maintained that it was when she appeared in court that he recognized her as the woman with whom he had had the encounter. He said that he had not wanted to tell the police officer anything at the time of his interview and that he just wanted to speak to his lawyer.
- [44] With respect to the injury to his genitals, he advised, again in response to questions in cross-examination, that he had not seen a doctor in response to it. He thought it was "just life, or something." He added that four or five years after the injury, his penis had begun to shrink somewhat. Again, he did not seek medical assistance, this time because he was drinking too much. He never told any prison doctors during his previous periods of incarceration because his condition was embarrassing to him. Nor did he mention it during counselling or other programs that he was required to undergo due to his prior sex offence convictions.

Additional evidence on the issue of capacity to obtain an erection

- [45] Because of the point in the trial at which the issue of Mr. Garnot's ability to have an erection became relevant, I permitted the Crown to call rebuttal evidence to attempt to prove that on dates before or after this alleged offence Mr. Garnot was actually physically capable of having erections and engaging in sexual intercourse.
- [46] I also offered Mr. Garnot's counsel the opportunity to seek medical evidence in support of the alleged erectile dysfunction and to re-open the defence case to present any such evidence.
- [47] As a result, Dr. Cassidy, a urologist, testified for the defence. He examined Mr. Garnot in April of this year at the Prince George Regional Correctional Centre, where Mr. Garnot was being held in custody. Dr. Cassidy's examination consisted of taking a detailed medical history from Mr. Garnot, which was focused on the issue of erectile dysfunction, and administering two tests: a sexual health inventory and another questionnaire dealing with androgen deficiency (low testosterone) in the aging male.
- [48] Actual physical testing of nocturnal penile tumescence, which can objectively validate reported problems of erectile dysfunction, is not available, even in large Canadian cities. It may be available in the United States, but Dr. Cassidy is not aware of specifically where. Of course, it was not available to him in testing Mr. Garnot while in custody.

- [49] His finding was that Mr. Garnot scored quite poorly on the sexual health inventory, four out of a possible score of 25, which is consistent with severe erectile dysfunction. A person in this situation would be capable of obtaining an erection but it would not be a full turgid one, sufficient to complete a sexual act of intercourse.
- [50] Based on the androgen deficiency test, he also diagnosed Mr. Garnot as suffering from hypogonadism, or low testosterone.
- [51] Dr. Cassidy distinguished erectile dysfunction from the ability to ejaculate, which would not be correspondingly impaired. The physiology of the two functions is quite separate. Ejaculation is neurologically mediated while erections are a function of blood flow. He agreed that erections are conditioned by the particular sexual preference of the male involved.
- [52] In cross-examination, Dr. Cassidy conceded that his diagnosis was grounded in Mr. Garnot's self-reporting. He had to assume that the history he was being given was accurate and that Mr. Garnot has the problem that he described. Dr. Cassidy discounted Mr. Garnot's current risk factors for erectile dysfunction, such as a recent stroke that he suffered while in custody and his ongoing hypertension, because of Mr. Garnot's history of unchanged dysfunction since the age of 17.
- [53] His examination revealed that Mr. Garnot's penis was about four inches in length when flaccid. He would have no reason to believe that it was only two inches long when erect, as Mr. Garnot had described in his evidence, because the penis increases in length when erect. He did not find any evidence of physical injury to the penis, such as penile plaques. Such injuries can also be associated with erectile dysfunction. The testicles were normal in size and consistency. He said if they had been crushed in an injury that could result in palpable scar tissue, which was not observed.
- [54] Based on Mr. Garnot's description of the injury and resulting symptoms, Dr. Cassidy believed that he must have suffered an injury to his bulbar urethra, which is an area between the scrotum and the anus. Such an injury would produce erectile dysfunction by scarring the bodies that trap blood for an erection, thus preventing it from being maintained, or by the creation of an abnormal connection of blood between the arteries and the veins, which prevents an erection from being created in the first place. It is possible for there not to be any other associated symptoms of such an injury, nor any ability to detect it or damage to associated structures through physical examination.
- [55] There are tests to detect these inflow and outflow abnormalities with respect to erections, but those could not be done in this case. The most common test is an ultrasound following the creation of an artificial erection. It would have to be done in a hospital setting, which was not available to Mr. Garnot because of his custodial status.

