

CANADA / JUDGMENT

R. v. Gauthier

2020 BCSC 146

COURT

Supreme Court of British Columbia

DECIDED

5 February 2020

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2020 BCSC 146 R. v. Gauthier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gauthier,

2020 BCSC 146

Date: 20200205

Docket: 66844

Registry: Chilliwack

Regina

v.

Steven Stewart Gauthier

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Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment

Counsel for the Crown:

J. Lester

Counsel for the Accused:

S.G. Price

Place and Date of Hearing:

New Westminster, BC

October 28-31, 2019

November 1, 4-6, 20, 21, 2019

January 9-10, 2020

Place and Date of Judgment:

New Westminster, B.C.

February 5, 2020

- [1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

Introduction

- [2] The accused, Steven Stewart Gauthier, is charged with three counts, including one count of aggravated sexual assault contrary to s. 273(2)(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], between June 1, 2016, and January 28, 2017. It is alleged that the accused failed to advise the complainant of his HIV-positive status prior to engaging in sexual activity. The accused is also charged with one count of sexual assault contrary to s. 271 of the Code and one count of assault contrary to s. 266 of the Code involving the same complainant between October 18, 2016, and April 2, 2017.
- [3] The offences are alleged to have occurred while Mr. Gauthier and the complainant were in a romantic relationship. Both the complainant, R.G., and Mr. Gauthier testified. The complainant testified that Mr. Gauthier denied he had HIV but said he had an immune disorder that did not place her at any risk. She also alleged that after they moved in together he engaged in non-consensual intercourse and physically assaulted her. Mr. Gauthier admitted that he knew he was HIV positive, but claimed that he disclosed his status to the complainant, and that they engaged in consensual, protected sexual intercourse. He adamantly denied assaulting R.G. in any manner. He urged this Court to reject the complainant's evidence as being neither credible nor reliable given her admission that she was delusional and suffering from psychosis during much of the relationship.
- [4] In addition to the evidence of the complainant, the Crown called doctors who treated the complainant as well as Mr. Gauthier's treating physician. The Crown also called Dr. Conway who provided expert opinion evidence regarding detection, treatment and transmission of HIV and AIDS. Documentary evidence pertaining to the accused's medical records regarding his HIV diagnosis and treatment were also tendered as exhibits. The Crown takes the position the evidence establishes that Mr. Gauthier knew his HIV status presented a realistic possibility of transmission of HIV and he failed to disclose that risk to the complainant.

Since the complainant was not properly advised of the accused's HIV status, her consent was vitiated. Further, with respect to the allegations of sexual assault and assault, the Crown argues the complainant's evidence should be accepted as she was both credible and reliable.

- [5] I am mindful of the fact that Mr. Gauthier is presumed innocent unless and until the Crown meets its burden of proof. The Crown is required to prove the guilt of the accused beyond a reasonable doubt.
- [6] I will begin these reasons with a summary of the relevant evidence in chronological order and then review the evidence tendered by Mr. Gauthier. Since Mr. Gauthier testified, I must instruct myself on the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [W.(D.)], when assessing his evidence. I will comment on issues that arise in the evidence as I conduct my review. I will then examine the legal principles which govern my analysis and finally apply the relevant law to my analysis of the evidence.

Summary of the Evidence

Evidence of R.G.

- [7] The complainant, R.G., was 31 years-old when she testified. She grew up in the Aldergrove area on a hobby farm and graduated from high school in 2006. She attended a few semesters at university and then switched to college where she obtained a diploma as a veterinary assistant. She has two young daughters who were residing with her at her parents' home in the summer of 2016.
- [8] In June 2016, R.G. reconnected with an old friend, M.A., at their high school reunion. M.A. told R.G. about Mr. Gauthier, who was looking for somebody to train his horse near Cultus Lake. Some time in late June or early July 2016, M.A. took R.G. to Mr. Gauthier's farm near Cultus Lake (the "Farm") where she met Mr. Gauthier for the first time. R.G. and Mr. Gauthier discussed arrangements for training his horse. R.G. testified that at this first meeting with Mr. Gauthier they drank casually and smoked marihuana. R.G. admitted at that time she consumed both alcohol and marihuana fairly frequently. She explained she would get a "buzz" but was never "falling down drunk".
- [9] After their first meeting, R.G. returned to the Farm with M.A. a few more times but by the end of July 2016 she was going to see Mr. Gauthier on her own. R.G. was intrigued by Mr. Gauthier and described him as friendly and welcoming. R.G. used her parents' van to drive to the Farm to see Mr. Gauthier on weekends while her children were spending time with her eldest daughter's father. R.G. recalled one occasion when she brought her children and another one of her friends to the Farm to camp overnight. R.G. said she consumed both alcohol and marihuana during this visit. At some point she was no longer permitted to use her parents' van so Mr. Gauthier bought her a car. R.G. was not clear on the exact sequence of events but there is no dispute that Mr. Gauthier bought R.G. a car for R.G.'s personal use.

The HIV Discussion

- [10] By August 2016, R.G. and Mr. Gauthier were in a sexual relationship and she was visiting him on the farm approximately once per week. They used condoms. R.G. testified that M.A. told her that Mr. Gauthier had HIV. R.G. asked Mr. Gauthier about his HIV status while they were sitting inside his trailer on the farm. R.G. told Mr. Gauthier that both his niece and M.A. had told her he was HIV positive. She said she spoke to Mr. Gauthier in a direct and clear manner, asking him: "do I need to be worried that I will contract HIV?" R.G. said Mr. Gauthier became very agitated and told her: "no, I have an immune disorder but you cannot contract it". R.G. asked again: "so you don't have HIV?" and he responded "no" and claimed the people who said he did, were slandering his name to make him look bad so she would not want to be with him. R.G. said she trusted Mr. Gauthier and believed him. At the time, she was ignorant about the disease and assumed that anyone who had it would appear gaunt and sickly. Mr. Gauthier appeared strong and muscular so she assumed he was healthy.
- [11] R.G. testified that after their discussion about HIV, they decided to stop using condoms. She cared very deeply for Mr. Gauthier and stated that had he told her he had HIV, she would have consulted a doctor about what to do and would have insisted on condom protection.
- [12] During the months of September and October 2016, while still residing at her parents' residence, R.G. spent more time with Mr. Gauthier and they continued their sexual relationship. R.G. estimated they had intercourse almost every time they were together. She also testified that she continued to consume alcohol and marihuana during this period.

