

CANADA / JUDGMENT

R. v. Graham

2025 BCSC 1820

COURT

Supreme Court of British Columbia

DECIDED

5 September 2025

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2025 BCSC 1820 R. v. Graham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Graham,

2025 BCSC 1820

Date: 20250905

Docket: 50029

Registry: Penticton

Rex

v.

Donovan Kayle Graham

Restriction on Publication: A publication ban has been imposed under s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Justice E. Sigurdson

Oral Reasons for Judgment

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M.A. Patterson

R.K. Neary

Place and Dates of Trial:

Penticton, B.C.

August 25–27, 2025

Place and Date of Judgment:

Penticton, B.C.

September 5, 2025

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- [1] These are my oral reasons for judgment in this trial. I reserve the right to revise them for clarity, syntax and references, but the result and reasoning will not change.
- [2] As a preliminary matter, I have considered the age of the complainant and principal witness in this case, at the time of the alleged events and her age today. I have considered the relationship of the issues in this case to a matter with a potentially core impact on her personal integrity, her identity and her privacy interests, and the fact that she is unrepresented by counsel in these proceedings but has a central role. Based on those considerations, I am making an order that restricts publication of the complainant's name

pursuant to s. 486.5(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. In any transcript or published version of these reasons, the complainant's name will be initialized. I make this order in light of the factors set out in s. 486.5(7). No other applications for publication bans were made during the course of the trial.

- [3] The accused, Donovan Kayle Graham, is charged with one count of sexual assault contrary to s. 271 of the Code, which is alleged to have occurred on July 14, 2022.
- [4] The Crown alleges that Mr. Graham sexually assaulted T.H., a friend and co-worker, in a trailer on a property near Cawston, BC, where they were both residing while working in the area during the summer. T.H. was 16 in July 2022. Mr. Graham was 23.

Issue at Trial

- [5] I must evaluate the credibility and reliability of the evidence at trial, and determine whether the Crown has, on all the evidence, proven beyond a reasonable doubt that Mr. Graham is guilty of sexual assault.

Evidence

- [6] The Crown led two witnesses in this case while the accused led no evidence. Unlike some sexual assault cases, this is not one where there is a "credibility contest" between the evidence of the Crown's witness, and that of the accused.

T.H.

- [7] T.H. was 16 at the time of the incident in question, and 19 at the time of trial.
- [8] T.H. testified that she and her mother, Jody, both worked at a bistro near Oliver in the summer of 2022. During that time, T.H. and her mother lived on a property with their boss, Anna Thibodeau, who had two trailers and a tent located on the property, which was a former organic farm. Also residing there was the accused, Mr. Graham.
- [9] T.H. did not know Mr. Graham before working with him and living on the property with him. She understood that he was 23 years old in July 2022.
- [10] Normally, T.H. and her mother slept in one trailer which had a regular bed and a seat that converted into a small bed or sleeping area. Ms. Thibodeau slept in the other trailer, which was air conditioned, had one bed, and an area in which there was space to sleep on the floor. T.H. testified that Mr. Graham slept in a tent on the property, but when it got really hot out he would sleep in Ms. Thibodeau's trailer.
- [11] T.H. testified that Ms. Thibodeau provided food, making meals for all of them at her trailer. She testified they had a fridge for cold food like cereal and a microwave in the other trailer.