- [56] Dr. Cassidy has seen complete erectile dysfunction arising from a blow to the genital area in only about five cases, out of the hundreds of examinations he has been involved in. He agreed that his patients are, in general, extremely motivated to resolve issues of erectile dysfunction.
- [57] Hypogonadism, or low testosterone, can result from trauma but, aside from an injury to the central nervous system, it would require a severe injury to both Mr. Garnot's testicles, one that that would have rendered them close to non-functional.
- [58] There is a normal male decline in testosterone after age 30, which can progressively lead to this condition, but Mr. Garnot gave a history of his sexual functioning having been the same since age 17 when he received his injury. If he had been hypogonadal, his testicles would also have atrophied, which was not the case here. There is a simple blood test to detect hypogonadism, which was also not performed in this case.
- [59] Dr. Cassidy agreed with the suggestion that hypogonadism affects desire for all forms of sexual activity, not just intercourse. He does not believe that that condition was the cause of the erectile dysfunction of Mr. Garnot in this case.
- [60] He agreed that erectile dysfunction of the kind reported by Mr. Garnot, whether due to bulbar urethra injury or hypogonadism, would be inconsistent with the robust sexual history related by Mr. Garnot to his probation officers and with the masturbation incident that he related in his evidence on November 20th, 2001.
- [61] Dr. Cassidy also agreed that there was no physical evidence supporting erectile dysfunction and that, at least with respect to hypogonadism as the cause, the examination was inconsistent with such a claim.
- [62] Angeline Cunningham also gave evidence on Mr. Garnot's behalf. They have lived together as romantic partners since 2001 and were married in 2009. In her direct evidence, she confirmed that Mr. Garnot has an inability to maintain his erection, which she said "goes soft right away." Vaginal intercourse is therefore not possible between them, she said, but he is able to ejaculate and they have other means of providing each other with sexual gratification.
- [63] Her knowledge of his problem dates to when they began having sexual contact in 2001. However, in cross-examination, she was unable to say the year in which this problem had originated and then testified that it was a few years after they started going together. Things were a little bit better before then, she said. He could have sex for five minutes and that they had intercourse "sometimes."
- [64] She maintained there was no sexual relationship during the period before 2001, when they were solely roommates. However, when she was asked if it would be false if Mr. Garnot had identified her as his wife on a temporary absence permit from prison in 1999, she said, "Maybe, I don't know." When asked in a follow-up question whether it was true, she said that "Probably, yeah." Similarly, when asked if it was false if Mr. Garnot told his probation officer

in 1999 that she had been his common-law for two years, she said, "I guess so," but when asked if it was true, said "True, I guess." It was later put to her that they had been common-law spouses since 1997. She said, "I don't even remember." It was then suggested that she did not want to tell that they were common-law from 1997 onwards because they were both collecting social assistance, to which she replied, "Probably, yeah." Still later, she acknowledged that she guessed that it was not true what she had said about them first getting together in 2001.

- [65] She also agreed that when Mr. Garnot went "AWOL" on his probation in the summer of 2001, she may have told his probation officer that she did not know where he was. He actually stayed with her until he was arrested and she "guessed" that she was prepared to mislead probation for his benefit.
- [66] The Crown's rebuttal evidence on the issue of Mr. Garnot's ability to have erections fell into two categories: evidence that he was capable of such erections during the course of sexual activity in the years before and after this alleged offence and evidence of his admissions to probation officers and related officials during the years immediately surrounding the offence date that would indicate his robust engagement in full sexual intercourse.
- [67] J. C. described an incident on August 1, 2007, in Sucker Creek, Alberta, involving Mr. Garnot. There is no issue about his identity as a person who had sexual contact with her because a male DNA profile obtained from a vaginal swab from her following the incident was admitted to have matched a cast-off sample obtained from Mr. Garnot to a level of probability so high that the probability of an unrelated individual having the same profile is one in 2.5 trillion, which I take notice is greater than the earth's entire population.
- [68] Ms. C. was 23 at the time. She had been consuming alcohol with friends that evening. She had met Mr. Garnot, whom she knew as "Billy Willier", earlier in the day. After midnight, she was at the home of another friend when Mr. Garnot showed up again. She and two other friends wanted to go to another small town called Jousard and he gave her a ride. The two other friends came with them.
- [69] He gave her a beer. She said she had been feeling "half-snapped" before that, by which she meant not completely drunk, still able to talk and not staggering. She does not know what happened to her after he gave her the beer, whether it was a blackout from drinking or something in the beer.
- [70] When she awoke, she said she was lying in the back seat of Mr. Garnot's car. Her pants were off and her shirt was lifted up. He was touching her all over and then he put his penis inside her and had sexual intercourse. She could feel his penis inside her. The intercourse did not last very long, she said. He was grunting during it and appeared to be enjoying himself.
- [71] She later reported the incident to the police. She was given a sexual assault examination by a physician, from which the sample ultimately matched to Mr. Garnot was obtained.

- [72] M. W. was the daughter of J. W., to whom Mr. Garnot was previously married. She was born in 1977. She said when she was 10 or 11 years old, there was an incident in which her mother and her female cousin were both passed out on the mother's bed after drinking and she observed Mr. Garnot having intercourse with the unconscious cousin.
- [73] She conceded in cross-examination that she had just a brief view of this intercourse occurring, that she does not like Mr. Garnot and that she has previously "gone to court against him."
- [74] G. W., M.'s older sister, described an incident when she was 15 and she and her sister, then 12 or 13, were having a nap during the day. Mr. Garnot came in and lifted her blanket. She moved, and he stopped and went to her sister's bed. He dropped his pants to around his ankles and was staring at her sister and got an erection while doing so. She described his penis as "straight out and erect." She noted the detail that he was wearing a blue T-shirt that he frequently wore and that "some of his belly was out of the front of his shirt." She jumped up and stood in front of her sister.
- [75] In cross-examination, she added the detail that Mr. Garnot pulled out a small handgun and pointed it at her and that he had held it to her head for a few minutes. She too agreed with the suggestion that she does not like Mr. Garnot.
- [76] It almost goes without saying, but of course I should emphasize that I will consider the rebuttal evidence as being potentially relevant only to the issue for which I admitted it: Mr. Garnot's ability to have erections. To the extent that any of this evidence shows criminal behaviour or other acts of bad character, I must of course disregard those aspects of it and not engage in any propensity reasoning with respect to the likelihood of Mr. Garnot having committed the present offence.
- [77] The other rebuttal witness was Sonja Arsenault, Mr. Garnot's former probation officer. She provided and interpreted probation records containing statements by Mr. Garnot concerning his level of sexual activity around the time of the offence and giving him the opportunity to express any concerns with his level of sexual functioning.
- [78] As in the case of the witnesses to his erections, the correctional context of these records, including Mr. Garnot's status as a convicted sex offender, was of course admitted only to provide the necessary context within which to understand the nature of his admissions and their significance, not to prove that he is the kind of person who, because of his past convictions, is more likely to have committed the present offence. I have also disregarded the evidence of Mr. Garnot's alleged breaches by contact with children during the probation period.
- [79] Some of the most relevant entries reflecting information provided by Mr. Garnot were:

- In a sex-offender risk assessment from August of 1999, the probation officer indicates that Mr. Garnot had a very high arousal level, had no sexual difficulties, and expressed satisfaction with his sexual performance.
- In a report from September of 1999, Mr. Garnot told a therapist that his sex life with Ms. Cunningham was "very satisfactory" and that they had intercourse five or six times a week.
- In the running records kept by probation, which consist of handwritten entries by the supervising probation officer, Mr. Garnot reported on November 18, 1999, that he and Angeline had sex every day, that she mainly initiated it, and that this was "okay" with Mr. Garnot.
- A further assessment in February of 2000 reported that Mr. Garnot had an age-appropriate consensual sexual partner.
- The running records for February 17th of that year show him reporting sex with her two times a day.
- The comment with regard to having no sexual difficulties was carried over from the previous assessment and was carried forward in the assessment of August 2000.
- In January 2001, he reported them having sex almost daily.
- Sex five or six times per week was described by him to the probation officer in the risk assessment of October 2000.

Charter application with respect to lost evidence

[80] In addition to the defences that I have described thus far, Mr. Garnot seeks a judicial stay of proceedings, based on a breach of his rights as guaranteed by ss. 7 and 11(d) of the Charter. With welcome candour, his counsel conceded that, in view of the difficulties with Mr. Garnot's credibility, this application was likely the most viable defence available to him.

[81] The conduct said to have given rise to these breaches is:

1. the failure of the investigating officer to preserve Ms. M.'s underwear on the offence date;
2. the RCMP's failure to forward the sexual assault kit to the forensic lab along with Ms. M.'s clothing;
3. the failure of forensic laboratory personnel to document through photographs the exact locations at which a DNA sample was found on her jeans; and
4. the destruction of the sexual assault kit.

[82] To assist in the analysis, it may be helpful to focus these grounds somewhat.

- [83] With respect to ground number one, I find that Dr. Byrne is likely to have followed his normal practice of placing the complainant's underwear into the sexual assault kit. He struck me as a careful and very experienced emergency physician who would have adhered to the governing protocols. This finding is confirmed to some extent by Corporal Washbrook's evidence that he was not presented with the victim's panties, despite having received all of her other clothing. I find that Ms. M. is simply mistaken on this point, perhaps due to the passage of time since the incident or the traumatic circumstances that surrounded it. Thus, I think this ground is subsumed within the grounds based on the failure to have the kit analyzed and the decision to have it destroyed, since the underwear would have been contained within it.
- [84] With respect to ground number three, I think the failure to document aspects of a crime scene or other relevant evidence by taking photographs is a matter that can affect the weight that can be attached to evidence (for example, in *R. v. Fisher*, 2008 CanLII 31414 (Ont. S.C.J.)) at para. D.4.9.4.9), but it is not in itself an instance of a failure to preserve material evidence. In any case, I think this ground is also subsumed in ground number four because there was evidence that the lab exhibits, including the swatch from the jeans that was analyzed, were returned to the Prince George detachment and routinely destroyed, like the sexual assault kit.
- [85] In my view, the essential question in this application is whether Mr. Garnot's rights were breached by the destruction of the sexual assault kit and all of the potentially relevant exhibits that it contained. The fact that this took place without any analysis of its contents having been performed is an aggravating factor, but the failure to conduct an analysis would have no current impact on his right to full answer and defence if the kit had not been destroyed, because it would still remain available to be analyzed at the request of the defence.
- [86] The law governing breaches of Charter rights arising from the failure to preserve evidence is set out by the decision of the Supreme Court of Canada in *R. v. La*, 1997 CanLII 309; (1997) 116 C.C.C. (3d) 97. The principles established by that decision have been concisely summarized in the oft-quoted excerpt from *R. v. F.C.B.* (2000), 142 C.C.C. (3d) 540 at page 547-48 (N.S.C.A.):
- (1) The Crown has an obligation to disclose all relevant information in its possession.
 - (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
 - (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
 - (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.