October 2016 - Move to the Farm

- [13] While her relationship with Mr. Gauthier developed in the early fall, tensions started to rise with her family. Whenever she returned home from the Farm she would smell of alcohol and marihuana, which caused her parents concern. Some time near the end of October 2016, R.G. and her sister had a "scrap" which I understood to be a physical confrontation. After her father broke up the fight, R.G. called Mr. Gauthier and asked him to pick her up. It was at this point that R.G. began living with Mr. Gauthier on the Farm.
- [14] Once she moved to the Farm, R.G. became increasingly upset because she could not see her daughters. Although her evidence was somewhat confusing I understood that at some point, her parents and the father of her eldest daughter obtained a court order prohibiting R.G. access to her children. Both R.G. and Mr. Gauthier testified that after she moved to the Farm, Mr. Gauthier attempted to assist her to regain access. At some point they went to family court and, as I understand the evidence, a term of the court order required her to attend rehab before she would be granted access to her daughters. R.G. testified that she was unable to get into rehab because a precondition to entering the facility was proof of income assistance, and Mr. Gauthier allegedly forced her to stop receiving income assistance. However, this part of her testimony was confusing and unclear such that I am not able to ascertain exactly what, if anything, transpired regarding this matter other than she never

enrolled in rehab.

- [15] In early fall 2016, Mr. Gauthier began to work with a real estate agent to sell the Farm and obtain a new home so that R.G. could have a place to bring her children.
- [16] By November 2016 R.G. said things were getting "progressively worse" because she missed her daughters and she was consuming alcohol and marihuana to console herself. She testified that in the past, when she was separated from her children, she would drink to excess.
- [17] R.G. testified that Mr. Gauthier became increasingly aggressive - choking her and pressing his forearms on her collarbones during intercourse, which she said was an almost daily occurrence. R.G. testified that Mr. Gauthier would physically assault her by randomly smashing the palm of his hand against her head. She was not able to describe the precise occasions when this occurred but said it would occur both inside the trailer and when they were in his truck.
- [18] Throughout the course of these assaults, R.G. described herself as having been in a state of "deep psychosis" and completely "delusional". She believed she was fighting for her life and was hallucinating what she described as "unimaginable things". She testified that throughout this period Mr. Gauthier used threats and intimidation to control her. For example, she testified that Mr. Gauthier forced her to sleep in the nude and deprived her of food. She also testified she was not permitted to leave the Farm on her own and had to spend all her time with Mr. Gauthier. However, she also acknowledged that Mr. Gauthier purchased her a car so that she could travel on her own and that occasionally she had use of Mr. Gauthier's truck. She also acknowledged that one day while driving back to the Farm she lost control of the car because she was upset about not seeing her children. She said the car was smashed beyond repair. The defence produced documents that establish that a violation ticket was issued to R.G. on November 10, 2016.

November 23, 2016 - First Attendance at Chilliwack General Hospital

- [19] On November 23, 2016, Mr. Gauthier drove R.G. to Chilliwack General Hospital where she was treated by Dr. El-Zammar in the emergency department. Dr. El-Zammar testified that she examined R.G. for complaints of lower abdominal pelvic pain and determined R.G. had a vaginal infection. R.G. reported that she was concerned her boyfriend might have HIV so Dr. El-Zammar ordered blood tests and advised R.G. she would contact her if follow-up was required. Dr. El-Zammar noted that R.G. appeared anxious and had bruises on her arms and thighs. Dr. El-Zammar testified that R.G. did not appear to be under the influence of alcohol or drugs and that her blood test results were negative for HIV.
- [20] R.G. testified that when she heard nothing further about her blood tests she was reassured that she did not have HIV and that Mr. Gauthier had told her the truth.

- [21] R.G. said by the end of November she was living in fear of Mr. Gauthier and that she complied with his demands for sex because she felt she had to. R.G. also explained that she had bruises all the time, some of which came from Mr. Gauthier being rough with her during intercourse. R.G. also testified that Mr. Gauthier would take her to sex shops to purchase sex toys which he would then insert into her anus during intercourse, against her will. In cross-examination, R.G. testified that in November she was getting progressively "sicker" meaning she was starting to fall into psychosis. She explained that she was struggling with reality and agreed that she believed in things that were not real.

December 27, 2016 - Second Attendance at the Chilliwack General Hospital

- [22] R.G. testified that by the end of December she was "delusional, out of my mind". She did not recall the details of this second visit to the Chilliwack General Hospital. Dr. El-Zammar testified that she examined R.G. on this occasion and noted that she was agitated and anxious. R.G. expressed concerns about Mr. Gauthier being behind the walls. Dr. El-Zammar gave R.G. a dose of Ativan to calm her down. R.G. expressed concern about HIV because she was having unprotected sex with her boyfriend. The blood test results indicated R.G. had both alcohol and cannabis in her system but Dr. El-Zammar did not observe that R.G. was intoxicated when she interacted with her. Dr. El-Zammar testified she was concerned about R.G.'s mental health but after a few hours in the hospital, R.G. calmed down. There were no indications R.G. was delusional or hallucinating when she was discharged.
- [23] R.G. returned to the Farm after the hospital. She testified she recalls very little of what occurred due to the fact that she was delusional.

January 3, 2017 - R.G. Leaves the Farm

- [24] R.G. testified that while Mr. Gauthier was away, she ran away from the Farm, climbing up the hill behind the property and flagging down a driver. R.G. testified she was reluctant to enter the man's car but once she did, the driver called her father and took her to the Chilliwack RCMP detachment.
- [25] Constable Sidhu testified that he dealt with R.G. at the detachment. Cst. Sidhu said R.G. looked scared, dishevelled and appeared to be having a mental breakdown. He noted she smelled strongly of marihuana. Cst. Sidhu determined that R.G. posed a danger to herself and others so he called an ambulance to have her transported to the hospital where she could be committed under the Mental Health Act, R.S.B.C. 1996, c. 288. Between 11:20 a.m. and noon, Cst. Sidhu stayed with R.G. inside a secure room at the hospital. He noted that at one point, he had to physically place her in the chair.
- [26] R.G. acknowledged her memory is "fuzzy" regarding what happened at the hospital and said she was delusional. On January 23, 2017, Cst. Sidhu learned that R.G. had left the Chilliwack General Hospital and an Apprehension Warrant under the Mental Health Act was issued. Cst. Sidhu was advised Mr. Gauthier was in emergency at Chilliwack General Hospital for his

own matter. Cst. Sidhu spoke to Mr. Gauthier who provided the address of the Farm. Cst. Sidhu did not locate R.G. but learned the next day that she had been located and returned to the Chilliwack General Hospital.