- [12] On the evening of July 14, 2022, T.H.'s mother was unwell from heat stroke, so was not at work at the end of the day. T.H. testified that she found some wine belonging to Ms. Thibodeau in a cooler at work and drank some of it before going home with Ms. Thibodeau and Mr. Graham. She testified that when she left work she was intoxicated. She said that her speech was affected and she was staggering.
- [13] T.H. said that she had not drunk white wine before that night. She had consumed alcohol before. She said she was not a regular drinker and did not have a tolerance for alcohol.
- [14] T.H. did not have a clear timeline of events for the evening. In general terms, she says she went to her trailer and got changed out of her work clothes. While there, she found a vodka soda which she drank in the bathroom while changing. When asked why she drank more despite being intoxicated and having a low tolerance, she said that "it's what teenagers do". At some point, T.H. fell and scraped her knee from missing a step on the way out of the trailer.
- [15] T.H. stated that she staggered around looking to find somewhere comfortable to sit. She believed it was clear to others around her that she was drunk. She did not recall having anything to eat. T.H. recalled that she, her mother, Mr. Graham and Ms. Thibodeau as well as some neighbours went to the river where it was cooler, and her mother stood in the river but they did not swim. She recounted that they were fishing and while doing so, a fish line or hook became wrapped around her. Either before or after going to the river, she and others went and sat in an area on the property where Ms. Thibodeau had set up camping chairs, and could look at the view. T.H. thought the adults were drinking but did not know for sure.
- [16] T.H. testified that after they spent some time at the creek and sitting in the camping chairs, her mother went to bed in Ms. Thibodeau's trailer, which was cooler because it had air conditioning. At that point, T.H. says she thought that because her mother was in Ms. Thibodeau's trailer, T.H. would sleep in her mother's bed and Mr. Graham would sleep on T.H.'s usual bed, the convertible bed in the main area of the trailer.
- [17] T.H. went back to her trailer with Mr. Graham. She said that her expectation was, and that she thought her mother's expectation was, that Mr. Graham would take care of her in her intoxicated state. She said that Mr. Graham described himself as her big brother, and she his little sister. T.H. testified that she did not know Mr. Graham before June 2022. She said that on one occasion around July 1 that year, she had a discussion with him about respecting physical boundaries and told him not to touch her for any reason, even to get her attention. At that time, she had not been concerned about sexual touching.
- [18] In the trailer, T.H. described a number of events preceding the alleged assault. She said she was not surprised Mr. Graham was in her trailer, as she assumed he was helping to take care of her.

- [19] The bed T.H. normally slept on was a convertible seat in the trailer's main area, which turned into a sleeping area. She said that if you sat too close to the edge it would tip over, and T.H. turned this into a game, where she would roll out of the bed and Mr. Graham would pick her up and put her back on the bed.
- [20] She testified that Mr. Graham made her some food in the microwave and fed her. T.H. did not recall what it was but it may have included rice, and it was in a container which she thought they ate out of. She says they ate on the convertible bed.
- [21] T.H. testified that Mr. Graham made the bed that T.H.'s mother normally slept on. She said he then helped her to that bed, not the convertible bed she had been playing on. T.H. had gotten ready for bed by changing into sweat pants and an oversized t-shirt. She did not recall what Mr. Graham was wearing.
- [22] She testified that when he helped T.H. onto the bed, Mr. Graham shortly thereafter shoved her over and said "move," to make room for himself on the bed. He then laid down on the bed. It was hot outside and in the trailer, and T.H. was on top of the covers.
- [23] T.H. testified that Mr. Graham was on the bed beside her. She was laying on her back, but had turned her head to the right to give herself some space. T.H. says that Mr. Graham started touching her stomach, under her shirt. She said she froze and did not know what was going on. She said he then put a hand on her left breast and fondled it. T.H. says she jerked away with her shoulders and head, and she thought that might have scared him off. T.H. testified that Mr. Graham then put his hand in her pants, and tried to get into her underwear. After a second or two, when his hand reached her pubic hairline, T.H. grabbed his hand and tried to pull it out of her pants. His hand went inside her underwear.
- [24] T.H. testified that she said "no, stop" three times to Mr. Graham. She says she was not able to control his hand by grabbing it, but she thinks he eventually moved it away himself. T.H. turned away from him on the bed, and she says that Mr. Graham then apologized to her.
- [25] After Mr. Graham's apology, T.H. testified that she rolled over and went to sleep. She testified that he "spooned" her, or in other words cuddled her from behind with his stomach to her back. However, T.H. clarified she did not actually recall this last set of details respecting Mr. Graham spooning her and falling asleep next to her, but was informed of it by Ms. Thibodeau, who entered the trailer the next morning, and who later confronted T.H. over this observation.
- [26] T.H. says she was awoken in the morning when Mr. Graham left for work with Ms. Thibodeau. He said good morning to her.

