

CANADA / JUDGMENT

R. v. Hallgrimson

2024 BCSC 2477

COURT

Supreme Court of British Columbia

DECIDED

6 December 2024

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2024 BCSC 2477 R. v. Hallgrimson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hallgrimson,

2024 BCSC 2477

Date: 20241206

Docket: 90896-2

Registry: Nanaimo

Rex

v.

Kim Ryan Hallgrimson

Before: The Honourable Mr. Justice Crossin

Oral Reasons for Judgment

Counsel for the Crown:

S. Cassell

Counsel for the Accused:

B. Movassaghi

Place and Dates of Trial:

Nanaimo, B.C.

December 2-5, 2024

Place and Date of Judgment:

Nanaimo, B.C.

December 6, 2024

Introduction

[1] The accused is charged on a three-count indictment as follows:

Count 1

Kim Ryan HALLGRIMSON, on or about the 4th day of January, 2023, at or near Qualicum Beach, in the Province of British Columbia, did sexually assault K.B., contrary to Section 27 of the Criminal Code.

Count 2

Kim Ryan HALLGRIMSON, on or about the 4th day of January, 2023, at or near Qualicum Beach, in the Province of British Columbia, without lawful authority, confined K.B., contrary to Section 279(2)(a) of the Criminal Code of Canada.

Count 3

Kim Ryan HALLGRIMSON, on or about the 4th day of January, 2023, at or near Qualicum Beach, in the Province of British Columbia, did knowingly utter a threat to T.B., to cause her death or bodily harm, contrary to Section 264.1(1) of the Criminal Code.

[2] The complainant K.B. is Ms. Kimberly Bain; and the complainant T.B. is Ms. Treena Bell.

The Evidence of Ms. Bain

[3] Ms. Bain is 64 years of age. She is Indigenous. She has been addicted to drugs, including heroin, for most of her life; a life that began in foster care. Ms. Bain has a breathtaking criminal record reflecting the kind of record often associated with a life of severe addiction. There are approximately 45 convictions dating back approximately 25 years. Many, as conceded by Ms. Bain, involving crimes of dishonesty. In addition, it includes the offence of unlawful confinement to which she was sentenced to a period of incarceration.

[4] Ms. Bain has resided in the Parksville area for the last 46 years. She has been with her partner Treena Bell for the last 16 years. In addition to her struggles with addiction, she suffers from certain physical disabilities as a result of a motor vehicle accident. She has an artificial knee and is awaiting surgery to address a broken ankle that apparently was not treated properly in the first instance.

[5] Her difficulty with mobility is noticeable. She has testified that her and Ms. Bell use electric wheelchairs to get around from time to time.

- [6] Ms. Bain was asked and testified about the state of her drug use around the time of the offence. She testified she had not been consuming heroin for a year. She was taking Sublocade. It was suggested in cross-examination that, in effect, in using Sublocade, she was effectively taking heroin; and was not being candid in this regard. She denied this. There was no evidence led concerning Sublocade. That said, judicial notice allows a conclusion that Sublocade is not heroin. Sublocade is a well-known treatment for opioid disorder.
- [7] Ms. Bain testified however that she does "slip". Two days before the events in question she ingested crystal methamphetamine. As at January 4, 2023 she had been awake for two days and was exhausted. She denies being under the influence of drugs on January 4, 2024 other than Sublocade and the remnants of her ingestion of crystal methamphetamine. In particular, she denied being under the influence of heroin.

The Incident of January 4, 2023

- [8] Ms. Bain testified that Ms. Bain and Ms. Bell arrived at 250 Pym Road in the Parksville/Qualicum area, sometime during the day of January 4, 2023. Ms. Bain and Ms. Bell had been staying at this residence. Ms. Bain testified they had arrived by taxi that morning. It appears in and around the beginning of January 2023, for reasons not explained by Ms. Bain, Ms. Bain and Ms. Bell were arranging to take up a new residence. They were in the process of attempting to collect their possessions, from a variety of locations including 250 Pym Road, and settle in the new address. Someone named Chuck was also at the Pym Road address, couch surfing, as described by Ms. Bain. Chuck was a drug user and as well a supplier. Others resided at 250 Pym Road as well.
- [9] Some of the possessions of Ms. Bain and Ms. Bell were at 250 Pym Road; and still more at a place referenced as Arbutus Storage. The ultimate destination and residence that the two had arranged to live was on Whistler Street in the Qualicum/Parksville area; near Horne Lake.
- [10] In any event, upon arrival at 250 Pym Road they noted a white pickup truck. Chuck was asked about the owner. It was owned by the accused. There was an expression of interest by Ms. Bell in hiring the owner to help them move. Chuck introduced the accused. Ms. Bain testified concerning the arrangements made with the accused and the use of his truck to assist in moving the possessions of Ms. Bain and Ms. Bell. It was apparent during the evidence of Ms. Bain that it was really Ms. Bell that had these discussions and Ms. Bain really had little first-hand knowledge.
- [11] In any event, arrangements were made with the accused. Ms. Bain testified that she was also advised that the accused had just arrived from the interior and was broke.
- [12] It was also elicited, in cross-examination, that the accused was also a drug user and Ms. Bain believed had purchased cocaine while at 250 Pym Road.

