

CANADA / JUDGMENT

R. v. Jajja

2021 BCSC 1805

COURT

Supreme Court of British Columbia

DECIDED

30 July 2021

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

2021 BCSC 1805 R. v. Jajja

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Jajja,

2021 BCSC 1805

Date: 20210730

Docket: 30146-2

Registry: Vancouver

Regina

v.

Imran Zafar Jajja

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 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 by the initials [name of complainant redacted], [name of witness redacted], [name of witness redacted], and [name of witness redacted]. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected throughout on June 4, 2024.

Before: The Honourable Madam Justice Warren

Oral Reasons for Judgment

(Redacted Version)

Counsel for the Crown:

J.P. Hermanson

Counsel for the Accused:

M.R. Shapray

M. Beckett

Place and Dates of Trial:

Vancouver, B.C.

May 31, June 1-4 and 7-10, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 30, 2021

Table of Contents

Introduction.. 3

Summary of the evidence. 4

Earlier in the evening of September 30, 2016. 4

At [Name of Nightclub Redacted] 6

Between leaving [Name of Nightclub Redacted] and arriving at the Hotel 8

At the Hotel 13

The aftermath. 15

The photographs and video footage. 17

[Name of Complainant Redacted]'s drinking pattern. 18

Expert toxicology evidence. 19

Legal principles. 21

The presumption of innocence, reasonable doubt, and burden of proof 21

Elements of the offence of sexual assault 23

Intoxication vs. incapacity. 24

The application of reasonable doubt in sexual assault cases. 25

The assessment of evidence. 25

Analysis. 26

The issue to be determined. 26

The credibility of the collateral witnesses. 27

The credibility of [Name of Complainant Redacted] 27

The credibility of Mr. Jajja. 28

Capacity to consent 32

Verdict. 37

Introduction

- [1] Imran Zafar Jajja is charged on a single count indictment with sexually assaulting [name of complainant redacted] on or about October 1, 2016, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46. He has pleaded not guilty.
- [2] Admissions of fact were made pursuant to s. 655 of the Code. Video surveillance footage taken outside the [name of nightclub redacted] nightclub in [location redacted] [name of city redacted] and outside the [name of hotel redacted] on [name of street redacted] in [name of city redacted], as well as photographs taken by a security camera inside a taxi, were admitted into evidence by consent. The Crown called six witnesses: [name of complainant redacted], her sister [name of witness redacted], her friend [name of witness redacted], her friend [name of witness redacted], Ravinder Minhas, the driver of the taxi where the photographs were taken, and Michael Rosland, an expert in the field of toxicology. Mr. Jajja testified in his defence.
- [3] There is no dispute that [name of complainant redacted] and Mr. Jajja, who did not previously know each other, met at the [name of nightclub redacted] nightclub late in the evening on September 30, 2016, and that they had sexual intercourse in room 132 at the [name of hotel redacted] (the "Hotel") in the early morning hours of October 1, 2016. The question is whether [name of complainant redacted] consented to the sexual contact.
- [4] [Name of complainant redacted] testified that after drinking alcohol on the evening of September 30, 2016, and going to [name of nightclub redacted] with friends, she blacked out and has no memory of a period of about five and a half hours. She testified that her last memory before the blackout is of being in [name of nightclub redacted]. She said she remembers nothing from then until she woke up alone at the Hotel at about 5:30 the next morning, with no recollection of how she got there. She testified that she does not know Mr. Jajja and has no memory of meeting him and spending time with him on the evening in question. She asserts a lack of consent and, specifically, that her cognitive capacity was so impaired as to render her incapable of knowing that she was engaging in a sexual act with Mr. Jajja or that she could refuse to participate in the sexual activity.

- [5] Mr. Jajja testified that he met [name of complainant redacted] at [name of nightclub redacted], that she willingly left with him, and, ultimately, that she went with him to the Hotel for the stated purpose of engaging in sexual activity. He testified that about 45 minutes after entering the hotel room, she initiated and enthusiastically participated in sexual intercourse with him. He testified that she subsequently demanded that he pay her \$1,000, which took him by surprise, and that he eventually agreed to pay her \$500. He said he left the Hotel at about 3:30 a.m., after telling [name of complainant redacted] he was going to an ATM to get the money, and he did not return.
- [6] The Crown submits that it has proved lack of consent, specifically, the incapacity to consent, beyond a reasonable doubt. Defence counsel argues that Mr. Jajja's testimony should be believed or, alternatively, that there is a reasonable doubt on the issue of [name of complainant redacted]'s capacity to consent.