- (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
 - (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.
 - (7) In addition to a breach of s. 7 of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.
 - (8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in O'Connor.
 - (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
 - (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.
- [87] Of the additional cases cited by counsel, I found the most helpful ones to be *R. v. Bero*, 2000 CanLII 16956 (Ont. C.A.); *R v. Nicholas*, 2006 CanLII 52320 (Ont. S.C.J.); and *F.C.B.*
- [88] *Bero* involved an appeal from the accused's conviction by a jury for impaired driving causing bodily harm as well as for care or control of a vehicle while having more than 80 milligrams of alcohol in 100 millilitres of blood. One of the grounds of the appeal was the trial judge's refusal to grant a stay of proceedings based on a Charter breach arising from the failure of the police to preserve evidence.
- [89] The only issue at trial was the accused's identity as the driver. His passenger testified that the accused had been the driver, but the passenger's credibility was attacked vigorously. The police accident reconstruction expert and a defence expert disagreed about whether the physical evidence showed implicated the accused or the passenger.
- [90] The passenger said that he had hit his head on the dashboard during the collision with such force that he severely cut his tongue. Thus, the presence and exact location of bodily substances within the car could have shed crucial light on who had actually been in the driver's position, the critical issue in the case.

- [91] Unfortunately, following a mechanical inspection, the vehicle had been sold to an auto wrecker and was destroyed routinely as part of that process. This was done after the accused had been charged, shortly after defence counsel had made his initial disclosure request and just before he requested that the car be preserved.
- [92] Doherty J.A. engaged in a helpful analysis and application of the applicable Charter principles. First, he characterized the nature of the decision to allow the car to be sold and destroyed:
- [37] The destruction of potentially relevant evidence is not satisfactorily explained where that destruction is occasioned by a failure to consider whether preservation of that evidence was necessary to meet the disclosure obligations of the Crown. The destruction of the vehicle amounted to a breach of the Crown's disclosure obligations and resulted in a breach of the appellant's rights under s. 7 of the Charter to full disclosure as an adjunct to his right to make full answer and defence.
- ...
- [39] This is not a situation in which the police considered the potential relevance of the vehicle and made a considered decision that it could not be relevant. Nor is it a case where the destruction was accidental in that it was the product of human error, or some cause beyond the control of the authorities. Nor is it a case where the police perceived the potential relevance of the vehicle but failed to take adequate steps to preserve it. Rather, as set out above, the failure to preserve the vehicle was caused by the failure to look beyond the needs of the prosecution to the wider question of the potential relevance of the vehicle to the defence. Had anyone directed their mind to the disclosure obligations set out in *Stinchcombe*, supra, I think the vehicle would have been preserved. The failure to preserve the vehicle reveals an ignorance of, or at least an indifference to, the duty on the Crown and the police to preserve the fruits of their investigation. This indifference or ignorance is difficult to comprehend so many years after the pronouncement of the Supreme Court of Canada in *R. v. Stinchcombe*, supra, and in my view, is a sufficiently serious departure from the Crown's duty to preserve evidence that it constitutes an abuse of process.
- [93] Considering the appropriate remedy, Doherty J.A. discussed the kinds of circumstances in which a stay of proceedings should be granted following a breach of this nature:
- [42] A stay of proceedings is a remedy of last resort. The prosecution's failure to preserve evidence does not automatically entitle the accused to a stay of proceedings even when that failure amounts to an abuse of process: *R. v. La*, supra, 108. A stay is an appropriate remedy only where the breach of an accused's s. 7 rights has caused harm to the accused's ability to make full answer and defence that cannot be remedied, or where irreparable harm would be caused to the integrity of the justice system if the prosecution were allowed to continue: *R. v. O'Connor* [citation omitted], approved in *R. v. La*, supra, at p. 108.

- [43] The reluctance to stay criminal proceedings reflects the strong preference for a verdict on the merits. A stay of proceedings is sometimes necessary, but it is nonetheless an unsatisfactory result which denies both the accused and the community their legitimate expectation of a true verdict based on the merits.
- [44] The integrity of the judicial process will generally be put at risk where the conduct of the state involves a deliberate attempt to compromise an accused's ability to make full answer and defence, otherwise undermines the fairness of the trial process or deliberately frustrates the court's ability to reach a proper verdict: *R. v. Carosella* [citation omitted].
- [45] The prosecution's failure to preserve the vehicle so as to give the defence a reasonable opportunity to examine it is troubling in that it suggests that despite repeated judicial pronouncements, the preservation of evidence, which while not helpful to the prosecution is relevant in the *Stinchcombe* sense, is still not engrained in the prosecution psyche. I cannot, however, conclude on this record that the failure to preserve the vehicle demonstrates a systemic disregard for the prosecution's obligation to preserve relevant evidence. Nor is there any suggestion that the prosecution acted with a malevolent motive. In these circumstances, permitting a trial on the merits would not do irreparable damage to the integrity of the judicial process.
- [94] Particularly helpful is the subsequent analysis of the actual nature and extent of prejudice to the accused's right of full answer and defence that resulted from the loss of evidence in that case:
- [48] The degree of prejudice caused to an accused by a failure to preserve relevant evidence and the availability of other means short of a stay to alleviate that prejudice are the primary considerations in deciding whether a stay is warranted by virtue of the prejudice caused to an accused's ability to make full answer and defence: *R. v. La*, *supra*, at pp. 109-110.
- [49] An assessment of prejudice is problematic where, as in this case, the relevant information has been irretrievably lost. No one can say with any certainty whether an examination of the vehicle would have produced information helpful to the appellant in his defence. It may have done so, or it may have yielded information that confirmed the Crown's case, or it may have produced information that supported neither the Crown nor the defence.
- ...
- [52] I accept that, depending on the results of forensic tests of the interior of the vehicle, they could have assisted the appellant in the ways outlined by counsel. The fact remains, however, that these possible advantages to the defence were no more than realistic possibilities, and were no more likely than test results that were adverse to or neutral to the defence position.
- ...