- [13] Ms. Bain and Ms. Bell both had automatic wheelchairs along with other furniture and personal items in boxes that had to be loaded from the garage attached to the residence at Pym Road.
- [14] Due to mobility difficulties, Ms. Bell had to help Ms. Bain into the truck once it was loaded. It was a four-door white pickup truck. Ms. Bain sat in the back passenger seat. The items had been loaded into the remaining space in the back seat and into the box of the pickup. The only room in the back seat area not taken up by moving items was the space occupied by Ms. Bain in the back passenger seat. Ms. Bell sat in the front passenger seat. The accused drove.
- [15] Ms. Bain, was, at this point, to some degree or another, still under the influence of crystal methamphetamine that she had consumed a couple of days before this event. She testified that some hours later, during the events that unfolded in the truck, she fell asleep in the backseat because "the crystal meth wore off". In addition, Ms. Bain testified that Ms. Bell smoked crack cocaine at 250 Pym Road before heading out in the truck to Arbutus Storage.
- [16] Ms. Bain agreed they arrived at 250 Pym Road during the day. She could not say precisely when. It took approximately one-half hour to load the truck. Ms. Bain testified that she believes they were at 250 Pym Road for a total of 40 minutes before leaving for the Arbutus Storage facility. The portion of the drive to Arbutus Storage is approximately 10 minutes.
- [17] Ms. Bain testified that they spent less than an hour loading the items into the truck at Arbutus Storage; and at one point testified they were only there loading the truck for approximately 15 minutes.
- [18] Following the stop at Arbutus Storage they left to continue on their journey to the Whistler Street residence which was approximately a five-minute drive from Horne Lake. Horne Lake was about a 20 minute drive from Arbutus Storage.
- [19] Ms. Bain testified the parties arrived at the Whistler Street residence without apparent incident. Ms. Bain testified that a person named Paul, who was dying of cancer, and was going to stay with them at the Whistler Street address, was present at the residence upon arrival. Ms. Bain testified that upon arriving the accused saw Paul and perhaps others and for reasons that are unclear, expressed the view that "it was a set up" and left at a high rate of speed; locking the doors and windows; and leaving with Ms. Bain, Ms. Bell and the furniture and other possessions.
- [20] Ms. Bain testified an argument then ensued, primarily between the accused and Ms. Bell. Ms. Bain testified that she wanted to get out of the truck or have the accused take them back to the residence. Both Ms. Bell and the accused became angry with one another. The accused stopped at Henry's Kitchen and told Ms. Bell to "shut her fucking mouth" and according to Ms. Bain threatened to hit Ms. Bell.
- [21] Ms. Bain testified that under that threat, Ms. Bell got out of the truck. Ms. Bain testified that she was trying to get out as well but she could not find any mechanism to unlock the door or the window. She testified the accused would not let her out. She asked Ms. Bell to help. Ms.

Bain testified that Ms. Bell attempted to help but could not open the door from the outside; nor could Ms. Bain open the door or the window from the inside. These efforts went on for about a minute. Access to the driver's side passenger door was blocked by items from the house. Ms. Bain testified the accused sped away. Ms. Bain saw Ms. Bell tumbling.

- [22] The accused then proceeded on the Island Highway. Ms. Bain testified she told the accused to go back but he drove referring to Ms. Bell "a fucking dyke". Ms. Bain stated that the time lapse at that point, that is between leaving 250 Pym Road and the incident at Henry's Kitchen, was approximately one and one-half to two hours.
- [23] It was now that Ms. Bain testified the accused went on prolonged diatribes consisting of obscene suggestions, during the course of which he periodically smoked crack cocaine. He kept suggesting, in the most provocative way, that she wanted to have sex with him and suggesting a variety of ways how he assumed she wanted to do that. Ms. Bain protested that she was a lesbian. She testified she kept asking him to let her out. He said "we'll have some fun first".
- [24] In particular, Ms. Bain testified that very shortly after leaving Henry's Kitchen the accused pulled off the highway and stopped in Qualicum Bay. There they sat. Ms. Bain wanting to get out but being refused.
- [25] Ms. Bain testified that she estimates that they stayed at Qualicum Bay for the next three to four hours. It was here she fell asleep. She cannot say how long she slept. She awoke to the groping.
- [26] In particular she testified she awoke to observe the accused squeezing her breasts to the point of pain. Ms. Bain was wearing a hoodie, a shirt and a bra and sweatpants.
- [27] The hoodie, shirt and bra had been pulled up over her breasts. Her sweatpants were pulled down slightly at the front, but not at the back. The accused had one hand on each breast. She woke and dispatched his hands from her breasts, she testified she was scared and angry. During the efforts to remove his hands, one of his hands "briefly brushed the top of the vagina".
- [28] Ms. Bain testified that the accused was leaning into the backseat, from the front seat, in order to do this. Ms. Bain testified that during this time his "butt" was in the middle of the front seat on the console. Still later she testified his right thigh was on top of the console in the front seat area.
- [29] The accused, after removal of his hands, exposed his penis and was touching his penis. It was erect. He was saying "get up here and sit on my dick". She was yelling "I'm a lesbian." She testified she wanted out that "he wouldn't let me out".