- [27] R.G. testified she spent the night away from the hospital walking around the streets of Chilliwack but could not recall any other details. In cross-examination she described her memory as "patchy" and "foggy" when recalling events in January and February.

January 27, 2017 - Transfer to the Abbotsford Regional Hospital

- [28] On January 27, 2017, R.G. was transferred from the Chilliwack General Hospital to Abbotsford Regional Hospital where she was admitted and treated by psychiatrist, Dr. Hussain, from the date of her admission until her discharge on February 20, 2017. Dr. Hussain remembered specifically dealing with R.G. because she was the only patient in his practice to have tested positive for HIV.
- [29] Dr. Hussain testified that R.G. presented as disturbed, delusional and psychotic upon her arrival at Abbotsford Regional Hospital. He said she appeared to be out of touch with reality. Dr. Hussain prescribed medication to calm her down and ordered blood and urine tests. The urine test revealed a high level of cannabis in her system. Dr. Hussain concluded that R.G. was suffering from drug-induced psychosis because she was a long-time marijuana user. While under his care she improved and responded well to anti-psychotic medication. Dr. Hussain testified that he cautions all his patients not to mix alcohol with anti-psychotic medications.
- [30] The blood tests also revealed that R.G. was HIV positive. Dr. Hussain testified he and an HIV nurse met with R.G. to advise her of the HIV positive test result. Dr. Hussain said R.G. appeared anxious about her diagnosis but her reaction was nothing extreme. The HIV nurse discussed HIV treatment with R.G. It is not clear when R.G. started taking her HIV medication - she testified she thought she started taking them in May or June, but also noted that she probably had them when she was discharged from the hospital in February 2017.
- [31] R.G. testified that she was very hurt when she learned she had tested positive for HIV. She trusted Mr. Gauthier and he gave her the disease. She was also angry with herself for believing him, but felt compassion towards him given the possibility that he believed he was healthy. She testified she never saw Mr. Gauthier take any HIV medications.
- [32] Soon after her diagnosis, R.G. testified she called Mr. Gauthier from the hospital to tell him he had given her HIV. She said he sounded surprised and told her there must be a mistake.

February 2017 - Return to the Farm

- [33] Upon her discharge from Abbotsford Regional Hospital on February 20, 2017, R.G. moved into her sister's coach house in Langley, with the assistance of her father. Within a few days R.G. began drinking and called Mr. Gauthier. She testified she called him to inquire about her dog. She said she had no intention of returning to the Farm. She also thought Mr. Gauthier might treat her better now that he knew he had given her HIV. During the phone call, he agreed to retrieve her and take her to the Farm.
- [34] After returning to the Farm, R.G. testified she urged Mr. Gauthier to get medications for his HIV. She said that Mr. Gauthier told her he stopped taking HIV medications because they made him tired. She also said he thought the government was trying to poison people with HIV. Despite this, Mr. Gauthier eventually made an appointment with his Positive Health team in Abbotsford. R.G. said she recalled going to the appointment with him although she was unable to provide any details.
- [35] During March of 2017, R.G. testified that she continued to have sexual intercourse with Mr. Gauthier and when she tried to push him away, he would grab her arms, restrain her and force her to continue. He did not stop when she asked him to stop. She also testified that they often argued and Mr. Gauthier often hit her with the palm of his hand.
- [36] In cross-examination, R.G. admitted that she was consuming large amounts of marihuana during this period and that this caused her to experience confusion and numbness.
- [37] R.G. confirmed that during March of 2017, she and Mr. Gauthier discussed moving from the Farm into an apartment in Aldergrove so that she could reunite with her children. Although she insisted that Mr. Gauthier would not let her go anywhere on her own, she acknowledged that when Mr. Gauthier was at the gym, she used his truck to go to some appointments, get groceries and walk the dog.

April 2, 2017 - Departure from the Farm

- [38] On April 2, 2017, R.G. sent her father a text indicating that she was in trouble. Sgt. Dyson and Cpl. O'Keefe of the Chilliwack RCMP testified that they attended at the Farm located at 855 Columbia Valley Road on a Check Well Being file regarding R.G. It appears the police were responding to a request to check on R.G. presumably from her father. Sgt. Dyson contacted Mr. Gauthier and R.G. by telephone and advised them he wanted to speak to them. Mr. Gauthier and R.G. got in the truck and drove up to the fence where the police were located on the opposite side of the fence. While Sgt. Dyson spoke with Mr. Gauthier, a female member spoke to R.G. With the assistance of a police officer, R.G. climbed over the fence and left the Farm with the RCMP. Cpl. O'Keefe took R.G. to a transition house later that evening.

Evidence of Dr. Smith

- [39] Dr. Smith practices family medicine at the Crossroads Family Practice in Chilliwack, BC. Mr. Gauthier was Dr. Smith's patient from 1997, until recently. In 2007, Dr. Smith received the results of a blood test that indicated Mr. Gauthier had tested positive for HIV. In August 2007, Dr. Smith met with Mr. Gauthier and advised him of the test results and ordered further conformity tests. On September 4, 2007, the test revealed Mr. Gauthier's viral load was 7350. On September 19, 2007, Dr. Smith met with Mr. Gauthier to discuss the results of his HIV test. Dr. Smith testified Mr. Gauthier was distraught and concerned that he had received a death sentence.
- [40] On October 2, 2007, Dr. Smith followed-up with Mr. Gauthier. He was reporting the feelings and emotions common to those who receive news of a positive HIV result. Mr. Gauthier reported he had talked to the HIV nurse and discussed a plan going forward, which included blood tests every three months. The HIV nurse had referred Mr. Gauthier to St. Paul's Hospital.
- [41] Dr. Smith explained that he was not Mr. Gauthier's treating physician for HIV but he would receive copies of reports from others regarding Mr. Gauthier. For example, Dr. Smith received the records from St. Paul's Hospital Virology and Reference Laboratory dated April 16, 2008, which listed the cumulative results of Mr. Gauthier's viral loads from September 4, 2007 to April 8, 2008. The report contained six results ranging from 7350 in September 2007, to 1450 in April 2008, with a report of 141 for February 18, 2008. Dr. Smith testified that after April 2008, he did not receive any further reports respecting Mr. Gauthier's viral load.
- [42] Dr. Smith also received the results of blood tests in March 2014 and September 2015, which reported his HIV positive status. There was no viral load report.
- [43] Dr. Smith met with Mr. Gauthier on April 15, 2010, regarding his back injuries. During that visit, Dr. Smith noted that Mr. Gauthier reported he was no longer taking medications, although Dr. Smith could not recall if Mr. Gauthier was referring specifically to his HIV medications. At the October 24, 2011 visit, Dr. Smith noted that Mr. Gauthier reported to him that he had been at the HIV clinic and that his viral load counts were doing well. On September 18, 2015, Dr. Smith met with Mr. Gauthier and noted that Mr. Gauthier reported he has not seen any HIV doctors recently and was fighting it himself. Dr. Smith testified it was Mr. Gauthier's decision to do this, and it was a decision Dr. Smith had to respect.