Summary of the evidence

Earlier in the evening of September 30, 2016

- [7] On September 30, 2016, [name of complainant redacted], who was then about 21 years old, worked a shift at a restaurant in [name of city redacted]. [Name of complainant redacted]'s sister, [name of witness redacted], and her friends, [name of witness redacted] and [name of witness redacted], also worked at that restaurant. On the evening in question, [name of complainant redacted]'s shift ended at about 10:30 p.m. [Name of witness redacted] was working that evening and her shift also ended at about 10:30 p.m. [Name of witness redacted] and [name of witness redacted] were not working but they were both at the restaurant with a group of friends, celebrating the birthday of one member of the group. The plan was for the whole group to travel together to the [name of nightclub redacted] nightclub on a party bus. [Name of complainant redacted] and [name of witness redacted] planned to join the group and board the bus when they finished their shifts.
- [8] [Name of complainant redacted] and [name of witness redacted] lived together at their parents' home at the time. [Name of complainant redacted] and [name of witness redacted] were very good friends. [Name of complainant redacted] and [name of witness redacted] had recently begun seeing each other. [Name of complainant redacted] described their status as "on the way to being in a relationship" and she acknowledged that it was very casual.
- [9] When [name of complainant redacted] finished her shift, she changed her clothes and then joined the group. She testified that she started drinking "to catch up", acknowledging that she was trying to get the same level of intoxication as the others who had been drinking for some time. The party bus was scheduled to leave the restaurant around 10:30 p.m. and [name of complainant redacted] agreed she was in a bit of a rush.

- [10] The party bus left the restaurant at about 10:45 p.m. or perhaps 11 p.m. There were about 25 people on board, including [name of complainant redacted], [name of witness redacted], [name of witness redacted], and [name of witness redacted]. People were drinking alcohol and dancing while en route [location redacted].
- [11] [Name of complainant redacted] testified that she drank a mix of Jägermeister and Red Bull out of a water bottle that was passed around on the bus. She said she had five to six "big swigs" from the water bottle. She recalled that it was quite strong, meaning that the Jägermeister content was high. [Name of witness redacted] testified that when she and [name of complainant redacted] got off work they each ordered a double alcoholic drink which they consumed at the restaurant before getting on the bus, but [name of complainant redacted] did not mention that.
- [12] On the evening of September 30, 2016, Mr. Jajja, who was then 39 years old, was at a friend's house with two of his brothers and another friend. He arrived there at about 8:00 p.m. or 8:30 p.m. He had two or three bottles of beer while he was there. He and three of the others decided to go [location redacted]. They took a taxi and arrived [location redacted] about 10:00 p.m.
- [13] Mr. Jajja and the other members of his group first went to a bar called [name of bar redacted] where they remained for about 45 minutes. He drank a beer and a shot of tequila there.

At [Name of Nightclub Redacted]

- [14] After leaving [name of bar redacted], Mr. Jajja and his friends went to [name of nightclub redacted], arriving at about 11:00 p.m. He said that at that time he was "a little bit buzzed" by the alcohol, and he described that as being happy and talking.
- [15] When the party bus arrived [location redacted], [name of complainant redacted] went inside [name of nightclub redacted]. She and [name of witness redacted] checked their coats and got their hands stamped so they could re-enter. They then went to the bar next door where the drinks were cheaper. At the bar next door, [name of complainant redacted] and [name of witness redacted] each consumed two shots of tequila, one after the other. They then returned to [name of nightclub redacted].
- [16] After returning to [name of nightclub redacted], [name of complainant redacted] danced with friends. She drank a shot of rum mixed with a liqueur. Her last memory is of being in [name of nightclub redacted], dancing and talking with friends. She did not have dinner that evening and recalled being quite drunk while in [name of nightclub redacted].

- [17] [Name of witness redacted] testified that after she and [name of complainant redacted] returned to [name of nightclub redacted] from the bar next door, a friend named "A" waved them over to the bar. "A" was with two men that [name of witness redacted] did not know. One of the men offered to buy them drinks which they agreed to accept, but the men then left the bar area. She said she and [name of complainant redacted] went back to where their friends were because the men had left.
- [18] According to Mr. Jajja, after arriving at [name of nightclub redacted] he ordered a beer and stood at some high-top tables with his friends. He said [name of complainant redacted] and some of her friends were standing close to his table and he started talking to her. Someone ordered a round of tequila shots and he and [name of complainant redacted] each had one. [Name of complainant redacted] left for a while and then returned and asked him to buy her a beer, which he did. He said they talked and went outside together so he could have a cigarette. Mr. Jajja said [name of complainant redacted] was holding his hand and hugging him. After the cigarette they went back inside and she rejoined her friends. Mr. Jajja said that she returned to talk to him a couple of times and she kissed him on the mouth while he was standing at the table with some of his friends. He said that [name of complainant redacted] then said she was hungry so they left to get some food. Mr. Jajja testified that he had a buzz and was happy and in a good mood, and [name of complainant redacted] was not that drunk and was also happy and in a good mood.
- [19] Surveillance video from outside [name of nightclub redacted] shows Mr. Jajja and [name of complainant redacted] leaving [name of nightclub redacted] at 12:02 a.m. There is nothing about what is seen on that video that indicates either of them was extremely intoxicated, but they are seen only very briefly. [Name of witness redacted] testified that she was outside at that time and she saw [name of complainant redacted] walking away with a man who she believed was one of the men who had been at the bar with "A", although she was not certain about that. She called after [name of complainant redacted] and asked where she was going. [Name of complainant redacted] said she was going to get some food and the man she was with was going to pay. [Name of witness redacted] testified that although [name of complainant redacted] "had a couple drinks in her" she did not seem "wasted or belligerently drunk". [Name of witness redacted] said there was nothing unusual about the manner in which [name of complainant redacted] spoke, she was not slurring her words. [Name of witness redacted] did not see [name of complainant redacted] again that evening. [Name of complainant redacted] testified she had no recollection of leaving [name of nightclub redacted] or having this interaction with [name of witness redacted] outside.
- [20] [Name of witness redacted] said she texted [name of complainant redacted] at about 12:30 a.m. but got no reply. She made at least one more effort to reach [name of complainant redacted] by text that evening. She said she did not think too much about it at the time, although she was a bit concerned.