- [27] T.H. testified that she made a statement to the police seven to ten days following the incident. She stated that her mother did not influence her in filing the report. The police statement was not in evidence, nor was there evidence from an investigating officer. T.H. explained that she told the police everything she could recall, and also conveyed the information she had from Ms. Thibodeau about finding Mr. Graham spooning her in the morning.
- [28] T.H. testified that she felt betrayed by Mr. Graham's actions, feeling like he had invaded her privacy. T.H. testified she did not consent to being touched by Mr. Graham on her stomach, her breast, or her pubic area.
- [29] T.H. identified Mr. Graham in the courtroom.

Anna Thibodeau

- [30] The Crown's second witness was Anna Thibodeau. She testified that T.H.'s mother, Jody, is her best friend of 25 years.
- [31] In July 2022, Ms. Thibodeau owned and operated a bistro at a winery in Oliver, BC. She employed T.H., Jody, Mr. Graham, and another woman, Melissa, at the bistro. T.H.'s role at the bistro including taking orders and serving. Mr. Graham helped out with anything he could do, including cooking and dishes.
- [32] Ms. Thibodeau resided on Sumac Road in Cawston, BC in July 2022. She is originally from Prince George, and knew Mr. Graham from there.
- [33] Ms. Thibodeau testified that at the property on Sumac Road, she had two trailers and a tent. She resided in one of the trailers, and another employee, Melissa, also stayed there. Mr. Graham stayed in the tent. T.H. and her mother shared the other trailer. Ms. Thibodeau was able to describe the interior layouts of the trailers in general terms.
- [34] The bistro was a 45-minute drive from the Sumac Road property. In the summer, they worked every day, leaving for work around 9 a.m. and finishing work around 6 p.m. Ms. Thibodeau or Jody would drive everyone to work and home. T.H. did not have a driver's license.
- [35] Ms. Thibodeau recalled the evening of July 14, 2022. That morning she and Jody had both driven to work. She testified that Jody had heatstroke so had gone home from work separately. Ms. Thibodeau drove Mr. Graham and T.H. home.
- [36] When they drove home from the bistro that night, Ms. Thibodeau noted that T.H. seemed intoxicated when she got into the vehicle. Ms. Thibodeau did not know at the time what T.H. had had to drink but learned later that she had "snuck" it from the cooler at work. This was not the first time she had seen T.H. "tipsy" but was the first time she had been intoxicated at work.

- [37] When they returned to the property, Ms. Thibodeau, Mr. Graham, T.H., and Jody all went down to the river for a swim, then back to the trailers to sit around. Ms. Thibodeau recalls that she and others were drinking alcohol. She testified that if T.H. drank alcohol, she took it from adults, but that Ms. Thibodeau did not share it with her. She did not recall whether she specifically saw T.H. drinking on July 14, 2022. She did not recall if she made herself or anyone else any dinner.
- [38] Ms. Thibodeau said that she observed that T.H. appeared to be intoxicated. She fell off of a chair, and fell down some stairs at the trailer onto a wooden porch.
- [39] Ms. Thibodeau stated that eventually everyone went to bed. She did not recall if she went to bed before or after T.H. had gone to bed. She did not recall the time she went to bed.
- [40] Ms. Thibodeau said that because of her heatstroke, Jody slept in Ms. Thibodeau's trailer, which had air conditioning. Ms. Thibodeau and Melissa also slept there. She did not see Mr. Graham or T.H. again after she went to bed. Ms. Thibodeau testified that her expectation was that everyone would sleep in their own beds, and that she would have expected Mr. Graham to sleep in his tent.
- [41] Ms. Thibodeau went to wake Mr. Graham up in the morning as she was going to drive him to work at his second job. She testified that before going to the trailer, she checked the tent for Mr. Graham. She then found him in the trailer, asleep, fully clothed, in the bed with T.H.
- [42] Ms. Thibodeau's testimony was that she went into the trailer for a couple of seconds, saw T.H. and Mr. Graham in bed fully clothed, got upset and yelled at them to wake up, and then left the trailer. Ms. Thibodeau was very clear that she had seen them in T.H.'s bed, which was the convertible bed in the main part of the trailer. She drove Mr. Graham to work.
- [43] When asked why she was upset about seeing T.H. and Mr. Graham in the trailer, Ms. Thibodeau said it was because of "the scenario," but she did not elaborate any further.
- [44] Ms. Thibodeau testified that she spoke to Mr. Graham after the events of July 14, 2022, and expressed to him that she was angry and disappointed. She said that he said to her that "mistakes were made" but did not elaborate further.
- [45] Ms. Thibodeau testified that Mr. Graham moved away from the property several days after the events of July 14, 2022. T.H. and her mother also moved away from the property. Ms. Thibodeau did not provide any details of those departures.
- [46] The accused did not call any evidence.
- [47] In argument, the Crown clarified that they do not ask the Court to take Ms. Thibodeau's testimony that Mr. Graham had said "mistakes were made" as an admission against interest. The Crown submitted that the fact this statement was made to Ms. Thibodeau was merely cause for suspicion about Mr. Graham's conduct.