Evidence of Dr. Conway

- [44] Dr. Brian Conway is a medical doctor and a specialist in the field of virology, particularly with respect to HIV, AIDS, the transmission and effects of HIV on the human body and the diagnosis and treatment of those conditions. He was qualified to provide expert opinion evidence and his expert report was filed as Exhibit #5 at trial. Although he was cross-examined, his opinion was not seriously challenged by the defence. I will summarize Dr. Conway's testimony, focusing on the aspects pertaining to the issue before me.
- [45] Dr. Conway explained that human immunodeficiency virus or, HIV, is a chronic, incurable infection that can develop into acquired immune deficiency syndrome or, AIDS. HIV can be transmitted at any time from an infected to an uninfected individual as long as the infected individual has a measurable amount of the virus in their circulation. HIV infection is usually acquired through sexual intercourse, infected blood or perinatal transmission. The use of condoms reduces rates of transmission when used consistently.
- [46] St. Paul's Virology Laboratory located in Vancouver, B.C., is the only laboratory that is certified to perform HIV viral load testing. The viral load is a value associated with increasing or decreasing risk of transmission. An undetectable viral load is a viral load that is so low that the tests to measure viral load can not accurately count the virus. In those cases, the result is reported as undetectable. Treatment of HIV can reduce the amount of virus to a level that is undetectable.
- [47] Dr. Conway testified that effective HIV treatment requires the ongoing, daily consumption of medication. Dr. Conway explained that if an individual stops taking the medicine "the virus starts growing again, because it has never been completely gone, and it goes back to being a detectable number that we will be able to count by the test". An individual with a viral load which is reliably and consistently below 1500 copies/ml presents an extremely low risk of transmission through vaginal intercourse. Condom use reduces that risk by 80 percent.
- [48] Dr. Conway's recommendation is that viral load testing be repeated every three months and more frequently if there is a change in the health of the individual. He emphasized that once an individual becomes infected with HIV, they need to commence treatment and cannot stop. Once an individual begins treatment, they need to be tested frequently to determine if the treatment is effective. Once the viral load reliably yields undetectable results, the frequency of testing could be reduced to once every six months, as long as the individual maintains the treatment regimen.
- [49] Dr. Conway reviewed the medical reports pertaining to Mr. Gauthier's blood tests which were filed as exhibits at trial. Dr. Conway opined that Mr. Gauthier never had an HIV plasma viral load measurement that was undetectable. According to the records, in September 2007, Mr. Gauthier's viral load measured 7350; October 2007, it was 9450; November 2007, it was 5390; January 2008, it was 5580; February 2008, it was 141; and April 2008, it was 1450. Dr. Conway explained that the measure of 141 does not mean Mr. Gauthier was undetectable because that measure was not consistent over a period of time. After April 2008, there were

no records providing viral load measurements until February 2017, which indicated a viral load of 6302. Dr. Conway opined that based on the findings, Mr. Gauthier's HIV plasma viral load exceeds 1,500 copies/ml at the relevant time. At that level, a risk of HIV transmission during vaginal intercourse is present.

[50] In addition to the measure of Mr. Gauthier's HIV plasma viral load, the records established that tests for the detection of HIV antibodies were done December 2009, June and October 2011, and March 2014. These tests confirmed Mr. Gauthier had HIV, but they did not measure his viral load.

[51] Dr. Conway also opined that the records reveal that Mr. Gauthier disengaged from his treatment regimen and that the frequency of testing was substandard. He concluded that, "the fact that all the viral load tests were positive and within a narrow range suggests that at no time did Mr. Gauthier receive any antiretroviral therapy to lower his viral load".

Defence Evidence

[52] Before I review Mr. Gauthier's evidence, I will briefly summarize the evidence of the other defence witnesses. The defence called Mr. Gauthier's brother, Rick Gauthier, and Mr. Gauthier's son, Michael Gauthier. Both testified that they knew Mr. Gauthier was HIV positive and they believed he did not conceal his condition. They also both testified that they had met R.G. and knew she was in a romantic relationship with Mr. Gauthier. Rick Gauthier said he told R.G. at least twice that his brother was HIV positive. Rick Gauthier also testified that Mr. Gauthier was taking his HIV meds in 2016 and 2017 and kept them in a container in his trailer. With respect to R.G., Rick Gauthier testified that when he would see R.G., she always appeared "glitched out" and angry although he could not provide specific instances to substantiate his observations.

[53] Michael Gauthier said he recalled one occasion where he asked his father if he had taken his medications in the presence of R.G. However, he also advised he was distracted with some personal matters at the time and does not specifically recall details between 2016 and 2017.

Evidence of Mr. Gauthier

Diagnosis and Treatment of HIV

[54] Mr. Gauthier is 58 years-old and was diagnosed with HIV in 2007. When he was first diagnosed he was devastated. A few months after his diagnosis he became a patient at St. Paul's Clinic. Initially he took his medication as prescribed, but over time he decided to replace his medication with steroids and focus on body-building.