- [21] [Name of witness redacted] testified that while in [name of nightclub redacted] he saw [name of complainant redacted] drinking with some of her friends, including a woman named "A", at the bar. He testified that [name of complainant redacted] was also with a man he did not know and that man passed her a drink. He testified that [name of complainant redacted] seemed to be getting more drunk as the night went on and he saw her having a bit of trouble walking. He testified that at one point they were all dancing in a group, and she was there one moment and gone the next. He said that at about 12:30 a.m. or 12:45 a.m., he texted [name of complainant redacted] asking where she was but got no response. He said he was angry with her for leaving. He believes he sent another text to her at around 2:00 a.m. but got no response. He said he phoned her but she did not answer her phone. He said he went home around 3:00 a.m., at which time he was "quite drunk".
- [22] At some point in the evening, [name of witness redacted] noted that she had not seen [name of complainant redacted] for quite some time. She asked around to determine if anyone knew where [name of complainant redacted] was. Someone told her that [name of complainant redacted] "left with some guy". In the early morning hours, she estimated sometime between about midnight and 1:30 a.m., she called [name of complainant redacted]'s cell phone and texted her, but got no response. [Name of witness redacted] left [name of nightclub redacted] around 2:30 a.m. She said by that time she was very drunk. She went with friends to get some food.

Between leaving [Name of Nightclub Redacted] and arriving at the Hotel

- [23] Mr. Jajja testified that after leaving [name of nightclub redacted], he and [name of complainant redacted] walked to a nearby pizza shop. He recalled [name of complainant redacted] was hugging him and kissing him along the way. He said they talked about "going somewhere to have fun". He testified that [name of complainant redacted] suggested they go to a hotel where she would perform oral sex on him and he could rate her performance out of 10. He testified he was shocked and surprised by the suggestion but he agreed to go to a hotel with her. He said that there was a lot of discussion about sex between him and [name of complainant redacted] shortly after they left [name of nightclub redacted], and she was kissing him and touching his penis over his pants while they were on [name of street redacted].
- [24] Mr. Jajja said that he and [name of complainant redacted] got slices of pizza which they ate outside. He said [name of complainant redacted] was not showing signs of impairment and he did not think she was drunk. After eating the pizza, he said he did not feel well and he suddenly vomited on [name of complainant redacted]'s legs and feet. He said he went into a store, got some wipes, and cleaned off the vomit as best as he could. He said he offered to take [name of complainant redacted] back to [name of nightclub redacted] but she declined, saying she wanted to spend time with him.

- [25] Mr. Jajja testified that he and [name of complainant redacted] then got into a taxi. He said he told the taxi driver to take them to a hotel and the driver drove them to a nearby [name of hotel redacted]. He said he and [name of complainant redacted] both got out of the taxi at the [name of hotel redacted] and went into the lobby. He said he was told there was no vacancy so he and [name of complainant redacted] left the [name of hotel redacted] and started walking.
- [26] Mr. Jajja said he and [name of complainant redacted] walked for a while. He said [name of complainant redacted] went into a restaurant to use the washroom. He said they then kept walking and eventually came to a bus stop. He said he told her to sit on the bench at the bus stop while he hailed a taxi. He said he tried to stop many taxis, he estimated 10 to 15 passed him by. He said he and [name of complainant redacted] were at the bus stop for about 10 to 15 minutes. He said he had not, by that time, noticed any major change in how [name of complainant redacted] was acting but he was not paying attention to her when she was sitting on the bus stop bench because he was looking for a taxi.
- [27] Eventually a taxi driven by Mr. Minhas stopped. Mr. Jajja testified that he said "let's go" to [name of complainant redacted], she raised her hand to grab onto him, and he grabbed her hand and helped her up. At this point he said he noticed a change in her condition. He said he thought she was sleeping, reasoning that they had walked a lot and she was tired. When Mr. Jajja was reminded that Mr. Minhas testified that [name of complainant redacted] was on the ground when he stopped the taxi, Mr. Jajja said he did not remember that.
- [28] Mr. Jajja said he helped [name of complainant redacted] into Mr. Minhas' taxi. He said that when [name of complainant redacted] got into the taxi "she did not land very well", but she quickly got herself up and seated behind the driver. He said she looked tired. He said he had not seen her consume any alcohol after leaving [name of nightclub redacted]. He acknowledged that in one of the photographs taken inside the taxi, his hand is on her thigh. He said he was asking if she was okay. In another photo he is leaning over towards her. He said she was asking him to give her a massage because her neck was sore. His hands are on her shoulders in some of the photos. He said he was giving her a massage as she had requested. In cross-examination, he acknowledged that once [name of complainant redacted] was positioned behind the driver, she slumped forward with her body folded over at the waist and her head hanging down towards her knees, and she stayed in that position during the entire ride.
- [29] Mr. Minhas testified that he was driving east on [name of street redacted] in his taxi when he was hailed by a man on the street. He said when he pulled over he saw a woman sitting on the ground. In cross-examination, he added that she was sitting on the ground with her back leaning against a wall. He said she was not able to walk on her own and the man "made her walk". He said she appeared to be drunk. He said the man "picked her up and held her arm and took her to the cab". In cross-examination, he acknowledged that the man did not move her legs for her but he said it appeared she needed support. As a result of the photographs, there is no doubt that the man was Mr. Jajja and the woman was [name of complainant redacted].

redacted].