- [54] . . . There was, however, another avenue open to the trial judge to minimize the prejudice caused to the appellant. The trial judge should have given the defence the opportunity to place before the jury evidence that the Crown had failed to preserve the vehicle as it was obliged to do, and evidence as to how forensic testing may have assisted in determining the identity of the driver. In my view, had the defence been allowed to make these points and to relate them to its position that the Crown had failed to discharge its burden of proof, the prejudice caused to the appellant would have been substantially reduced. . .
- [55] The appellant was denied access to evidence which had a realistic possibility of assisting his defence. That evidence could also have destroyed his defence or it could have been of no assistance to him. When that prejudice is considered along with the measures that could have been taken to alleviate the prejudice, I conclude that this is not one of those rare cases where a stay of proceedings was an appropriate remedy.
- [95] In *Nicholas*, a trial court decision, the accused sought a stay of proceedings based on the failure of a forensic identification officer to preserve an exhibit. The accused was charged with offences arising from three break and enters of the residences of women. The Crown relied on similar-fact evidence from one offence to another. A DNA profile from an orange juice carton at the location of one of the offences matched the profile found in the vagina of the victim of the second offence, who had been sexually assaulted by the intruder. At the scene of the third offence, the identification officer had examined an orange juice carton for fingerprints but when that examination proved negative he took it upon himself to destroy the carton without submitting it for DNA examination. The officer mistakenly believed that it would not have been accepted for testing because that offence did not involve a homicide or a sexual assault, which were the existing criteria for DNA submission to the forensic lab in Ontario.
- [96] The Crown conceded that this officer's decision amounted to "unacceptable negligence" as that term is used in the cases. However, Dunnet J. was not satisfied that the destruction represented a disregard of the well-known disclosure obligations that amounted to an abuse of process:
- [23] There is no issue that while Sudeyko [the identification officer] properly tested the items for fingerprints, he erroneously concluded that this was the extent of their evidentiary value. He failed to appreciate that the matter involving A.U. [the third offence] would be considered serious and failed to make inquiries of the investigating officer who had determined there was a sexual element to the incident.
- [24] I have not been persuaded that the conduct of Sudeyko amounts to gross negligence. However, in the particular circumstances of this case, the destruction of the orange juice carton without determining the status of the investigation amounts to unacceptable negligence. The evidence was potentially relevant at the time it was destroyed. Accordingly, there has been a breach of the duty to disclose, which has prejudiced the applicant's right to make full answer and defence.

- [97] Dunnet J. then considered the appropriate remedy on the facts of that case:
- [34] On the evidence before me, I am unable to conclude that Sudeyko's conduct demonstrates a systemic disregard for the prosecution's obligation to preserve relevant evidence warranting judicial intervention and sanction. Further, there is no evidence that his conduct leading to the destruction of potential evidence was deliberately undertaken for the purpose of defeating the disclosure obligation.
- [35] The break-in at the home of A.U. occurred at the beginning of June 1999. The Task Force was formed in late August and the break-in and sexual assault of F.G. and the discovery of the orange juice carton in her home did not occur until September 13, 1999. In these circumstances, I am not persuaded that the actions of Sudeyko warrant a remedy of last resort.
- [36] There is no evidence that DNA testing may have yielded evidence unhelpful to the prosecution. As was stated in Bero, at para. 52, a favourable forensic analysis simply creates a realistic possibility for the defence, and it is equally likely that the result would have been adverse to or neutral to the defence position.
- ...
- [44] I conclude that the remedy envisioned in Bero will adequately address the prejudice to the applicant in these circumstances . . .
- [45] Accordingly, counsel for the applicant will be permitted to question witnesses on the reasons for the destruction; the tests which could have been conducted but were not; the possible results of the tests that could have been conducted and, given the other evidence in the case, the likelihood of obtaining probative evidence going to the identity of the A.U. intruder. In my view, this remedy constitutes a powerful weapon in the defence arsenal.
- [46] The jury will also be explicitly instructed concerning the failure of the police to preserve the evidence and the impact that the failure may have in assessing whether the Crown has proven the charges in respect of A.U. beyond a reasonable doubt.
- [98] Although the nature of the lost evidence in the F.C.B. case was somewhat different (a failure to preserve a complainant's statement and officers' notes on a sexual assault allegation that was revived and led to charges 12 years after it originally arose) the comments that the case contains on the impact of a policy concerning the preservation and destruction of file material by the police are helpful:
26. The police, through their policies, do not determine the standard of care applicable to the duty to preserve evidence. However, where a policy appears reasonable according to an appropriate standard at the time it was in force, compliance with that policy strengthens the submission that there was no unacceptable negligence.