- [55] Mr. Gauthier was cross-examined extensively. He explained that for at least a few years while he was taking steroids and doing body building, he would take his HIV medications about every third day. He said he was on this treatment regimen when he was with R.G. He then clarified his evidence stating: "I was coming off the steroids because I had a groin injury and stuff, so I wasn't able to body build anymore. So I had to slow down the steroids and I started back on with my meds".
- [56] Mr. Gauthier testified that during this time, Dr. Smith expressed shock to Mr. Gauthier at how low his "levels" were. It is unclear to me what Mr. Gauthier meant when he referred to his "levels". There are records establishing Mr. Gauthier had blood tests periodically between 2009 and 2015, but there are no records of Mr. Gauthier having his viral load measured after 2008 until February 2017. Mr. Gauthier then clarified that he spoke with Dr. Smith about his levels only after the relationship with R.G. ended in 2017. The evidence established that on February 14, 2017, Mr. Gauthier had a blood test which revealed that his viral load was 6302. There is no reason to think Dr. Smith would have regarded this as a low viral load count.
- [57] Later, Mr. Gauthier claimed he saw Dr. Burns at St. Paul's at least twice in the course of his relationship with R.G. He said he saw Dr. Burns at St. Paul's throughout his time attending the St. Paul's Clinic, including in 2014 and 2015. When Mr. Gauthier was asked to explain Dr. Smith's notation indicating that when Mr. Gauthier saw Dr. Smith in September 2015, Mr. Gauthier reported that "he had not seen any of his HIV doctors," Mr. Gauthier denied that this was what he reported. He indicated that Dr. Smith could be mistaken as he clearly did not understand what Mr. Gauthier told him.
- [58] Mr. Gauthier testified that he was aware of his viral loads during 2016 because he was getting his blood work done at St. Paul's Clinic. He believed his viral load was in the non-detectable range. When pressed on this point Mr. Gauthier stated "as far as I know yes, I know no different". Mr. Gauthier also testified that the HIV nurse, "Cathy", told him his viral loads were "good". Mr. Gauthier could not remember when that was.
- [59] When asked again as to when he stopped the steroid regime and resumed taking his HIV medications, Mr. Gauthier explained it was about January 2017 because that was around the time he pulled his groin and was prevented from body-building. Mr. Gauthier clarified that the St. Paul's Clinic did not approve his alternative treatment plan but they monitored his progress.
- [60] Mr. Gauthier acknowledged that he was aware that a key part of treatment was to maintain a low viral load. He acknowledged there was a risk of passing HIV to other people. He said he has pushed people away in the past but, "R.G. kind of agreed on it. She kind of talked me into that this would be okay, that she won't get it or she doesn't get it."
- [61] When asked about the results of his February 14, 2017 HIV test, which indicated a viral load of 6302, Mr. Gauthier denied having ever been informed of the result. Mr. Gauthier said it was a big surprise to him. Mr. Gauthier then explained that at the time he had so many other

physical issues - "staph infection, broken foot, heart attack, stress from her" - that "the last thing on my mind at that point in time was what a doctor would have said about a load". When asked again about the lack of viral load tests from 2013 through to 2016, Mr. Gauthier maintained he had been tested and the lack of records was a failure on the part of the medical records system.

July 2016 - R.G. and the HIV Discussion

- [62] Mr. Gauthier testified about his first meeting with R.G. in July 2016 at the Farm. His description of their first meeting aligned with R.G.'s.
- [63] Mr. Gauthier testified that soon after he met R.G. they went to Cultus Lake to have a drink at a karaoke bar. He testified that while they were sitting in his truck R.G. told him she had heard from others that he had HIV. He said he told her that he did and she asked him how he got it. He said he thought he got it from a blood transfusion when he was a child. Mr. Gauthier said he told R.G.: "yeah, and that's when we talked and that was it, and we didn't discuss it". Mr. Gauthier then proceeded to describe events inside the karaoke bar which were completely unrelated to what he discussed with R.G. about his HIV status.
- [64] During cross-examination, Mr. Gauthier clarified that the discussion in fact took place inside the van R.G. was driving as she had picked him up that evening. Mr. Gauthier stated he told R.G. the following:

.and then she starting telling me how everybody was telling her about my HIV and I told her "Yes". I told her it was an autoimmune deficiency, that I was on pills, that it's supposed to be non-transferable and I probably got it from when I had cancer when I was a kid .

- [65] When asked if he told R.G., during this conversation that his viral loads were undetectable, Mr. Gauthier stated: "at that time, as far as I knew, my viral loads were non-detectable". When pressed if he told R.G. as much he stated: "last I had heard, my viral loads were non-detectable is what I told her. I said last I heard". However, he then denied that he ever mentioned viral loads to R.G., instead saying: "I just said that mine was non-detectable. That's all I said. I had - what do you call it - a blood disorder". Mr. Gauthier also testified that he was advised by the clinic in January 2017 that his viral loads were "good" when he called in to check. He also testified that he told R.G. about the phone call and "it was good".
- [66] When asked if he ever discussed his HIV status with R.G. after the discussion in the truck, Mr. Gauthier responded "well, I mean yes and no" and then explained that he has never hidden his HIV status from anyone because "on the occasion that I could get cut or anything could happen".

Nature of the Relationship

- [67] Mr. Gauthier testified he became sexually active with R.G. sometime after Halloween when she moved in with him. He said they always practiced safe sex using a condom. He noted that when R.G. claimed to be pregnant, he bought her a pregnancy test because he knew they were having safe sex. He testified that after she moved in they had sex once or twice a week but she had some infections so the intercourse decreased. He also denied using sex toys with R.G. and was adamant that any toys she used were purchased by her.
- [68] Mr. Gauthier testified that soon after moving onto the Farm, R.G. started drinking heavily and their relationship soured. He said they were fighting all the time and that he tried to get her to stop drinking. He testified he took her to the hospital because of her drinking which aligns with the other evidence regarding R.G.'s November and December 2016 hospital visits. Mr. Gauthier testified after R.G. was at the hospital and was on her anti-psychotic medications she continued to drink excessively and she started "doing crazy things like running away". He described her as "majorly hallucinating". Mr. Gauthier's evidence regarding R.G. attending Chilliwack General Hospital and the Abbotsford Regional Hospital also aligned with the evidence of R.G., Dr. El-Zammar and Dr. Hussain in terms of time frame.
- [69] Mr. Gauthier did not deny he had sexual intercourse with R. G. at the beginning of their relationship but he disagreed with R.G.'s account of the frequency with which it occurred. In cross-examination he adamantly denied ever forcing her to have sex, stating: "you know, beating your woman to have sex or - forcing her into having sex? That's not love, that's not having sex or making love, that is - that's - that's rape. So, no, I disagree". Mr. Gauthier said he had a variety of physical challenges including a back injury and a hernia from body-building which impeded his ability to have sex. He also testified that he had erectile dysfunction so was not capable of engaging in intercourse at the frequency which R.G. described. As noted by Crown counsel neither R.G. nor Dr. Smith were asked about Mr. Gauthier's erectile dysfunction or physical restrictions during cross-examination.
- [70] Mr. Gauthier denied assaulting R.G. He said he would pull her hair during sex when she asked him to. He admitted he would get angry and raise his voice, but he denied ever hitting her. When asked about R.G.'s bruises, Mr. Gauthier explained that she was always falling or banging into things, which may explain the bruises.
- [71] When it was suggested to Mr. Gauthier that he was controlling and abusive towards R.G., Mr. Gauthier became very animated and explained how it was actually R.G.'s family, particularly her father who were the ones that were abusive and controlling towards R.G. He referred to their efforts to keep R.G.'s children away from her.
- [72] Mr. Gauthier also testified about the incident on April 2, 2017, when the police attended at his property and R.G. left the Farm for the final time. He denied that he was angry about the incident and claimed to have been somewhat relieved that she left.