- [30] Mr. Minhas testified that Mr. Jajja asked him to take them to a nearby motel. He took them to the [name of hotel redacted]. He said he did not hear [name of complainant redacted] say anything during the ride. He said he heard no conversation between Mr. Jajja and [name of complainant redacted]. In cross-examination, he acknowledged that he had an earphone in one ear and it is possible that they had a conversation and he did not hear it. He testified he was concerned that [name of complainant redacted] might throw up so he told Mr. Jajja that if she was going to throw up he would stop the car and Mr. Jajja responded to the effect that everything was fine and she would not throw up.
- [31] Mr. Minhas is an experienced taxi driver having driven a cab for 12 to 13 years. He testified that he frequently deals with people who have consumed alcohol and he agreed that he has likely picked up hundreds or thousands of drunk people. He testified that he formed the opinion that [name of complainant redacted] was very drunk. He said that it appeared to him that she did not know where she was. He said Mr. Jajja was sober. In cross-examination, he acknowledged that he could not say that Mr. Jajja had had nothing to drink but he said that from Mr. Jajja's "body language" it appeared that Mr. Jajja was sober.
- [32] The timestamps on the photographs taken inside the taxi, which it is agreed are fast by one minute, show that the taxi arrived at the Hotel at 1:22 a.m. Mr. Jajja got out and walked to the exterior window of the reception desk where he booked a room. It is admitted that he registered for two people, under his own name, and paid for the room with his credit card. From the timestamps on the photos it is apparent he was outside the taxi for over 3 minutes. From the photos, it is apparent that [name of complainant redacted] remained slumped over behind the driver's seat for much, if not all of that time.
- [33] Mr. Minhas testified that when Mr. Jajja returned to the cab after being at the reception desk, he said there was a room available and then he tried to get [name of complainant redacted] out of the cab. Mr. Minhas testified that Mr. Jajja asked him to help get [name of complainant redacted] out of the cab but Mr. Minhas said he could not do that. When asked specifically what Mr. Jajja did to try to get [name of complainant redacted] out of the cab, he said he told her to get out, two or three times, and she was "saying no, no, no". He said she responded "no, no, no" at least three or four times. He said she was "too drunk" and she appeared not to know where the man was taking her. In cross-examination, he agreed that [name of complainant redacted] appeared to be asleep and Mr. Jajja was trying to shake her awake, and when Mr. Jajja said "get out, we are here" she responded "no, no, no". He said Mr. Jajja managed to get her out. He said he used a bit of force, pulling her up, and held her by the arm and made her walk. He also said that she needed support and she was not walking properly, but Mr. Jajja was walking fine. He said Mr. Jajja paid the cab fare.

- [34] In his testimony at trial, Mr. Jajja said he did not recall asking Mr. Minhas for help getting [name of complainant redacted] out of the taxi. He said he opened the door and told her to get out. She was sitting in the back seat, slumped forward. He grabbed both of her shoulders and shook her because he thought she was sleeping. He said he did not recall her verbal response, but that she took his hand and he helped her get out.
- [35] Mr. Jajja said he took [name of complainant redacted]'s arm and they walked arm-in-arm across the hotel parking lot towards the room. Initially, when he was asked whether he noticed anything about her condition, he said she was sleepy and she was having difficulty walking because there was still vomit inside her shoes, so he helped her walk. Later, after the lunch break, he said that he noticed a change in [name of complainant redacted]'s condition while they were at the bus stop and that he believed the cause of the change was alcohol - that she was drunk. In cross-examination, he said she was having difficulty walking because she was drunk and because there was vomit in her shoes. He said when they arrived at the Hotel he too was intoxicated, although he said he did not drink any alcohol after leaving [name of nightclub redacted].

At the Hotel

- [36] Mr. Jajja testified that when he and [name of complainant redacted] got into the hotel room she asked him to turn the lights on for her in the bathroom. He said that she went into the bathroom and he thinks she threw up. In cross-examination he agreed that he did not hear her throwing up. He said she was in the bathroom for five to six minutes and he was laying on the bed. He said when she came out of the bathroom she laid down on the bed beside him. He said he was busy on his phone for 10 to 15 minutes and she lied on the bed next to him.
- [37] Mr. Jajja said he heard [name of complainant redacted] make a sound like she was going to vomit so he told her to go to the bathroom, which she did. He characterized her as "a little drunk at that time". The second time she was in the bathroom for about 10 to 15 minutes. He said that when she came out there was vomit on her hair and she asked him if he wanted to take a shower with her. He said he did not. He said she went back into the bathroom and took a shower. He said he did not actually see her in the shower but he heard the shower turning on.
- [38] Mr. Jajja said that they had been in the room for about 30 to 40 minutes by the time [name of complainant redacted] came out of the bathroom after the shower. He said she had her clothes on. He said he asked if she was fine and she said she was much better. He said after the shower there was "so much improvement" in her condition as compared to when they were in the taxi and walking across the hotel parking lot.
- [39] Mr. Jajja said that when [name of complainant redacted] came out of the bathroom the third time, after the shower, they started kissing. He said that [name of complainant redacted] then undid his belt and suggested that she perform oral sex on him. He said he told her he