- [30] Ms. Bain testified that she told the accused he was going to go to jail and the accused stated that no one would believe her. These exchanges carried on for a period of time after the groping ceased although it is unclear for how long these exchanges unfolded. In any event the accused drove away from Qualicum Bay and stopped very shortly thereafter at Baylis Road. They remained at Baylis Road for about an hour. They then returned to Qualicum Bay. There they stayed, as testified to by Ms. Bain, for the next four to six hours.
- [31] Throughout these stops Ms. Bain testified that the accused would be periodically smoking cocaine and it is then he would immediately launch into obscene laced invitations for sex. She testified that when stopped the accused "nodded out" three times for about a minute.
- [32] Ms. Bain stated that at some point the accused appeared to have consumed all his drugs. She devised a ruse. She told the accused if they went to "Pat's place" he could get more drugs and alcohol. Pat was in fact an addict and a drug dealer. The accused drove to Pat's. Pat was present, along with a friend of Ms. Bain, Susie. There is also one other whose name Ms. Bain could not recall.
- [33] Ms. Bain testified that the arrival at Pat's was two to four hours after the incident at Henry's Kitchen. Ms. Bain also testified however that the arrival at Pat's was approximately 10-11 hours after the incident at Henry's Kitchen. She testified the arrival was the next day January 5, 2023. She testified it was daylight although she could not give a precise time.
- [34] Ms. Bain agreed she told the police in her statement that they arrived at Pat's at approximately 2:00 p.m. The police statement was taken at 11:45 p.m. on the evening of January 4, 2023.
- [35] Upon arriving at Pat's she alighted from the truck. How she alighted from the truck and under what circumstances was not offered in evidence. In any event when she saw Susie she testified she felt safe. The accused left with the belongings but without Ms. Bain.
- [36] Ms. Bain told Susie what happened. Someone dialled the police, but Ms. Bain provided the address to the place and she stated that she would await their arrival. She testified she also slept at Pat's. Whether this was before or after the police were called is not known. Ms. Bain stated she spoke to an officer. In addition, Ms. Bell had arrived and this also provided a great deal of comfort to Ms. Bain. She testified she and Ms. Bell then returned to 250 Pym Road to retrieve "her stuff".
- [37] When she arrived back at 250 Pym Road the police were also there.
- [38] She testified the accused was also at 250 Pym Road as well as his truck. She testified the truck still contained half the belongings, the other half, she stated, having flown out of the truck on its travels.

The Evidence of Ms. Bell

- [39] Ms. Bell is 58 years of age. The Crown led from Ms. Bell, as the Crown did with Ms. Bain, evidence of her physical difficulties; her drug addiction; and her criminal record.
- [40] Ms. Bell had to sit during her evidence. She described a series of health issues impacting her life beginning in 2019. It has obviously been a challenge for Ms. Bell dealing with these matters which was apparent during her evidence in describing her difficulties.
- [41] She, like Ms. Bain, has been a drug addict most of her life. She testified she still uses rock cocaine from time to time. She may have been using heroin in January 2023. Ms. Bell testified she also suffers from ADHD and confesses that this impacts her memory.
- [42] Again, like Ms. Bain, Ms. Bell has a criminal record; to say the least. Since 1996 she has approximately 80 convictions; ranging from a multitude of failures to appear, to robberies, to unlawful confinement. Many, if not most, featuring dishonest conduct.

The events of January 4, 2023

- [43] Ms. Bell testified that while she and Ms. Bain had made tentative arrangements to live at the Whistler address, they had been living in the garage at 250 Pym Road because it was cheaper. Just around the time of this event Ms. Bell had determined that she did not want to stay at 250 Pym Road because she felt the persons at the house were "ripping off old people". Consequently there was a decision that they were going to move their effects over to the Whistler Street property.
- [44] Ms. Bell testified that she and Ms. Bain did not arrive at 250 Pym Road on the day of January 4, 2023 by taxi, but had in fact spent the previous night at the residence.
- [45] Ms. Bell testified that the accused "showed up" in his pickup truck at 250 Pym Road on January 4, 2023. She believes it was some time in the morning. It was Ms. Bell that had discussions with the accused about hiring the accused to help with the moving. They agreed on \$75 and "a half a ball" (of cocaine). Ms. Bell purchased the "half ball" from Chuck. Ms. Bell testified that it was Chuck and the accused that did most of the loading at Pym Road. They then left to retrieve more items at Arbutus Storage. Ms. Bell testified that Chuck accompanied herself, Ms. Bain, and the accused in the pickup truck to Arbutus Storage. Chuck also rode in the front seat of the vehicle. Ms. Bell testified that they were two to three hours at Pym Road before departing for Arbutus Storage.
- [46] Ms. Bell says that the group was at Arbutus Storage for one to one- and one-half hours. They then drove Chuck back to Pym Road and the three carried on to Whistler Street. Ms. Bell testified that the backseat was full of their possessions except for the space occupied by Ms. Bain. She cannot recall whether Ms. Bain was sitting behind the passenger's seat or the driver's seat.