Legal Principles

The Charge

[48] Mr. Graham is charged with sexual assault contrary to s. 271 of the Code. The Code identifies the offence as follows:

Assault

265(1) A person commits an assault [which includes sexual assault] when

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

Sexual assault

271 Everyone who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Meaning of consent

273.1(1) Subject to subsection (2) consent means, for the purposes of section 271 the voluntary agreement of the complainant to engage in the sexual activity in question.

The Crown's Burden

- [49] The accused is presumed innocent unless the Crown proves his guilt beyond a reasonable doubt. This principle is the bedrock of our criminal justice system for the reasons described in *R. v. Nyznik*, 2017 ONSC 4392:
- [5] The presumption of innocence, and along with it the standard of proof beyond a reasonable doubt, are important safeguards to ensure that no innocent person is convicted of an offence and deprived of his liberty. Without these protections, there would be a serious risk of wrongful convictions - an outcome that cannot be accepted in a free and democratic society.
- [50] The Crown bears the burden to prove the elements of the offence beyond a reasonable doubt. This burden never shifts to the accused.

[51] Reasonable doubt is not easy to define, though it is closer to absolute certainty than to proof on a balance of probabilities: *R. v. Starr*, 2000 SCC 40 at para. 242. The Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320, described the following as part of an appropriate instruction for a jury on reasonable doubt:

[39] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[52] This standard is also applied by judges, who must accept that if an accused is likely guilty, that is insufficient to meet the standard. To convict, I must be sure that the accused committed the offence. It would not be safe to convict someone of a criminal offence, with all the consequences that involves, without the certainty prescribed by the beyond a reasonable doubt standard.

[53] Although it must prove all the elements of the offence, the Crown is not required to prove each piece of evidence that makes up the theory of its case beyond a reasonable doubt: *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Arp*, [1998] 3 S.C.R. 339 at para. 33.

[54] In this case, the Crown's burden is to prove these essential elements of the offence beyond a reasonable doubt:

- a) that Mr. Graham is the person who committed the offence on the date and in the place described in the indictment;
- b) that Mr. Graham touched T.H. directly or indirectly;
- c) that the touching by Mr. Graham was intentional;
- d) that the touching by Mr. Graham took place in circumstances of a sexual nature;
- e) that T.H. did not consent to the sexual activity in question; and
- f) that Mr. Graham knew or was wilfully blind to the fact that T.H. did not consent to the sexual activity in question.

[55] This is not a case involving honest but mistaken belief as to communicated consent.

Assessment of the Evidence

[56] I must assess the entirety of the evidence while keeping in mind the Crown's burden of proof, and I may accept all, some, or none of what a witness says: *R. v. W.D.A.Z. (Y.C.J.A.)*, 2018 BCCA 180 at para. 70.

[57] The determination of guilt or innocence must not devolve into a mere "credibility contest": *R. v. J.H.S.*, 2008 SCC 30 at paras. 9, 13. The verdict must be based on an assessment of all the evidence to determine if I am left with a reasonable doubt about the accused's guilt.