did not want to do that. He said she then indicated that she wanted him to perform oral sex on her but he declined. He said she rubbed against him, moved her underwear to the side, and guided his penis into her vagina. He said initially he was lying on his back on the bed and she was on top of him and later he stood up behind her and penetrated her vagina while she was kneeling on the bed. He said she told him to "hit [her] hard" and indicated that she was enjoying the sex. He denied any attempted or actual anal penetration. He said he pulled out before ejaculating. He said she had a towel that she had used to dry her hair and they used that to wipe up. He said she gave no indication that she did not know what she was doing or who she was with. He said he would not have engaged in sex with her if he believed she was not willing or if he believed that she did not know what she was doing. He said at no time did she say no or stop.

- [40] Mr. Jajja testified that after the sex, he and [name of complainant redacted] talked and they both said they enjoyed the sex. He said out of the blue she asked him for \$1,000. He said there had been no prior discussion of him paying for sex. He said he was surprised and asked her why he should pay. He said she responded that he had to pay her. He said he could not pay her \$1,000 but, after she got aggressive and mean, he agreed to pay her \$500. He said he had planned to stay in the hotel room for the night but [name of complainant redacted]'s demand for money made him nervous.
- [41] Mr. Jajja said he left the room and went to the reception desk where he asked the concierge if there was an ATM at the Hotel. He said the concierge told him there was not and that the closest one was at a gas station. Mr. Jajja said he did not have his wallet with him so he went back into the room. He said he told [name of complainant redacted] to come with him in a taxi to the gas station to get the money and that he would then drop her off after paying her. He said she refused to leave the room until he paid her. He said that he told her he would go get the money and come back. Then he left and did not return. He said he got a taxi and went home.
- [42] [Name of complainant redacted]'s first memory, after the blackout, is waking up alone in the hotel room. She testified that she was wearing her dress but it was pulled up over her hips. She said her shoes and underwear were off but she was wearing her socks. She did not have her coat with her, having left it at [name of nightclub redacted]. She said it was hazy and she was confused about where she was. She felt dazed but was not alarmed at first. She felt discomfort mainly in her anus but also around her vagina. She said the discomfort was severe enough that it was the first thing she noticed when she woke up. She said she did not have this discomfort earlier in the evening, prior to her blackout. She said she went to the bathroom and when she wiped there was "quite a lot of blood" on the toilet paper that came from her anus. She testified that it "seemed like [she] had had sex", although she had no recollection of having done so. She testified that she would not have consented to having sexual activity with the man shown in the photos sitting beside her in the taxi.

[43] [Name of complainant redacted] testified that she found her underwear on the ground next to the bed. She said she has no memory of removing her underwear. She said she put her underwear on and then started panicking. She said she went outside because she did not know where she was. She said she was looking around for the front desk. The video from outside the Hotel shows [name of complainant redacted] first leaving the room at 5:40 a.m. She returned to the room and used the phone in the room to place a call to her own phone because she did not know where her phone was. She said when she did that, her phone rang loudly and she found it easily in her purse on the other side of the bed. Upon finding her phone she saw that she had many missed calls and texts asking where she was. She said the first message came in at about 12:30 a.m. She checked her Internet search history and saw a search that she did not recognize or have any recollection about. She said the messages included messages from [name of witness redacted] who was angry because she left the nightclub without telling him she was leaving. She phoned [name of witness redacted]. She testified she was scared and crying and trying to piece together what had happened. She said she was "pretty hysterical". [Name of witness redacted] told her to come to his house so she got a cab and did so.

The aftermath

[44] [Name of witness redacted] testified that he received the call from [name of complainant redacted] at about 5:30 a.m. He testified she was crying. He told her to come to his home and she did. He said when she arrived, she was crying and distraught. He said she seemed sober but looked disheveled and her hair was a mess. She stayed for a few hours. [Name of complainant redacted] testified that when she left [name of witness redacted]'s house later that morning, it was light out and she saw that there was vomit on her shoes. She said she does not recall vomiting.

[45] After leaving [name of nightclub redacted] and getting food with friends, [name of witness redacted] took a cab back to the restaurant in [name of city redacted]. She arrived at about 3:30 a.m. or 4:00 a.m. While there, she phoned [name of complainant redacted]'s cell phone twice but got no answer. She then went home, arriving about 4:30 a.m. When she got home she looked for [name of complainant redacted], who was not there. She then went to bed. She woke up at about 10:30 a.m. [Name of complainant redacted] was still not home. Her mother asked where [name of complainant redacted] was and [name of witness redacted] told her mother that she was at [name of witness redacted]'s house. She acknowledged that she deliberately lied because she did not want her parents to know that she did not know where [name of complainant redacted] was. In cross-examination, she agreed she was "covering" for [name of complainant redacted]. [Name of witness redacted] texted [name of complainant redacted] and then [name of complainant redacted] phoned her from [name of witness redacted]'s house. [Name of witness redacted] said [name of complainant redacted] sounded like she had been crying and was more upset than she had ever sounded before.