- [47] Ms. Bell described arriving at the Whistler Street property and the accused becoming agitated concerning certain people at the residence and leaving the area in his truck.
- [48] Ms. Bell testified that she and the accused began arguing on the approach to Henry's Kitchen. The evidence is somewhat vague as to exactly what they were arguing about. Ms. Bell testified that the accused wanted her out of the truck.
- [49] The direct evidence of Ms. Bell concerning this area of evidence was described initially as the accused stopping at Henry's Kitchen and saying "get out". Her evidence was that she did. Ms. Bell testified she tried to help Ms. Bain out of the vehicle but could not open the door and that Ms. Bain was trying to open the door as well. The accused then drove away from the area. She held onto the truck for 20 or 30 feet but then let go.
- [50] Somewhat later in her evidence Ms. Bell returned to this area of evidence and testified that during the argument between herself and the accused he said "I'll knock you out"; and Ms. Bell responded "go ahead".
- [51] Still later in her evidence the Crown led from Ms. Bell that the accused had said "shut your mouth before I smash your head"; and Ms. Bell agreed.
- [52] Ms. Bell agreed that when "she was kicked out of the truck" Ms. Bain was asleep. She testified however that when she was trying to open the door Ms. Bain was awake. She testified the "knobs" on the back door were missing and so she could not open the door.
- [53] Ms. Bell testified that it was about 5:00-5:30 p.m. on January 4, 2023 when they were at Henry's Kitchen. Later in her evidence she testified it was 7:00-8:00 p.m. on January 4, 2023 when they arrived at Henry's Kitchen.
- [54] Ms. Bell testified that having been left at Henry's Kitchen she phoned someone and that person picked her up and Ms. Bell testified that she and this person spent the next 11 hours driving around in this person's vehicle visiting a number of places and persons in and around the area looking for Ms. Bain.
- [55] At the end of the 11-hour stretch they went to Pat's and discovered the accused was there. Ms. Bell testified the accused had shaved his head. She testified they arrived at Pat's about 3:00-4:00 in the afternoon of January 5, 2023. Somewhat later in her evidence Ms. Bell testified they arrived at Pat's at approximately 7:00-8:00 a.m. on January 5, 2023. Still later she testified they arrived at 4:00-5:00 in the afternoon on January 5, 2023. Ms. Bell testified that upon arrival at Pat's, sometime on January 5, 2023, Ms. Bain was shaking and distraught. Ms. Bell testified Ms. Bain said that the accused had tried to do some things to her. She testified Ms. Bain said he had his hands on her breasts and that it left bruises. He said "you want a 12 inch cock". Ms. Bell cannot recall the identity or name of the person that helped her search over the course of those 11 hours.

The Evidence of Constable Nixon

- [56] Constable Nixon is a member of the RCMP stationed with the Oceanside RCMP serving the immediate area including the Qualicum/Parksville area.
- [57] Cst. Nixon began his shift at approximately 6:00-7:00 p.m. on the evening of January 4, 2023. It is Cst. Nixon's understanding the detachment received a telephone call from Ms. Bain at approximately 9:00 p.m. that evening reporting her allegations concerning her dealings with the accused in his truck and this report was dispatched to Cst. Nixon soon thereafter. He testified that other matters intervened but eventually he attended at Pat's place about three to three and one-half hours later; shortly before midnight.
- [58] Upon arrival at Pat's place Ms. Bain exited from the residence and was ushered into the back of Cst. Nixon's police vehicle. Ms. Bain indicated she was uncomfortable giving a statement in the area of the house and so Cst. Nixon drove across the street. It was there, in the parking lot of a brewery, Ms. Bain provided a statement; sitting in the police car. Cst. Nixon was uncertain how much time he spent with her; but said it was perhaps 20 minutes. He then drove her back to the house and a few minutes later interviewed Ms. Bell. Cst. Nixon testified that he suspects he took Ms. Bell's statement, as well, in the backseat of his vehicle.
- [59] Cst. Nixon testified that he assumed the leadership role in the investigation.
- [60] Cst. Nixon testified that when he attended at Pat's place Ms. Bain appeared upset and did not appear intoxicated. He testified that it did not appear Ms. Bell was intoxicated.
- [61] That evening, Cst. Nixon testified he attempted to obtain a statement from Pat. He was advised Pat did not want to provide a statement that evening. Cst. Nixon said he also attempted to obtain a statement from Susie. She refused.
- [62] He testified that he did not, nor did anyone to his knowledge in the investigation, attempt to interview Pat or Susie again. In addition, there were no attempts to his knowledge to interview any potential witnesses at Pat's or 250 Pym Road, or anywhere else, concerning the events of the evening.
- [63] There is no evidence whether the police attempted to again interview Ms. Bain or Ms. Bell after the interview in the backseat of the police vehicle on January 4/5, 2023.