THE GOVERNING LEGAL PRINCIPLES

[73] The offence of assault and sexual assault is contained in s. 265 of the Code. Section 265 provides as follows:

265. (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

.....

- (2) This section applies to all forms of assault, including sexual assault ... and aggravated sexual assault.

- (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

.....

- (c) fraud; ...

[Emphasis Added.]

[74] The offence of aggravated sexual assault is set out in s. 273(1) as follows:

273. (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

- (2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable

.....

- (b) in any other case, to imprisonment for life.

[Emphasis Added.]

[75] In *R. v. Cuerrier*, [1998] 2 S.C.R. 371 [Cuerrier], the Supreme Court of Canada held that the failure to disclose a condition that poses significant risk of serious bodily harm amounts to fraud that vitiates consent to sex. In *R. v. Mabior*, 2012 SCC 47 [Mabior], the Supreme Court of Canada affirmed the *Cuerrier* test and explained the element of significant risk of bodily harm should be read as requiring an individual's disclosure of their HIV status if there is a realistic possibility of transmission of HIV. Failure to disclose that a person has HIV will not constitute fraud vitiating consent to sexual relations under s. 265(3)(c) if there is no realistic possibility of transmission of HIV (para. 91). A "realistic possibility of transmission" may be negated where it is demonstrated that: "(i) the accused's viral load at the time of sexual relations was low; and (ii) condom protection was used" (para. 94).

[76] In Mabior, the Court summarized what the Crown must establish under ss. 265(3)(c) and 273, at para 104:

To summarize, to obtain a conviction under ss. 265(3)(c) and 273, the Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (deprivation). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV.

[77] The Court provides further guidance as to who bears the burden of proof at para. 105:

The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence -- a dishonest act and deprivation -- beyond a reasonable doubt. Where the Crown has made a prima facie case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used.

Credibility, Reliability and the W.(D). Framework

[78] The evidence in this case poses challenging questions about both the credibility and reliability of the two main witnesses, the complainant and the accused. Credibility has to do with a witness's veracity and reliability pertains to the accuracy of the witness's testimony. I recognize that a credible witness may give unreliable evidence. (see: R. v. Plehanov, 2019 BCCA 462; R. v. M.A., 2019 BCSC 640 [M.A.]; R. v. Morrissey (1995), 22 O.R. (3d) 514, 97 C.C.C. (3d) 193 (C.A)).

[79] I am mindful that a trial is not a credibility contest and my role as the fact finder is to determine whether the Crown has established the elements of the offence beyond a reasonable doubt. I am also cognizant of the sensitivities involved in assessing the evidence of a complainant in a sexual assault trial. The comments by Molloy J. in R. v. Nyznik, 2017 ONSC 4392 at para. 16 are instructive in this respect:

It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt.

[80] As stated earlier, because Mr. Gauthier testified, I must instruct myself in accordance with the principles established in W.(D). In doing so, I am guided by the comments of MacKenzie J.A. in R. v. Kaplan, 2019 BCCA 356 at paras. 59-60:

[59] The "rule in W.(D.)", the "W.(D.) instruction", or simply "W.(D.)", comes from W.(D.) at 757-58 in which Justice Cory made it clear that "[i]n a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue." He suggested the following instruction:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Since then, W.(D.) has become a staple of the criminal law repertoire for instructing juries, and to the framework judges follow in their self-instruction in cases where credibility is important. Needless to say, W.(D.) has generated significant jurisprudence since 1991.

[60] The purpose served by W.(D.) is to remind the trier of fact that reaching a verdict is not simply a question of choosing between the Crown's and the accused's evidence. The question is whether, based on the totality of the evidence, the trier of fact is left with a reasonable doubt as to the guilt of the accused. Judges are not required to repeat the formula set out in W.(D.) to demonstrate they relied on the appropriate legal principles when assessing the accused's credibility: *R. v. Boucher*, 2005 SCC 72 at para. 59, per Justice Charron, dissenting (but not on this point).

[81] I am mindful that Mr. Gauthier is presumed innocent unless and until the Crown meets its burden of proof. The Crown is required to prove the guilt of the accused beyond a reasonable doubt.

[82] I have had the opportunity to observe Mr. Gauthier as he testified and I have carefully reviewed all of his evidence. Applying the W.(D.) analysis, there are some aspects of Mr. Gauthier's testimony I do accept - particularly that which aligns with the other witnesses. There are other aspects that I do not accept - inconsistencies and contradictions which inhere in Mr. Gauthier's evidence that lead me to conclude that his testimony is not all true. I will discuss my findings in more detail below.

ANALYSIS

Count 1 - Aggravated Sexual Assault

Issue: Does the evidence establish R.G.'s consent to sexual intercourse was vitiated by Mr. Gauthier's fraud as to his HIV status?