- [46] [Name of witness redacted] testified that when [name of complainant redacted] got home she looked "very rough". She had stains on her dress and vomit on her shoes and looked like she had been crying.
- [47] Later the same day, [name of complainant redacted] and [name of witness redacted] phoned the Hotel trying to learn the identity of the person who had booked the room. They were not able to get any information from the Hotel. [Name of complainant redacted] then phoned the police, and at some point that day they went to the drugstore to pick up "Plan B".
- [48] On October 2, 2016, [name of complainant redacted] attended at [name of hospital redacted] where she was treated by Dr. Sarah Olson. Dr. Olson performed an anogenital exam. She noted a small superficial abrasion on the vagina which could be consistent with recent penetrative force, but was insufficient for Dr. Olson to provide any opinion regarding whether there was consent or a lack of consent. It was agreed that the phrase "penetrative force" does not describe the degree of pressure applied or whether the pressure was applied with or without consent; that a complaint of tenderness to the vagina and anus could be consistent with penetrative force applied to the vagina and anus; and an observation of blood from the anus could be consistent with penetrative force applied to the anus although blood is an infrequent result of anal sex.
- [49] Mr. Jajja was not contacted by the police about the events in question until January 2019.

The photographs and video footage

- [50] I have already noted what is depicted in some of the photographs and videos. However, I wish to say a bit more about [name of complainant redacted]'s appearance in them.
- [51] The first taxi photo showing [name of complainant redacted] starting to enter the taxi is timestamped 1:15, with seconds and fractions of seconds also noted. As I already mentioned, it is agreed that the timestamps are fast by one minute. [Name of complainant redacted] is seen starting to leave the taxi in a photo that is timestamped 1:26:29. Accordingly, [name of complainant redacted] was in the taxi for just over 11 minutes. There are about 135 photos taken over that 11 minutes; on average, more than 12 photos per minute. The first few photos in which [name of complainant redacted] can be seen show her shoulder entering the rear passenger door. She is then seen lying on her left side across the back seat, with her hair falling over her face. The next several photos show her pushing herself up with her right forearm. The first photo showing her seated behind Mr. Minhas is timestamped about 20 seconds after the first photo showing her beginning her entry into the taxi and about 15 seconds after the previous photo which shows her still pushing herself up. In other words, it took her more than five seconds and as many as 20 seconds to get from the rear passenger side door to the driver's side of the back seat.

- [52] Every photo of [name of complainant redacted] taken after she is seated behind Mr. Minhas shows her bent over at the waist with her head hanging down. Over the course of the drive to the Hotel she appears to become more folded over with her head hanging lower. She is never seen sitting in an upright position.
- [53] The surveillance video from outside the Hotel shows [name of complainant redacted] being guided by Mr. Jajja across the parking lot towards the hotel room. She is bent over with her head hanging down and her face positioned towards the ground, as if she is looking at her feet. Mr. Jajja is supporting her with his right arm. She is seen swaying, staggering, and stumbling. Her body movements and the position of her head indicate that she is not looking where she is going or controlling her direction of travel.
- [54] The photos from the taxi and the video from the Hotel show that [name of complainant redacted] was wearing a short dress with spaghetti straps and no coat. The video shows that she was wearing ankle boots. The photos appear to show Mr. Jajja carrying her purse as she gets into the taxi. The video clearly shows him carrying her purse as they move across the parking lot towards the hotel room.

[Name of Complainant Redacted]'s drinking pattern

- [55] [Name of complainant redacted] was not certain about what she drank over the material time. As I mentioned, she did remember having five or six swigs from the water bottle containing Jägermeister and Red Bull, two shots of tequila at the bar next door to [name of nightclub redacted], and one shooter at [name of nightclub redacted]. According to [name of witness redacted], [name of complainant redacted] also had a double alcoholic drink at the restaurant before getting on the party bus. According to Mr. Jajja, she also had a shot of tequila and a beer with him at [name of nightclub redacted]. I find that she had at least the equivalent of eight drinks between about 10:30 p.m. and midnight.
- [56] [Name of complainant redacted] weighed about 125 pounds on the evening in question. Prior to that evening, she had experienced a similar kind of blackout after drinking alcohol. She said that in the months before that evening, she typically drank to intoxication about once every two weeks.

Expert toxicology evidence

- [57] Michael Rosland, a toxicologist with the RCMP, was qualified to give expert evidence in the field of toxicology, including the pharmacology of drugs and alcohol and their effects on the human body. Given that [name of complainant redacted]'s actual blood alcohol concentration level and her actual alcohol elimination rate are unknown, Mr. Rosland was limited to providing general information about alcohol absorption and elimination rates and the relationship between blood alcohol concentration levels and the body, and providing potential blood alcohol concentrations for hypothetical drinking patterns.