[58] Section 274 of the Code provides that sexual offences do not require corroboration. Accordingly, an accused can be convicted on the evidence of the complainant alone. In such cases, the assessment of credibility is important: *R. v. L.F.*, [2006] O.J. No. 4173, 2006 CanLII 34723 (O.N.S.C.):

[9] Very often in sexual assault and related sexual and physical abuse allegations, proof to the criminal standard relies primarily on the credibility of the complainant and the accused. Sexual assaults are almost always perpetrated in private, with only the complainant and the assaulter present. Corroboration, as the term was formerly defined in the Criminal Code, is no longer necessary for a conviction for sexual related offences. A court may convict on the evidence of a complainant alone. However, unless there is some confirmatory or supportive evidence of the allegations by the complainant, a court may have difficulty concluding beyond a reasonable doubt that the Crown has proven the offence(s). Confirmatory evidence can include a broad spectrum of direct and circumstantial evidence from strong, e.g. eye witnesses to the assault, semen of the accused found on the complainant, her clothes or bedclothes, to moderately supportive, e.g. similar act evidence, to marginally confirmatory, e.g. evidence of opportunity or motive. However, where there is no evidence other than the testimony of the complainant and the accused, their credibility will be critical to resolving the 'he says/she says' conundrum the court faces.

[59] In this case there is no contest of credibility between T.H. and Mr. Graham because the accused did not testify. However, the credibility and reliability of the evidence given by T.H. are fundamental to this case.

[60] In the recent decision *R. v. A.R.*, 2025 BCSC 1594, Justice Gibb-Carsley set out a helpful articulation of the principles guiding assessment of credibility and reliability in a case such as this. I can do no better than Gibb-Carsley J.'s articulation, and I rely on it here:

[51] The analysis of credibility and reliability involves a close examination of numerous factors. The term "credibility assessment" refers to an assessment of two qualities of a witness's testimony, their credibility and their reliability: see G.F at para. 82. It is well-established that while often considered together, reliability and credibility are not the same. The distinction was articulated by the Ontario Court of Appeal in *R. v. H.C.*, 2009 ONCA 56 at para. 41:

[41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

- i. observe;
- ii. recall; and
- iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence

[52] Stated bluntly, credibility addresses whether a witness is lying, whereas reliability is concerned with honest mistakes.

[53] If the complainant testifies that she did not consent to the sexual activity in question and the issue is contested, then it is necessary for the court to assess the credibility and reliability of the testimony. As explained in *Ewanchuk*:

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

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

[54] The assessment of credibility is important in this case. However, courts must be cautious not to decide a case based on a choice between the Crown's evidence and the accused's evidence: see *R. v. Pangan*, 85 B.C.A.C. 54, 1996 CanLII 2461 (C.A.) at para. 40. In other words, as I stated above in respect of the *W.(D.)* analysis, the determination of an acquittal or of a guilty verdict cannot be based on a mere credibility contest.

[55] Our Court of Appeal in *R. v. J.T.*, 2019 BCCA 180, summarized the factors to be considered in assessing credibility at para. 31:

[31] a witness's demeanor in the witness box, although it is recognized that it would be dangerous to rely wholly on demeanor to convict; internal inconsistencies in a witness's testimony at trial and/or external inconsistencies in a witness's testimony with prior testimony or out-of-court statements; any explanation by the witness for the inconsistencies; any consistent evidence or corroborating evidence to support the witness's evidence, although corroboration is not a requirement; and how a witness withstands cross-examination.

[61] In this case, T.H. was 16 at the time of the alleged assault. Her youth then, and now, gives rise to certain considerations. The Supreme Court of Canada in *R. v. W (R.)*, [1992] 2 S.C.R. 122 at 134, made the following comments about the assessment of evidence given by an adult about experiences they had as a child:

It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards - to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is a individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[62] I must take these cautions into consideration here and consider T.H.'s evidence given her age at the time of the events and at the time of testifying.

[63] The court in *R. v. C.H.*, 1999 CanLII 18939 (N.L.C.A.), 182 Nfld. & P.E.I.R. 32 emphasized the importance of addressing inconsistencies in evidence when assessing the credibility of an only, or a critical, witness testifying against an accused: paras. 23-24. The Ontario court of Appeal in *R. v. G.(M.)*, 1994 CanLII 8733 (O.N.C.A.), 93 C.C.C. (3d) 347, expressed this exercise as follows:

[27] Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness-box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness. This is particularly true in cases of young persons. But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely upon the testimony of a witness who has demonstrated carelessness with the truth.