The Evidence of Constable Reid

- [64] Cst. Reid has been a member of the Oceanside RCMP since 2013.
- [65] Cst. Reid began his duties approximately 7:00 a.m. on the morning of January 5, 2023. In the course of those duties he reviewed the "file" that Cst. Nixon had prepared from his interviews with Ms. Bell and Ms. Bain.

- [66] He subsequently overheard a dispatch at approximately 11:30 a.m. that Cst. Reguish was currently in attendance at 250 Pym Road and that the accused was at the residence. Cst. Reid and Corporal Kane then drove to 250 Pym Road.
- [67] There Cst. Reid observed Cst. Reguish speaking with the accused; the pickup truck parked in the driveway; Ms. Bell and Ms. Bain in and about the truck; and a number of items sitting on the driveway at the back area of the pickup truck. The box of the vehicle was empty except for what was described as a whisk used as a cooking utensil. The items in the driveway included two wheelchairs.
- [68] Cst. Reid spoke with Ms. Bain briefly and determined he was going to arrest the accused. Cst. Reid also spoke to the owner of the home. Cst. Reid testified that the accused exited the residence and was arrested by Cst. Reid.
- [69] He testified that he then attempted to locate Susie on January 5, 2023 but he could not locate her. He testified he did not attempt to find or interview her after January 5, 2023; nor did he attempt to interview anyone else associated with these events.
- [70] Cst. Reid arranged for the accused's truck to be transported to the detachment and stored. He obtained a search warrant and with Cst. Kane searched the vehicle. Photos were taken and entered as exhibits.
- [71] Cst. Reid testified that there was a child lock on the driver's door that could lock the backseat windows. He also testified the driver's door "had a missing piece". It was unclear, at least to me, what 'piece' he was describing. In any event, he testified this was the only door that had anything missing from the mechanisms. He testified there was no impediment in opening the doors from the outside.
- [72] Cst. Reid testified that the backseat area contained a large amount of clothing and other items. Photos were taken. He testified most of the clothing were large male clothing. A few items were smaller; a yellow shirt, a brown jacket, and a set of sweatpants.
- [73] Cst. Reid testified the sweatpants smelled of urine, as did the backseat. He testified no effort was made to determine ownership of these items. There was no evidence the police did a follow-up with Ms. Bain concerning these items; nor what, if anything, belonged to either one of Ms. Bain, or Ms. Bell, or the accused.

The Evidence of Corporal Kane

- [74] Cpl. Kane has been a member of the RCMP for 19 years. He has been stationed in Oceanside for seven years. He was, on January 5, 2023, the supervisor of the investigative section.

- [75] Cpl. Kane received the report of the previous complaint of Ms. Bain at the 7:00 a.m. briefing on January 5, 2023. It appears he tasked himself to interview Susie. In that regard, he drove to her residence but apparently she was not there. He then drove by 250 Pym Road; a place he testified he was familiar with, often associated with drug activity and disturbances. He observed what he believed to be the accused's truck in the driveway. He carried on and returned to the detachment.
- [76] He testified that at approximately 11:40 a.m. that morning a disturbance was reported to be taking place at 250 Pym Road. He and Cst. Reid attended. Upon arrival two other officers were in attendance, Cst. Egars and Cst. Reguish. Csts. Egars and Reguish were engaging in conversation near the front door with the accused. Ms. Bain and Ms. Bell were in the process of unloading items from the box of the pickup truck parked in the driveway.
- [77] Cpl. Kane briefly spoke with Ms. Bain and Ms. Bell; as well as Csts. Egars and Reguish. He testified Ms. Bain was very upset and enraged. He testified she also smelled of urine.
- [78] He stated he was very familiar with both Ms. Bain and Ms. Bell. He stated Ms. Bain did not appear to be under the influence of any narcotic at that time. He testified that he had seen her many times under the influence of narcotics when not being able to stay awake.
- [79] Cpl. Kane participated in the search of the truck.
- [80] He testified the backseat was full of items; for instance pillows, clothing, and bags. He stated he had been asked by Ms. Bain to look for her pants in the vehicle; as well as a roast beef.
- [81] These items were seized, although Cpl. Kane testified he did nothing else to further the investigation.
- [82] He did testify concerning his photos and observations of the doors of the vehicle. He testified there appeared to be something broken or missing from the driver's door in and around the locking devices. It was not clear, at least to me, what this was, nor its significance.
- [83] In any event Cpl. Kane testified "all the other doors were fine". He looked particularly at the rear passenger's door. He addressed something about the tab on the locking device that I found somewhat incomprehensible. In any event there was no suggestion in his evidence anything was untoward about the rear passenger's door; nor that "knobs" were missing.