- [58] Mr. Rosland testified that as the consumption of alcohol increases, blood alcohol concentration increases, and there is an increasing depression of brain function. Higher brain functions are the first to become impacted, leading to loss of inhibition and increased sociability. As blood alcohol concentration increases further, muscle coordination is affected, beginning with fine motor control and progressing to gross motor control, leading to problems with balance, swaying, staggering, and slurred speech. As blood alcohol concentrations increase further, fundamental tasks such as sitting and standing become impacted. Beyond that, reflexes are depressed, and there can be a failure to respond to stimuli and difficulty maintaining consciousness.
- [59] Mr. Rosland explained that these symptoms are subject to an individual's tolerance. An intolerant drinker or someone with little drinking experience may have a particular symptom at a lower blood alcohol concentration than an experienced drinker. It is not possible to estimate a blood alcohol concentration solely from symptoms because of differences in tolerance. He said a 21 to 22 year old female who drank to the point of intoxication about once every two weeks would fall on the tolerance spectrum between an inexperienced drinker and a heavy drinker. In other words, a place on the spectrum consistent with a social drinker.
- [60] Mr. Rosland explained that memory can be affected by alcohol in two ways. Fragmentation refers to gaps in memory over the course of a drinking episode. A person with fragmentation may, with prompting, come to remember what happened during those gaps. Blackout refers to a loss of memory over a period of time where, even with subsequent information and prompting, the memory does not return. Blackout is correlated with a rapidly rising blood-alcohol concentration which occurs when alcohol is consumed over a short period of time. Blood-alcohol concentration also increases faster on an empty stomach than when the drinker has recently eaten. He said a person experiencing a blackout may interact with their environment, for example, they may speak or walk, but not remember doing so. He said blackout is correlated with people who have a blood-alcohol concentration of greater than 200 milligrams per decilitre, and with people who have a prior history of blackout.
- [61] Mr. Rosland provided the following estimated theoretical maximum blood alcohol concentrations for the following hypotheticals. Each of the hypotheticals assumed a 125 pound female drinking between 10:30 p.m. and midnight, a standard elimination rate of 10 to 20 mg/dL per hour, and evenly spaced consumption:
- (a) if this female drank one ounce of Jägermeister, two ounces of tequila, and then one ounce of rum, she would have a theoretical maximum blood-alcohol concentration of between 102 and 117 mg/dL at midnight, with peak absorption about 30 minutes after the last consumption;

- (b) if this female drank all of that plus a double mixed drink (two ounces of alcohol) and one further ounce of alcohol, she would have a theoretical maximum blood-alcohol concentration of between 186 and 201 mg/dL at midnight, with peak absorption about 30 minutes after the last consumption.

Mr. Rosland explained that most people typically only reach 50 percent to 75 percent of the maximum blood-alcohol concentration.

- [62] Mr. Rosland testified that a blackout would be possible with either of the hypothetical drinking patterns, but that the second one was more strongly correlated with blackout than the first.
- [63] Mr. Rosland used three terms to describe a hierarchy of intoxication starting with impaired, moving to intoxicated or advanced state of impairment, and finally moving to heavy or severe intoxication. At the heavy or severe intoxication stage he would expect gross motor control actions to be markedly deteriorated, while other symptoms might include emotional instability, mental confusion and disorganization, delayed or slowed response to stimuli such as questions, and possible loss of consciousness.
- [64] Mr. Rosland confirmed that with a general standard alcohol elimination rate, he would expect a person with a blood-alcohol concentration of 200 mg/dL to have a blood-alcohol concentration of about 180 to 190 an hour later, provided they did not drink during that hour. He said that he would not expect a marked improvement in such a person's level of impairment over that hour and he would expect that they would still be heavily intoxicated.

Legal principles

The presumption of innocence, reasonable doubt, and burden of proof

- [65] The most important principle of law applicable in every criminal case is the presumption of innocence. It guarantees that an accused is presumed innocent until the Crown has proven every element of the offence beyond a reasonable doubt.
- [66] Two rules flow from the presumption of innocence. One is that the Crown bears the burden of proving the accused's guilt. That burden of proof is always on the Crown. It never shifts to the accused; the accused does not have to prove anything. The other is that guilt must be proved beyond a reasonable doubt.
- [67] A reasonable doubt is a doubt that is based on reason and common sense; it is logically derived from the evidence or the absence of evidence; it is not based on sympathy or prejudice: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 39. Believing the accused is probably guilty is not enough to convict, but the Crown does not have to prove guilt to an absolute certainty or beyond any fanciful or speculative doubt. Having said that, proof beyond a reasonable doubt is "much closer to absolute certainty than to a balance of probabilities": *R. v. Starr*, [2000] 2 S.C.R. 144 at para. 242.

- [68] It is only the elements of the offence that are subject to the proof beyond a reasonable doubt standard. Each individual piece of evidence is not subject to that same standard. The facts that are said to support an inference of guilt can be established on a balance of probabilities: *R v. Collin*, 2008 BCCA 431 at paras. 16-18. The ultimate question is whether the totality of the evidence establishes each element of the offence beyond a reasonable doubt: *R v. Villaroman*, 2016 SCC 33 at para. 30.
- [69] In a case where proof of one or more of the elements of the offence depends on circumstantial evidence, an accused may not be convicted unless an inference of guilt is the only reasonable inference that the evidence permits: *Villaroman*. This is a high standard that requires that alternative explanations be excluded. The existence of any rational, non-guilty inference is enough to raise a reasonable doubt: *R. v. Garciacruz*, 2015 ONCA 27 at para. 68
- [70] Accordingly, when assessing circumstantial evidence it is necessary to consider other plausible theories and other reasonable possibilities that are inconsistent with guilt, but the Crown does not have to negative every possibility, no matter how irrational or fanciful; other reasonable possibilities must be based on "logic and experience applied to the evidence or absence of evidence, not on speculation": *Villaroman* para 37. A measure of common sense must be brought to the analysis. The court is not expected to consider the case as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility: *R v. To*, 1992 CanLII 913 (B.C.C.A.) at para. 41.
- [71] As noted in *Villaroman* at para. 38, the line between a plausible theory and speculation is not always easy to draw, but the basic question is whether the circumstantial evidence or gaps in the evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