- [99] Applying the principles from these decisions to the evidence in the present case, I conclude that the failure to preserve the sexual assault kit, which contained items that clearly had potential relevance, resulted from the confluence of two factors:
1. Corporal Washbrook's failure, through inexperience, to understand his responsibility to at least preserve, if not have analyzed, evidence that could prove useful in the hands of the defence, even though a DNA profile had already been obtained from one exhibit; and
 2. The local detachment policy then in effect to reduce unnecessary demand on storage facilities by persistently requiring investigators to decide between preserving exhibits or to having them destroyed.
- [100] As Ms. Foot testified, the present system allows members to put very long diary dates on items that they perceive to have some potential future relevance, so that they are not saturated, as she described it, with retention diary dates. One would have expected at the time of this investigation that an aggravated sexual assault in which a male DNA profile had been identified but not yet matched to a known suspect would fall into such an indefinite, or at least long-term, preservation category. The absence of criteria reflecting case seriousness or future investigative viability, beyond that which might be requested by the member, made the policy then in effect fatally flawed, in my view.
- [101] Forensic DNA analysis was hardly in its infancy in 2001 and a knowledgeable officer and/or a forward-thinking policy would have taken the obvious possibility of a future match into account.
- [102] In all the circumstances, I do find that there was unacceptable negligence on the part of the police in failing to preserve the kit and thereby a breach of Mr. Garnot's s. 7 rights. I am not satisfied, however, that the conduct of the RCMP amounted to an abuse of process or that the integrity of the justice system has been imperilled by it.
- [103] I am mindful of Doherty's J.A.'s concerns in Bero about the unacceptability, so long after Stinchcombe, of police officers continuing to fail to grasp their broader obligations to the defence when dealing with seized evidence. However, I think Corporal Washbrook's failure to perceive the broader value and implications of destruction is more akin to the error of the forensic officer in Nicholas. He seems, based on his limited experience at that time, to have considered the recovery of a sample from the jeans as being sufficient rather than, as the police did with the vehicle in Bero, to have acquiesced in the disposal of evidence with no particular consideration of, or concern about, the impact on the defence at a future trial.
- [104] With respect to a remedy for such a breach, this case is analogous to Bero in that there is a reasonable possibility that the analysis of the contents of the kit, including the panties, would have assisted the defence. Dr. Byrne confirmed the value of the panties as a prime location for leaking semen, and his vaginal and anal swabs and vaginal washings would obviously be of potential benefit for the same reasons. However, also as in Bero and

Nicholas, it is also possible that analysis of the contents of the kit would only have confirmed the identity of Mr. Garnot, to even a greater degree of certainty than the more remotely circumstantial deposit of semen on an unspecified area of the crotch of Ms. M.'s jeans that is currently the basis of the case against him.

- [105] Viewed in that light, the destruction of the kit may have impaired the Crown's case more than Mr. Garnot's defence, and the breach would be, in some respect, self-punishing. Or, as indicated in Bero, there is also the possibility that the results could have been of no assistance to the Crown or the defence.
- [106] Every case must, of course, be decided on its particular facts, but I consider the deprivation of the accused's rights here to be of a similar degree of seriousness to the loss of an accused's opportunity to demonstrate that he was not the driver of a destroyed vehicle when his identity as the driver was the critical issue dealing with his guilt, or the opportunity to show that someone else handled an orange juice container in circumstances where similar-fact evidence was being relied on from count to count.
- [107] As in those cases, I think there is a remedy short of the most drastic one of a stay of proceedings that can still alleviate the prejudice caused by the lost evidence. Put another way, I do not think this is one of the clearest cases in which a stay is required.
- [108] When I consider all of the evidence, I conclude that the potential harm to Mr. Garnot's right to full answer and defence can be mitigated in a meaningful way by my instructing myself explicitly, when I consider whether the inferences from the current circumstantial evidence are sufficient for the Crown to meet its burden of proof beyond a reasonable doubt, that the failure of the police to preserve the evidence in this case must figure prominently in that analysis.
- [109] Specifically, I must ask myself whether the absence of what could have been additional confirmatory evidence from the sexual assault kit or the reasonable possibility that the analysis of one of the samples from the kit could have pointed to another person mean that the guilt of Mr. Garnot beyond a reasonable doubt is not the only rational inference to be drawn from the evidence.
- [110] The other aspect of the remedy discussed in Bero and Nicholas is not required because I have already heard evidence during the course of the trial explaining the failure of the police to preserve this evidence.

Discussion of the evidence

General principles

- [111] Despite its aura of scientific certainty and the admission of fact in this case that the profile found on Ms. M.'s jeans was a "match" to a known sample from Mr. Garnot, DNA evidence is still only a piece of circumstantial evidence, from which the presence of its donor at the location where it was found may be inferred.
- [112] As the sole issue in this case is the identity of Ms. M.'s assailant, and the sole evidence capable of proving it is the presence of Mr. Garnot's DNA profile on a semen stain on the inside crotch of her jeans, before I could convict him of the offence of aggravated sexual assault, I must be satisfied that his guilt beyond a reasonable doubt is the only rational conclusion to be drawn from the evidence.
- [113] In addition, Mr. Garnot has testified and given an exculpatory version of events on two bases: one, that his semen could have been deposited on Ms. M.'s jeans during a consensual sexual encounter on the evening of the 20th, and two, that he lacks the capacity to produce the kind of sustained erection necessary to have been her assailant in the aggravated sexual assault. If I believe his evidence or am left in a state of reasonable doubt by it, either on its own or to the extent that it may be supported by the evidence of Dr. Cassidy or Ms. Cunningham, on either exculpatory basis, I must find him not guilty.
- [114] It is only if I reject his evidence and am left with no reasonable doubt by it that I go on to consider whether the Crown has proven his guilt beyond a reasonable doubt on the whole of the evidence.