- [64] Our Court of Appeal in *R. v. B. (R.W.)*, [1993] B.C.J. No. 758, further emphasized:
- [28] Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.
- [29] There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

Application of Legal Principles

- [65] I review the evidence with the above principles in mind. This case turns on whether I accept T.H.'s evidence as establishing beyond a reasonable doubt that Mr. Graham committed sexual assault.

Demeanour

- [66] The demeanour of a witness is a significant element in the assessment of credibility.
- [67] I observed that T.H. was nervous. She was at times very soft spoken or uncertain, and at other times spoke more confidently. She experienced moments of difficulty in the testimony. Counsel for the accused characterized her evidence as belligerent or combative. T.H. spoke sarcastically on a few occasions, made extraneous comments about the questions asked, and even questioned why she was asked certain questions under cross-examination and whether they were relevant.
- [68] I do not find that T.H.'s credibility was affected by her demeanour. She did become frustrated under cross-examination, and expressed that. She was agitated and upset on occasion. She talked back to counsel examining her. But I do not hold any of that against her in terms of her credibility. It is difficult to testify about highly personal experiences, and to be tested on your evidence when it is done through effective cross-examination. T.H. is also a very young adult, and I would not expect her to maintain her composure throughout this experience.
- [69] There was also a challenging dynamic in this case, in that it involved a relationship between T.H. and Mr. Graham which was imprinted with a degree of trust, as was asserted by T.H. Nothing in the evidence before me challenged this characterization of the relationship. Mr. Graham was older; she was a teenager; he was her co-worker; they lived on the same property; and she had previously spoken to him about the need for physical boundaries. T.H. testified there was an understanding that he was someone who would take care of her in a situation where she was intoxicated. That evidence was not called into doubt. She also testified that he described himself as in the role of an older-brother figure. There is a clear power dynamic and a trust dynamic in that set of features. I find that her sense of betrayal founded in this aspect of the relationship permeated her evidence and was likely a source of

the friction that she expressed in giving testimony.

- [70] I do not find that her demeanour impaired her credibility, and would instead find that her evidence was consistent with that of a young person who was testifying about a challenging set of information arising from events when she was an even younger person.
- [71] The court in *R. v. C.H.*, referred to me by counsel for the accused, holds that "as important as it is, credibility of a complainant accepted on the basis of demeanour alone, is not a sufficient basis to convict an accused where the allegations are credibly denied or there is other contradictory evidence." para. 24. Additionally, in *R. v. C.H.*, the court cites *R. v. S. (W.)*, 1994 CanLII 7208 (O.N.C.A.), 90 C.C.C. (3d) 242 at 250:

I am not satisfied, however, that a positive finding of credibility on the part of the complainant is sufficient to support a conviction in a case of this nature where there is significant evidence which contradicts the complainant's allegations. We all know from our personal experiences that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not the sincerity of the witness but the reliability of the witness's testimony. Demeanour alone should not suffice to found a conviction

- [72] Although I do not reject T.H.'s testimony based on the way she testified, as stated above, her sincerity alone is insufficient to convict on a criminal standard of proof.

Coherence and Consistency

- [73] The accused submitted that T.H.'s evidence was inconsistent, unreliable, and not credible, and that she fabricated parts of the narrative. In particular, the accused submitted there were significant inconsistencies in elements of T.H.'s narrative as between her evidence and the evidence of Ms. Thibodeau, the latter of which counsel for the accused submitted should be preferred.
- [74] In giving her testimony, T.H. often used words that made her evidence vague, like "I believe", "I might have", "I could have", or "I probably". It was unclear whether when she did so it was reflective of actual uncertainty, or whether this was a pattern of speech the witness adopted in a state of nervousness in her testimony. I do not have a benchmark on which to evaluate this pattern and whether it is a speech habit or an indication of actual uncertainty.
- [75] On some aspects of her evidence, counsel for the accused asked her to clarify whether her statement meant that she recalled something occurring, or whether she was speculating. Crown counsel argued that T.H. gave evidence in this qualified manner in respect of ancillary matters, but on the events at the centre of the allegation, she did not do so. This was largely the case, but this feature of her evidence gave rise to some doubt in my view.