The Law

- [84] In relation to the offence of sexual assault, ss. 150.1(1) (2.1), 265.(1), 271, and 273.1 of the Criminal Code are the governing provisions.
- [85] The jurisprudence is clear concerning the issue of consent. See *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; and more recently *R. v. Barton*, 2019 SCC 33.

- [86] In the event the trier of fact accepts the subjective testimony of the complainant that she did not consent, the Crown has discharged this obligation to prove the absence of consent. The assessment of the credibility of the complainant in this regard must be undertaken on the whole of the evidence, including the totality of her conduct. The complainant need not express her lack of consent for the actus reus to be established. Silence, ambiguous conduct, or passivity does not amount to consent, and to so proceed on that basis is an error of law. The Crown must also prove the required mens reus beyond a reasonable doubt. The Crown must prove beyond a reasonable doubt that the accused intended to touch the complainant for a sexual purpose, knowing the complainant did not consent, or being either wilfully blind or reckless as to the presence of consent.
- [87] There is no issue in this case that in the event there is a finding that the accused touched Ms. Bain as described, it amounts to sexual assault. The issue in this case is whether that finding can safely be made.

Unlawful Confinement

- [88] Section 279(2) requires the physical restriction of a person's movements against her will, preventing that person from moving from one place to another. The restraint can be physical, or one effected by fear, intimidation or psychological or other means. It requires an intentional element that may be inferred from the actions of an accused. The Crown must prove the accused intentionally confined Ms. Bain. Proof of intent can be inferred from the commission of the act on the basis of the principle that a person intends the natural consequences of their actions. In this case there can be a finding of unlawful confinement at any point in the travels that day in the truck of the accused.

Uttering Threats

- [89] The actus reus of uttering threats will be made out if a reasonable person fully aware of the circumstances in which the words were uttered or conveyed would have perceived them to be a threat of death or bodily harm. The Crown need not prove that the intended recipient of the threat was intimidated by it or took it seriously. The mens rea of the offence is made out if the accused intended the words uttered or conveyed to intimidate or to be taken seriously. A subjective fault applies; however in order to determine the state of mind in an accused the court is entitled to draw reasonable inferences from the words in the circumstances, including how the words were perceived by those hearing them.

Credibility and Reliability

- [90] Issues of credibility and reliability of witnesses played a significant part in this trial.
- [91] Credibility and reliability are different notions. Credibility concerns the veracity of a witness; to be blunt, an assessment of whether the witness is lying. Reliability is an analysis of the accuracy of the witnesses' evidence. These two concepts may be, but are not necessarily, connected. It is unlikely a witness who is not credible is nevertheless found to

be reliable, in the absence of independent corroborative evidence. It is not axiomatic however that a credible witness provides accurate evidence and is therefore a reliable witness. A credible witness may in fact not provide reliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.) at 526, 1995 CanLII 3498.

- [92] The determination of veracity and accuracy requires consideration of a number of factors and inquiries.
- [93] It may be a witness did not have an optimum opportunity to hear or see matters unfold. Importantly, the condition of the witness at the time may be a relevant consideration. In addition, the memory of a witness may be faulty for one reason or another, including the passage of time. The trauma of an event can impact the ability of a witness to accurately recall. The stress and anxiety sometimes associated with providing evidence in a formal way in an unfamiliar environment, for instance a hearing, or a courtroom, can sometimes inhibit the ability to say precisely what one wants to say, and in the way one wants to say it.
- [94] There will be circumstances, like the case at bar, where a witness has given previous statements that are inconsistent with the current evidence. Certainly where a witness has provided inconsistent evidence on a previous occasion under oath, the Court will proceed with caution before accepting an invitation to find that person is a witness of truth.
- [95] As well, an analysis of whether a witness has remained internally consistent in providing evidence is often a factor that is telling. Inconsistencies in the witnesses own evidence at trial, or with other witnesses, calls for an assessment on the "totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case": *F.H. v. McDougall*, 2008 SCC 53 at para. 58.
- [96] When presented with conflicting testimony, the Court should assess the evidence with a view to determining whether a particular version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, 1951 CanLII 252 (B.C.C.A.) at para. 10, [1952] 2 D.L.R. 354. The Court must bring experience to bear in assessing when that evidence of the witness accords with common sense and can live comfortably with the independent evidence that has been accepted by the Court: see also *Bradshaw v. Stenner*, 2010 BCSC 1398.
- [97] The tone and manner of the witness in providing his or her evidence remains properly a factor to be considered in assessing credibility and reliability. Frankly, I found this aspect helpful in the overall consideration of matters, but care must be exercised concerning the weight to be afforded what is generally referred to as an assessment of the demeanour of the witness.