- [83] With respect to the allegation of aggravated sexual assault, there is no dispute that Mr. Gauthier was HIV positive when he met R.G. in the summer of 2016. There is also no dispute that R.G. was HIV negative in November 2016 and then tested positive in January 2017, after having engaged in a sexual relationship with Mr. Gauthier.
- [84] Failure to disclose one's HIV positive status amounts to fraud vitiating consent where the complainant would not have consented had he or she known the accused was HIV positive, and where sexual contact poses a realistic risk of transmission or causes actual harm in the form of transmission of HIV. There is no realistic risk of transmission when the infected party has a low viral load, and a condom is used. In this case, the complainant in fact contracted HIV. There was no evidence that the cause of the HIV infection was anything other than sexual contact with the accused. In any event, I find that Mr. Gauthier posed a realistic risk of transmission to the complainant at the relevant time because his viral loads were not low, and they engaged in unprotected sexual contact.
- [85] I do not believe Mr. Gauthier's evidence that he was advised that his viral loads were "good" or that he was in contact with the pharmacy at St. Paul's Hospital about his alternative treatment regime. While there is evidence that Mr. Gauthier had blood tests conducted between 2009 and 2015, there is no evidence that a viral load test was performed after 2008 until February 14, 2017. While Mr. Gauthier may have felt healthy, I do not accept that his viral loads were ever undetectable. It was only his bare assertion that he had undetectable viral loads at any given time. Mr. Gauthier's testimony that he was able to manage his HIV with steroids stands in stark contrast to the evidence of Dr. Conway, an expert in the treatment and management of HIV.
- [86] Dr. Conway testified that HIV is a chronic, incurable infection. Within a day or less of the initial infection it becomes irreversible. Generally, within six weeks of the person becoming infected, an HIV test will indicate positive results. Contrary to what Mr. Gauthier suggested in his testimony, treatment for HIV requires the ongoing, daily consumption of medication and frequent monitoring. If an individual stops the medicine the virus grows. Regular blood tests to monitor the plasma viral load are part of a well-established treatment protocol for individuals with HIV. Dr. Conway's opinion evidence does not lend support to the alternate treatment regime Mr. Gauthier described. Indeed, the evidence suggests that Mr. Gauthier disengaged from treatment, which is consistent with what Dr. Smith testified Mr. Gauthier reported to him in 2015. I reject Mr. Gauthier's evidence that his alternate treatment regime using steroids and periodic HIV medication was sanctioned by any medical professional. Despite his insistence that the evidence of his brother and his son supports his cause, I do not accept the evidence that Mr. Gauthier was taking his HIV medication during the relevant time. I accept Dr. Conway's evidence and opinion after his assessment of the reports that Mr. Gauthier never had an undetectable HIV plasma viral load measurement.
- [87] Further support for my findings arises from a review of the medical records as conducted by Dr. Conway. Dr. Conway explained that Mr. Gauthier's records establish that Mr. Gauthier did not have a viral load measurement after 2008 until February 2017. In February 2017, his viral

load was nowhere near undetectable. Further, there is no evidence that Mr. Gauthier's viral loads were undetectable at any stage, hence why there was absolutely no medical evidence to support Mr. Gauthier's assertion that his "levels were good". Mr. Gauthier's suggestion that there may be other medical records which would establish that his viral loads were undetectable is purely speculative. I am not satisfied that Mr. Gauthier's viral load count was ever at a level other than one which posed a realistic possibility of transmission.

[88] I do not accept Mr. Gauthier's evidence that he told R.G. about his HIV status. His evidence was internally contradictory and inconsistent on this point. I found Mr. Gauthier to be particularly evasive on this important point. Mr. Gauthier simply denied that the conversation in the trailer, described by R.G., ever took place.

[89] During cross-examination Mr. Gauthier provided various versions of his conversation with R.G. ranging from:

- (a) telling her he had a non-transferable autoimmune deficiency;
- (b) telling her he acquired HIV from a blood transfusion as a child;
- (c) telling her he was HIV positive, but that he was taking pills and was non-transferable;
- (d) telling her he had a blood disorder;
- (e) telling her his viral loads were good, but qualifying his answer about his viral loads by repeatedly stating "as far as I know, I know no different" and also contradicting himself at one point by saying they never discussed viral loads; and
- (f) stating that R.G. was the one who "talked me into this that this would be okay".

[90] Mr. Gauthier was vague and evasive in his testimony both in chief, and cross-examination. When pressed by the Crown to explain what he told R.G., Mr. Gauthier resorted to the refrain "as far as I know, I know no different", which I found to be an effort to deflect responsibility from himself. I find this to be Mr. Gauthier's attempt to couch that which he could not deny in terms that would be conducive to his defence. A unifying theme underpinning his testimony is that he was aware, and knew, when asked by R.G., that there was something he ought to disclose. He disclosed something - but I find he failed to disclose to R.G. the exact truth of his HIV status: that he had it, and if she had sexual intercourse with him, there was a realistic possibility she would be exposed to infection.

[91] I accept, as both Mr. Gauthier and R.G. testified, that they used condoms during sexual intercourse in the early stages of their relationship. However, I also accept R.G.'s testimony that the parties eventually decided to stop using condoms. It is difficult, on my assessment of the evidence, to accept Mr. Gauthier's categorical assertion that he and R.G. "always" used condoms. I find that this does not accurately reflect the parties' sexual practices.