Assessment of the defence evidence

- [115] In assessing Mr. Garnot's evidence to this standard, I take into account that his life experience has not equipped him to explain his actions effectively in a courtroom setting and also that he was in the pressure-filled situation of testifying in his own defence. Even taking those factors into account however, I found his evidence to be unsatisfactory in many respects.
- [116] His numerous dishonesty-related convictions and the one for perjury (while the latter is somewhat dated) suggest that he may not necessarily take his oath to tell the truth seriously. Quite aside from that, however, there are difficulties with the plausibility of his actual version of events.
- [117] Dealing with his claim of an earlier consensual sexual encounter with Ms. M., my first concern is the unlikelihood of his evidence that he recognized her in the courtroom as the woman he had paid \$20 to masturbate him on November 20th of 2001. While he later clarified in cross-examination that her bloody and swollen face in the photos he was shown by the police prevented him from recognizing her, his initial explanation when asked by his own counsel was that it was because "she was short and that", which really does not make any sense. I am unable to believe that he could credibly claim to recognize a person he met

for such a short time and dealt with mainly in darkness during a furtive sexual encounter almost 10 years ago. What I find is more likely is that he felt compelled to purport to identify Ms. M. in order to link her to a non-culpable explanation for his semen having ended up on her pants.

- [118] Nor did he describe the encounter itself believably. I was unable to accept that Mr. Garnot would simply be walking downtown and then accept an offer for sex for \$20 from a woman previously unknown to him, in the context of telling her what time it was, when he had never engaged in such activities before and has not pursued them since.
- [119] Further, given his alleged significant embarrassment over his erectile dysfunction, which was sufficient to prevent him from seeking assistance with it over his entire adult life, it seems unlikely that he would have subjected himself to the requirement to explain this predicament to a stranger and expose himself to potential ridicule from her arising from it.
- [120] The supposed actions of this woman toward Mr. Garnot also left me in a state of disbelief. Whether she was a professional sex trade worker, as the Crown suggested in her questions, or just a woman seeking to make \$20 opportunistically, it makes no sense that a person willing to engage in such a transaction would express such a fastidious degree of dismay over getting Mr. Garnot's semen on her hand, or take the opportunity to bring sexual pleasure to herself by masturbating.
- [121] I am driven to the inescapable conclusion that this entire episode was fabricated, and not with a great amount of skill, to work backwards from the desired outcome that Mr. Garnot's semen was placed on Ms. M.'s jeans during a consensual encounter. I do not believe it.
- [122] Nor am I able to accept Mr. Garnot's claim to have been incapable since age 17 of the kind of erection necessary to complete an act of sexual intercourse. Dr. Cassidy was a careful and helpful witness and I place full confidence in his professional skill, but at the end of the day his opinion was dependent for its weight on the reliability of the history that Mr. Garnot provided to him. There was no objective physical evidence of an injury that could have produced the claimed incapacity and to the extent that it might be thought to derive from low testosterone, the physical evidence tends to contradict it.
- [123] I also cannot accept, no matter how passive Mr. Garnot may be with respect to his physical health, that he would never have sought medical assistance for this supposed injury. If he has this problem currently, I think it is more likely due to his present risk factors of a stroke and high blood pressure, either on their own or in conjunction with normal declining testosterone as part of the aging process.
- [124] Ms. Cunningham's evidence was of no assistance in this regard. I found her testimony to be vague, confused, and defensive. I was left with the impression that her loyalty to Mr. Garnot would have led her to assert virtually anything that she perceived to be in his interests. Her fundamental assertion in direct examination that he has never been able to have intercourse with her and that their sexual relationship began in 2001 quickly collapsed on

cross-examination, in favour of admissions that they had a form of intercourse, albeit one unsatisfactory to her, in the early years of their relationship, which may have commenced as early as 1997.

- [125] She also conceded a willingness to mislead probation about Mr. Garnot's whereabouts when he was AWOL on his probation and to conceal his continuing presence at her residence.
- [126] Overall, I found her to be a person who displayed a causal regard for the truth. I do not believe her evidence and cannot base a doubt on it.
- [127] In sum, I do not believe Mr. Garnot's evidence and I am not left in a state of reasonable doubt by it.

Disproof by the Crown of the incapacity defence

- [128] Mr. Garnot having raised the defence of his incapacity to commit the offence, the obligation falls on the Crown to disprove the existence of that defence beyond a reasonable doubt.
- [129] For the most part, I found the Crown's rebuttal evidence on this issue to be compelling and believable.
- [130] Ms. C. was a very credible witness. Her account of her drinking behaviours and Mr. Garnot's sexual acts sounded to me like a natural recollection of actual events, and her description of the sexual assault itself contained idiosyncratic details that I would not expect someone who is not being truthful to invent, such as Mr. Garnot's grunting in pleasure and the fact that the intercourse did not last very long. Further, there is confirmation of the commission of an act of intercourse of some kind from the forensic analysis of her sexual assault exam, the results of which were admitted. I accept her evidence that she felt his penis inside her during the act and that this is consistent only with his production of an erection for that purpose.
- [131] I also found M. W. credible, notwithstanding her dislike for Mr. Garnot and her apparent involvement in a previous prosecution of him. Her account of a fleeting glimpse of Mr. Garnot's sex with a passed-out cousin of his wife's had no hint of exaggeration and seemed to be a genuine recollection of a child's inadvertent observation of an instance of adult sexuality. Had she been intent on blackening Mr. Garnot's reputation before the court, I would have expected to see something inflated or lurid about it, rather than this quite banal snapshot of a very brief incident.
- [132] I would have said the same thing about the evidence of G. W., based on most of her evidence, but her bizarre introduction during cross-examination of her allegation that Mr. Garnot produced a handgun, which came out of nowhere having regard to the rest of her evidence, was so jarring and dramatic and that caution dictates that I should not rely on any of her evidence, even on the narrow issue of whether Mr. Garnot had an erection at the time.