Analysis

- [98] The testimony of Ms. Bain directed at the precise conduct that is the subject matter of Counts 1 and 2 is relatively clear and unequivocal. She has testified she awoke to discover the accused squeezing her breasts. She has testified that to the knowledge of the accused she wanted to get out of the truck of the accused and for a prolonged period the accused prevented that.
- [99] Similarly the testimony of Ms. Bell concerning Count 3 is generally supportive of the elements of Count 3; and somewhat purportedly corroborated by the evidence of Ms. Bain.
- [100] The evidence outside the confines of the four corners of the alleged conduct however, that address the context and circumstances surrounding the particular allegations, in my view, seriously impacts the reliability of the evidence in support of those allegations.
- [101] The initial, perhaps most glaring area, is the evidence concerning the timing of events.
- [102] Ms. Bain was imprecise and inconsistent in her evidence concerning the passage of time beginning from leaving 250 Pym Road sometime on January 4, to alighting from the truck at Pat's place; and the stops in between. More broadly, Ms. Bain testified that the entire event lasted throughout the day of January 4, and through the night, and ended at Pat's place the next day; January 5, 2023.
- [103] Ms. Bell testified to much the same timing; however accompanied by somewhat more stark inconsistency. Ms. Bell testified that from the event at Henry's Kitchen she spent the next 11 hours; throughout the night, searching at various places and speaking to various persons, attempting to locate Ms. Bain. She testified the last place on the search was Pat's residence and there she found Ms. Bain. This was at approximately 3:00-4:00 p.m. in the afternoon of January 5, 2023. Later in her evidence Ms. Bell testified that she arrived at Pat's place approximately 7:00-8:00 a.m. the morning of January 5, 2023.
- [104] It is manifestly clear on the evidence that the events began upon leaving 250 Pym Road sometime in the afternoon of January 4, 2023 and concluded with Ms. Bain alighting the truck at Pat's place sometime before 9:00 p.m. that evening.
- [105] It is apparent both Ms. Bain and Ms. Bell had grave difficulty reconstructing events from memory. I agree with Ms. Cassell that the court must be alive to the fact that trauma can impact memory and the court must be sensitive to that in assessing evidence. In my view however there are clearly other factors at play; given the fact both are so wildly out of synch concerning the timing of events.
- [106] In this regard, I do find Ms. Bain, was, during these events, to one degree or another, still under the influence of crystal methamphetamine that she had consumed a couple of days before. Ms. Bain testified that she fell asleep in the truck at some point because "the crystal meth wore off".

- [107] Ms. Bell testified she has been diagnosed with ADHD. This she concedes, impacts her memory. In addition I conclude there is certainly a prospect Ms. Bell was also under the influence of crystal methamphetamine during the relevant timeframe. Ms. Bell denies this is so. Ms. Bain however testified, I think reluctantly out of loyalty to her partner, that Ms. Bell did in fact consume crystal methamphetamine at 250 Pym Road on January 4, 2023.
- [108] I also observe that it seems unlikely both could be so similarly wrong about the timing of the events by innocent coincidence.
- [109] Perhaps the most troubling aspect to this point however is that it was plain, given the timing of when they provided their statements, their evidence was far removed from the true state of affairs. It became apparent to Ms. Bain during the course of her evidence that her statement was provided to the police at 11:45 p.m. the evening of January 4, 2023. It was equally plain her version of the timing of events could not be remotely accurate. She nevertheless steadfastly maintained the events transpired over the course of the evening well into the next day.
- [110] Similarly, it became clear to Ms. Bell she provided her statement just after midnight January 5, 2023. Nevertheless she clung to supporting Ms. Bain.
- [111] Their reluctance to concede this obvious inconsistency amplifies the concern relating to the reliability of both the evidence of Ms. Bain and Ms. Bell relating to the overall reliability and credibility of their evidence.
- [112] I am also troubled by the evidence relating to the initial events at 250 Pym Road on January 4, 2023.
- [113] Ms. Bain gave evidence that she and Ms. Bell arrived that day by taxi; paying \$45. Ms. Bell testified they did not arrive by taxi, but had been staying in the garage at 250 Pym Road and awakened to find the accused's truck parked at the residence.
- [114] In a somewhat different area, Ms. Bain testified that when at some point she awoke in the backseat of the truck, the accused had positioned himself from the front seat area such as to reach into the backseat, presumably rearrange her clothing to expose her breasts, and was squeezing each breast. She described his position in this regard as having his "butt" resting on the centre console. Later in her evidence she demonstrated this; however her "butt" remained on the driver's seat and he was described as having his right thigh on the centre console.
- [115] I would say it is perhaps a difficult observation to describe, particularly in the circumstances. Nevertheless, it is another inconsistency that must be assessed in the context of the whole.