- [92] Although I do not accept Mr. Gauthier's evidence with respect to disclosure of his HIV status, the analysis does not stop there. I must continue to ask myself whether, on the whole of the evidence, the Crown has proved the necessary elements of the offence beyond a reasonable doubt.
- [93] The evidence establishes that by November 2016, R.G. was consuming alcohol and marihuana in excess and that she was suffering from delusions. R.G. testified that during that period she suffered from hallucinations which rendered it difficult to distinguish her distorted thinking from reality. The testimonies of Dr. El-Zammar and Dr. Hussain confirm that by the end of December and into January, R.G. was suffering from delusions and required hospitalization and medication to treat her condition. R.G.'s acknowledgment that she was suffering from delusions and hallucinations in late 2016 and 2017 factors into my assessment of her reliability. However, when R.G. met Mr. Gauthier in July 2016, there is no evidence to establish that she was suffering from any mental health issues that would render the reliability of her evidence dubious. Although she consumed alcohol and marihuana, she still had custody of her two young daughters and was living with them at her parent's house. In other words, her drug-use and alcohol consumption did not culminate in psychosis at that time.
- [94] While R.G. was not a perfect witness, her evidence regarding the conversation she had with Mr. Gauthier regarding his HIV status was clear and detailed. R.G. testified that soon after she first met Mr. Gauthier she was told by others that he had HIV. I accept R.G.'s testimony on these following points:
- (a) Soon after she began a relationship with Mr. Gauthier she asked him directly about his HIV status and whether there was any risk that she might contract the disease.
 - (b) Mr. Gauthier denied having HIV, stating he had an immune disorder which she could not contract.
 - (c) When she spoke to Mr. Gauthier she knew little about HIV and assumed that someone with HIV would appear sickly. Since Mr. Gauthier appeared fit and healthy she believed him.
 - (d) After this conversation, they agreed to no longer use condoms.
- [95] I believe R.G.'s testimony that she would not have had unprotected sexual intercourse with Mr. Gauthier had she known of his HIV-positive status.
- [96] Dr. El-Zammar's evidence assists me with my assessment of R.G.'s evidence. Dr. El-Zammar testified that during the November 23, 2016 visit to the Chilliwack General Hospital, R.G. expressed a concern that her boyfriend might have HIV and blood tests were taken. When R.G. heard nothing further from the doctor she was reassured that Mr. Gauthier had told her the truth. R.G.'s description of how she felt when she learned from Dr. Hussain that she was HIV-positive is another factor that I have considered. R.G. was upset and disappointed that Mr. Gauthier would expose her to such a life-altering disease but she was also sympathetic towards Mr. Gauthier and concerned about his health.

- [97] Given that Mr. Gauthier presented a realistic risk of transmission of HIV to R.G., he was obligated to disclose his HIV status prior to sexual contact. I am satisfied that the Crown has established that R.G.'s consent to sexual intercourse was vitiated by Mr. Gauthier's failure to disclose his HIV status. I am also satisfied that the Crown has established that R.G. would not have consented had she known that Mr. Gauthier was HIV-positive and there was a significant risk of bodily harm.
- [98] Accordingly, I find that the Crown has established all the elements of the offence of aggravated sexual assault.
- [99] I turn now to the other counts on the Indictment.

Counts 2 and 3 - Sexual Assault and Assault

- [100] The allegations of sexual assault and assault span from October 18, 2016, to April 2, 2017, except for the period January 3 until February 20, 2017, when R.G. was hospitalized. As previously discussed, the evidence established that R.G. and Mr. Gauthier began their intimate relationship some time in the late summer or early fall of 2016.
- [101] Mr. Gauthier admits that he had a sexual relationship with R.G. but that shortly after she moved onto the Farm their relationship deteriorated. Mr. Gauthier acknowledged that he engaged in sexual intercourse with R.G. but insists it was consensual. He testified that it occurred less frequently than R.G. described. He also acknowledged that he often argued with R.G. but denied he ever hit her.
- [102] The Crown submits that R.G. was a credible witness who described incidents of sexual assault and assault in late November and December 2016 and March to April 2017. I agree that R.G. testified in a sincere and forthright manner. She also willingly admitted to having some issues with memory. She was a quiet, calm witness who did her best to answer questions and provide her testimony. I did not view her as evasive or recalcitrant. When she did not understand a question she would say so and appeared to be doing her best despite clearly being nervous.
- [103] However, I must consider more than merely R.G.'s demeanour on the stand. I approach her reliability as to the alleged assault and sexual assault with difficulty. I am mindful that a credible witness may give unreliable evidence.
- [104] Based on my consideration of all of the evidence, I find there is a distinct difference in the quality and reliability of R.G.'s evidence with respect to the time when she first met Mr. Gauthier in the summer of 2016, and the evidence regarding events that unfolded during the period between November 2016 and April 2017. The difficulty I have with R.G.'s evidence is that she admits that during the period of November 2016 through to April 2017, she was unwell, suffering from what she described as delusions and hallucinations. As early as November 2016, she said she was in "deep psychosis". She was consuming excessive amounts of alcohol and marihuana to the point that Dr. Hussain diagnosed her with drug

induced psychosis. She was hospitalized for treatment of her delusions. In cross-examination she admitted that by November 2016 she was struggling with reality and believed in things that were not real. She also admitted her memory was "patchy" and "foggy" and her marihuana consumption made her feel confused and numb.

- [105] R.G.'s own admission that she did not have a firm grip on reality renders it impossible, on the evidence before me, to determine which aspects of her testimony were based on fact and which sprung from her delusions. While I accept that R.G. sincerely believes these events took place, that is not a basis upon which I can be satisfied beyond a reasonable doubt that the assaults occurred at all, or in the manner in which she alleges.
- [106] The Crown submits I should accept R.G.'s evidence and reject Mr. Gauthier's evidence. As I previously mentioned, aspects of Mr. Gauthier's evidence were inconsistent, contradictory and unsatisfactory. These inconsistencies cast doubt on his version of the events. However, I need not go so far as to reject his evidence in its entirety. The onus is on the Crown to establish the case beyond a reasonable doubt and that onus does not shift to Mr. Gauthier. He has no obligation to establish his innocence.
- [107] Instead, what I must assess is whether, in light of the evidence I do accept - notwithstanding my rejection of Mr. Gauthier's testimony- I am convinced beyond a reasonable doubt of Mr. Gauthier's guilt. As stated at para. 23 of M.A. "the test to be applied is not whether I believe the evidence of the Crown or the defence more, but whether the Crown has proven the offences beyond a reasonable doubt".
- [108] The standard of proof in a criminal case requires sufficient clarity in the evidence to enable the court to determine the facts. In this case, for the reasons I previously mentioned, I do not have the requisite clarity to accomplish this as there are factors that significantly undermine the reliability of R.G.'s evidence. That is not to say that I find the complainant untruthful. Rather, having considered all of the evidence, I am not satisfied that the Crown has met the burden of establishing the offences of sexual assault and assault beyond a reasonable doubt.

Disposition

- [109] I am satisfied that the Crown has established beyond a reasonable doubt that Mr. Gauthier committed aggravated sexual assault of R.G.
- [110] I am not satisfied the Crown has established beyond a reasonable doubt that Mr. Gauthier sexually assaulted or assaulted R.G.
- [111] Mr. Gauthier, please stand.
- [112] On Count 1 on the Indictment, aggravated sexual assault I find you guilty.
- [113] On Count 2 of the Indictment, sexual assault I find you not guilty.

[114] On Count 3 of the Indictment, assault I find you not guilty.

"Devlin J."

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Prepared on 26 October 2026 · Esheria