- [76] T.H. often did not have a clear account of events immediately surrounding the alleged assault. She did not have a clear description of how or even why Mr. Graham physically helped her to the bed. Nor could she recall details of eating with Mr. Graham, or why he might have fed her. The facts of these events which took place even immediately before the facts of the assault itself were seemingly not available to T.H.
- [77] It was not clear to me on the evidence what effect T.H.'s intoxication may have had on her ability to recall the evening. Her evidence was that from the time she left work she was intoxicated, and she continued to drink more when she was at home. She agreed she was drunk when Mr. Graham was with her in the trailer. The fact she was intoxicated does not make her less believable. But it may affect whether she has a reliable recollection of what occurred during that period. I am left with the question of the effect of alcohol on T.H.'s memory unanswered.
- [78] T.H. also described how her memory returned over time so that she could recall some but not all the events of the evening. T.H. was transparent that she did not recall details of the evening, or the exact order of extraneous events. The order of events itself was not of particular concern. T.H. was not, however, always precise about what she recalled independently and what other people had told her. When pressed, she was generally clear about what she knew directly and what had been conveyed to her. While this speaks positively to her credibility, which is to say her genuine effort to give her honest evidence, it does not assist with the reliability of the information that she was conveying if it was transmitted by someone else.
- [79] While T.H.'s evidence was coherent on the core elements of the allegations, and in fact the only evidence on the core elements, there were inconsistencies between other more collateral aspects of her evidence, and that of Ms. Thibodeau. These included which bed Ms. Thibodeau and Mr. Graham were found in in the trailer, and the question of whether it was likely that Mr. Graham made her a meal in the trailer, and who would have provided that food. Those details on their own were not sufficient to give rise to a reasonable doubt, but they do contribute to my assessment of the evidence as a whole.
- [80] There are essentially three reasons T.H.'s evidence gave rise to reasonable doubt for me due to concerns about its reliability.
- [81] First, T.H. was not precise in giving her evidence about what she knew from her own observations and experiences, and what had been told to her by other people. It can be hard to recall events several years after the fact, but first-hand information must be given priority in this context, and I must understand the source of the information adequately to give it weight. This was specifically the case in relation to the question of whether T.H. and Mr. Graham were "spooning" in bed. T.H. properly identified that she knew this second-hand, but it initially formed a definitive part of her own account of the events. This feature of T.H.'s evidence gave me a degree of concern about the overall reliability of her testimony.

- [82] There were discrepancies between the evidence of T.H. and Ms. Thibodeau on the issue of where T.H. and Mr. Graham slept and where they were found in the morning. T.H. was clear and definitive that the events occurred on her mother's bed in the bedroom. Ms. Thibodeau was clear that she found the two on the convertible bed in the main area. Only one of them can be correct, and neither of them were pushed particularly hard on that detail. Ms. Thibodeau was in the trailer very briefly, on her evidence, and that would count against her relative certainty about the location. On the other hand, her clarity of the "situation" that she encountered may have been more acute because she saw them immediately upon entering and not having to go to the bedroom. Although nothing about the alleged assault turns on the location the two were found sleeping, this distinction in the stories does create a minor inconsistency which gives rise to reliability concerns.
- [83] The second reason for concern about reliability of the evidence is that T.H. was equivocal or qualifying in many of her answers, and she did not clearly state what occurred according to her memory. This was not as much the case regarding the key events of the alleged assault and whether she consented--on those matters she was more express. However, this way of speaking nevertheless signaled to me that there is at least a risk that T.H. was filling in her evidence with a guess or assumption when she did not have a confident answer. This too gave rise to significant concerns about the overall reliability of her testimony.
- [84] Third, during her testimony, T.H. expressed that she remembers more now than she did immediately after the events. In discussing her visit to the police to make a report, she said that she did not at that time recall exactly what happened, just the areas they were in and the people present. She said that with everything going on with having to go to court she was able to recall, but at the time of making the police report she did not recall parts of her memory relating to what led to the incident. She said in her testimony that "the way that memory works" is that sometimes you remember things that were not available to you before. This comment gave rise to some doubt. I do not deny that this may occur, that memory can be revived with prompts or stimuli, but it was not clear to me how in this case the experience of memories resurfacing gave rise to a reliable account on the part of T.H. Although I find T.H. sincere, I do not find it appropriate for the court to assume that her memory filled itself in reliably over time.
- [85] I find that the features of T.H.'s testimony I have described gave rise to reasonable doubt. I do not have to find that a witness had a motive to fabricate evidence or that they in fact did so, in order to conclude that their evidence is not sufficiently reliable to overcome reasonable doubt. In this case, I have concluded there was sufficient uncertainty around the evidence of T.H. to give rise to a reasonable doubt.