- [116] As well the evidence of the circumstances at Henry's Kitchen has significance; not only in relation to the allegations of uttering a threat to Ms. Bell; and the charge of unlawful confinement relating to Ms. Bain, but to the overall reliability of the evidence concerning the sexual assault.
- [117] The Crown has informally particularized the uttering a threat count and declared that it seeks to prove a particular utterance as the foundation for this offence. That utterance is "you better shut your mouth before I smash your head".
- [118] The evidence of Ms. Bell in this regard is, again, not particularly consistent. When Ms. Bell was initially taken through her narrative, she did not testify to a threat at all; only being ordered out of the truck. Somewhat later Ms. Bell returned to this area of evidence and testified the accused said "I'll knock you out" and Ms. Bell responded "go ahead". It is my note that the only time Ms. Bell testified to the words relied upon by the Crown was when those precise words were suggested to Ms. Bell by Crown counsel; and Ms. Bell agreed. This is not a method of eliciting evidence that is entitled to a great deal of weight.
- [119] Ms. Bain purported to corroborate the evidence of the exchange between the accused and Ms. Bell, although Ms. Bain did not testify to the words relied upon by the Crown. In any event, Ms. Bell testified Ms. Bain was asleep during this exchange. If true, Ms. Bain overheard nothing.
- [120] There are additional features of the evidence relating to the stop at Henry's Kitchen that, in my view, impact the reliability and credibility of the narrative of both Ms. Bain and Ms. Bell.
- [121] Aside from testifying to matters at a time when Ms. Bell has her asleep; Ms. Bain testified that she could not open the door because there was no mechanism; or perhaps a broken mechanism, that prevented her from unlocking the door. The weight of the evidence from the police witnesses however is that there was no impediment to opening or unlocking the passenger's side door; certainly at the time it was inspected the next day.
- [122] Ms. Bell testified she could not open the door because "knobs" were missing. The evidence clearly does not support this.
- [123] This casts some doubt on whether Ms. Bain was in the truck then, or at any time, against her will.
- [124] Ms. Bell also testified that she was distraught with concern at Henry's Kitchen due to the fact Ms. Bain was now in the company of the accused against her will. She testified this concern caused her to then conduct a search, with the help of an unidentified person, over the course of the next 11 hours. The search entailed enquiries at numerous places and to numerous persons. I have addressed the notion of the search purportedly taking place throughout the night over the course of 11 hours. In addition Ms. Bell agreed she told the police in her statement, shortly after midnight on January 5, 2023, that after being left at Henry's Kitchen and being picked up by the unidentified person in that person's vehicle, "I

sat all day with this person until I heard from Kim".

- [125] Ms. Bell was not asked if she adopted this statement nor to explain the discrepancy. Nevertheless it is an inconsistent statement on a most fundamental aspect of matters. It raises the prospect that there was not the search efforts as described because there was not the concern as described; and there was not the concern as described because there was no notion that Ms. Bain was in the truck against her will.
- [126] I have not touched on all of the difficulties with the evidence of Ms. Bain and Ms. Bell; for example the fact of their criminal records do not assist them.
- [127] That said there is evidence Ms. Bain was upset and distraught following her arrival at Pat's. She immediately complained of precisely what she now complains of. This evidence, if accepted, can be used in a limited way to assist the trier of fact in assessing credibility; see *R. v. Ay*, [1994] B.C.J. No. 2024 (Q.L.), *R. v. Langan*, 2019 BCCA 467; Chief Justice Bauman in dissent but adopted by the Supreme Court of Canada at 2020 SCC 33.
- [128] With respect however it cannot overcome the overall quality of the evidence in this case.
- [129] I accept the submissions of Ms. Cassell that inconsistencies or weaknesses in evidence of peripheral events need not impact the credibility of the evidence concerning the core offence. While Ms. Cassell said all that possibly could be said to advance the prosecution; I find I am left in a state of extreme uncertainty concerning the evidence in support of the indictment. In my view the whole of the evidence fatally taints the reliability of the evidence that is in direct support of the core offences. I simply do not find the evidence of Ms. Bain or Ms. Bell reliable in relation to the fundamental aspects of proof.
- [130] I also observe there appears to have been no attempt to interview Ms. Bain or Ms. Bell following the taking of their initial statements provided to the police while seated in the backseat of the police vehicle. In addition the evidence before me revealed little or no effort on the part of the RCMP in pursuing the prospect of corroborative evidence; be it in the form of witnesses to aspects of the events, or in the form of even minor forensic evidence. The prosecution of this case was certainly not assisted by the superficial way this matter was investigated.
- [131] That is not to say I conclude the conduct complained of did not happen. What I find is that it would be unsafe to rest a conviction upon the whole of the evidence and in the result I am left with a reasonable doubt. I find the accused not guilty on all counts.

"Crossin J."

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