- [133] With respect to the probation records, even if I allow for some measure of exaggeration from Mr. Garnot concerning his sexual performance, or some motivation to portray himself as engaged in normal heterosexual relations with an adult partner to please his supervisors, I find it highly unlikely that he would have failed to make at least some reference to this supposed inability to have erections, if it had actually been a problem during the period of probation supervision. Such a disability might similarly have assured his supervisors that his capacity to re-offend was diminished.
- [134] The records and the evidence of Ms. Arsenault convince me that it was of utmost importance to Mr. Garnot's supervisors, given the nature of the convictions for which they were supervising him, to have an accurate understanding of his personal sexual habits, because of the intrinsic relationship of those habits to his risk of re-offending. Whatever level of filtering needs to be applied to the self-reporting of sex offenders, the information they gained had to be reliable enough to form a basis of their assessments, on which public safety depended.
- [135] Considering all of this evidence I am satisfied that the Crown has disproved beyond a reasonable doubt Mr. Garnot's defence of a lack of physical capacity to have sexually assaulted Ms. M.

Proof of identity by the Crown

- [136] Put simply, the question I must resolve on this critical issue is whether the finding of Mr. Garnot's semen on the inside crotch of the jeans Ms. M. was wearing when the police dealt with her is consistent with no other rational explanation than his guilt beyond a reasonable doubt.
- [137] While the DNA profile is the only evidence of identity, there is other evidence to suggest that the semen was left during the timeframe and under the circumstances that she described. Ms. M.'s intoxicated condition and the possibility of her having received a concussion with some resulting amnesia prevent me from putting any weight on her description of the assailant and require me to approach her account of the events with some degree of caution. Nevertheless, the fact that she was assaulted in the location that she described immediately prior to the arrival of the police is confirmed by the presence of her sock in the location that she pointed out, her injuries and emotional state upon the arrival of the police, and what were described as fresh vaginal and anal/rectal injuries found during the sexual assault exam.
- [138] I also found Ms. M. to be a straightforward and entirely guileless witness, and I believe her evidence denying the suggestion of a sexual encounter with Mr. Garnot earlier that day, as well as her evidence that the jeans she was wearing were put on new that day.

- [139] The significance of all of this evidence is that I feel confident, based on these individual pieces of evidence, finding as a fact that the semen was placed on the crotch of the jeans during the time period of the sexual assault described by Ms. M., and at no other time.
- [140] An additional concern is the imprecision in the evidence of the location of the semen, due to the nature of the forensic lab's recording process at that time. I am satisfied, given Mr. Groves' clear definition of the parameters of what he defined as the crotch, that a deposit at any location within that defined area would have been equally consistent with having been deposited during the assault, or having leaked out of Ms. M.'s vagina or anus when she pulled her jeans back up following it. I consider the occurrence of such leakage to be a matter of common sense and ordinary human experience, but if any greater scientific or medical certainty of that point is needed, there is also Mr. Groves' evidence of the inner crotch as being a viable site at which to locate semen from a forensic point of view and Dr. Byrne's characterization of the underpants as a prime location for such leakage.
- [141] The remaining issue, applying the remedy that I have devised for the s. 7 breach, is whether the loss of evidence that would have been available had the sexual assault kit been properly preserved creates a situation in which the finding of Mr. Garnot's semen in the location identified is consistent with another rational conclusion other than proof of his identity as the actual assailant beyond a reasonable doubt.
- [142] It is trite to say that a reasonable doubt can be based on the absence of evidence. However, even giving the loss of this evidence its maximum possible weight, I find that it does not lead to a reasonable doubt based on the existence of another rational explanation.
- [143] On the facts as I have found them, there was no earlier sexual encounter between Mr. Garnot and Ms. M., and no other viable third party assailant emerged on the evidence. Given her condition at the time, I do not consider Ms. M.'s indication to the police that the male who assaulted her identified himself as "Jack", a name Mr. Garnot disavows, to rise to the level of implying the existence of an alternative suspect. That being the case, the possibility of the lost exhibit leading to the identification of anyone except Mr. Garnot recedes to the level of speculating that someone else did the things that Ms. M. described without leaving any physical trace of himself, while Mr. Garnot left his semen without having been the assailant. As a result, the absence of this evidence does not leave me in a state of any reasonable doubt.

Conclusion

- [144] As a result, I do find that Mr. Garnot's guilt beyond a reasonable doubt is the only rational conclusion to be drawn from the evidence and I find him guilty of the aggravated sexual assault of Ms. M.
- [145] As I indicated at the outset, I find him not guilty of the count of uttering threats.

"Schultes J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/18/2011BCSC1814.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-garnot-2011>

Prepared on 28 October 2026 · Esheria