Absence of Evidence

- [86] Finally, I find I have reasonable doubt in this case because of the fact that there is little evidence in total for the court to rely on. To this point, I note that in *R v. Bruzzese*, 2023 ONCA 300 at para. 22, the Ontario Court of Appeal states: "It is a well-established principle that the absence of evidence may raise a reasonable doubt about the guilt of an accused or contribute to a conclusion by the trier of fact that the case for the Crown falls short of the standard of proof the law demands: [citations omitted]".
- [87] In this type of case, where the events in issue took place privately, there is no confirmatory physical, eyewitness or other supportive evidence of the details advanced by T.H. that assists my analysis or that helps resolve any of the reliability concerns I have identified. The criminal standard of proof is very high and meeting it requires sufficiently clear evidence to allow the Court to determine the facts. I am left with uncertainty about the elements that must be proved by the Crown because I find that I am unable to find the evidence given by T.H. to be sufficiently reliable that I am left without reasonable doubt.

Conclusion

- [88] The burden to prove the accused's guilt beyond a reasonable doubt rests entirely with the Crown. It is a stringent burden, closer to absolute certainty than proof on a balance of probabilities.
- [89] When I ask myself about whether I have a reasonable doubt, I must do so in mind of the very real myths and stereotypes about sexual assault that permeate our culture, including the criminal law. As judges we are taught to reject myths and stereotypes which put undue burdens on those who have experienced sexual assault, which prevent them from reporting these crimes, and which treat them as being at fault in circumstances where they endured harm. I must reject any thinking that predisposes me to viewing a young woman as less credible, or judging her actions or her character based on stereotype. I must reject any myths about how a true victim of assault would act in a given circumstance, and I must seek to view the situation, based on all the evidence, as much as anyone is able to do, with an open mind informed by these cautions. I have strived to do that here to the very best of my ability.
- [90] On consideration of all the evidence, which I have noted was limited in this case, I am left with reasonable doubt as to whether the accused committed sexual assault on the night of July 14, 2022 near Cawston, BC.

- [91] My conclusion is not based on a negative credibility assessment of T.H.'s evidence, but on its reliability. My conclusion is further based on the relative paucity of evidence available for me to consider. To be clear, I do not find that corroboration of T.H.'s evidence is required to prove sexual assault; rather, I find that in this case, with some of the weaknesses, equivocation, uncertainties, and minor discrepancies in T.H.'s evidence, without more, the Crown's case is insufficient to rise above the standard of beyond a reasonable doubt.
- [92] Mr. Graham, would you please stand. On the count alleging that you committed sexual assault, Count 1, I find you not guilty. You may be seated.
- [93] I wish to make a final comment on the experience T.H. may have endured throughout this trial. She was a minor in July 2022 and is still a very young person. She has carried these events with her through her early adulthood, as have others involved. It is clear there were moments when it was challenging for her to give evidence. As I have said, it is natural not to have perfect recall of events that happened on a single night three years ago. The fact that I cannot rely on T.H.'s evidence to find guilt beyond a reasonable doubt does not reflect upon T.H. personally. There is an importantly robust standard that must be applied to all criminal matters, and that is what I have sought to apply faithfully here.
- [94] Those are my reasons.
- "E. Sigurdson J."

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Prepared on 27 October 2026 · Esheria