Elements of the offence of sexual assault

- [72] The essential elements of the offence of sexual assault were recently summarized by Justice Karakatsanis in *R v. G.F.*, 2021 SCC 20 at para 25:
- [25] The actus reus of sexual assault requires the Crown to establish three things: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent: *Ewanchuk*, at para. 25; *R. v. Chase*, [1987] 2 S.C.R. 293. The first two elements are determined objectively, while the third element is subjective and determined by reference to the complainant's internal state of mind towards the touching: *Ewanchuk*, at paras. 25-26. At the mens rea stage, the Crown must show that (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting, or was reckless or wilfully blind as to the absence of consent: *Ewanchuk*, at para. 42. The accused's perception of consent is examined as part of the mens rea, including the defence of honest but mistaken belief in communicated consent: *R. v. Barton*, 2019 SCC 33, at para. 90.

- [73] Consent, for purposes of establishing the offense of sexual assault, is defined in s. 273.1(1) of the Code as "the voluntary agreement of the complainant to engage in the sexual activity in question". Pursuant to s. 273.1(1.1), consent must be present at the time the sexual activity in question takes place. Section 273.1(2) provides that no consent is obtained if, among other things, "the complainant is incapable of consenting to the activity".
- [74] In *G.F.* at paras. 43-53, the Supreme Court of Canada clarified that capacity is a precondition to subjective consent. Accordingly, a finding of subjective consent requires both that the complainant was capable of consenting and did agree to the sexual activity.
- [75] In the same case at paras. 53-58, the Supreme Court of Canada outlined the four requirements for capacity. For a complainant to be capable of providing subjective consent, she must be capable of understanding four things: first, the physical act; second, that the act is sexual in nature; third, the specific identify of the complainant's partner or partners; and fourth, that she has the choice to refuse to participate in the sexual activity.

Intoxication vs. incapacity

- [76] Intoxication can result in incapacity to consent to sexual contact. However, intoxication does not necessarily equate to incapacity: *R. v. F.B.P.*, 2019 ONCA 157.
- [77] As observed in *R. v. Tariq*, 2016 ONCJ 614, intoxication alone, even severe intoxication, is not enough to conclude that the complainant did not have an operating mind (para 94). Evidence of specific acts or utterances by the complainant that suggest she had an operating mind, was capable of making decisions, or was in control of her actions, has resulted in the conclusion that incapacity has not been established beyond a reasonable doubt (paras. 87 and 91). On the other hand, "[c]ases where extreme intoxication has led to findings of incapacity tend to be cases where the evidence of intoxication is far beyond the loss of gross motor skills and balance" and "tend to include evidence of a loss of awareness or loss of consciousness" (para 92).
- [78] As noted by Fenlon J.A. in *R. v. Czechowski*, 2020 BCCA 277, at para. 47, incapacity is a finding of fact that requires judges to consider all of the evidence and mere proof of drunkenness, loss of inhibitions, regret for a bad decision, or some memory loss do not on their own negate capacity for consent, but neither does the ability to walk a short distance, make a phone call, speak, and recall some events necessarily preclude a finding of incapacity.
- [79] That a complainant's memory of the sexual activity is limited or non-existent does not mean the complainant lacked the capacity to consent. A complainant's loss of memory means that the complainant cannot give direct evidence about whether she consented or whether or not she had the capacity to do so, but that does not mean that evidence of memory loss is irrelevant. It may be circumstantial evidence that when considered with other evidence permits inferences to be drawn about whether she was capable of consenting.

The application of reasonable doubt in sexual assault cases

- [80] In sexual assault cases, the complainant and the accused are often the only witnesses to the alleged criminal conduct. It is vitally important that judges do not decide that an accused is guilty merely because the judge disbelieves the accused. The correct application of the burden of proof requires the judge to acquit the accused if the evidence as a whole raises a reasonable doubt.
- [81] To assist in the proper application of the burden of proof, the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 recommended the following framework:
- a) if the evidence of the accused is believed, he must be acquitted;
 - b) if the evidence of the accused raises a reasonable doubt, even if some or all of it is not believed, he must be acquitted; and
 - c) if the evidence of the accused does not raise a reasonable doubt, I must go on to determine whether the guilt of the accused has been established beyond a reasonable doubt by the evidence that is accepted.

The assessment of evidence

- [82] The decision of whether to accept all or part of the testimony of any witness involves an assessment of credibility and reliability.
- [83] Courts have recognized a number of factors as helpful in assessing credibility and reliability, including the inherent plausibility of the witness's evidence in the context of the case as a whole. That is, whether the witness's account makes sense or whether it seems impossible or unlikely.
- [84] In assessing the inherent plausibility of evidence, I am permitted and expected to apply common sense derived from life experience. However, I must recognize that the use of common sense is fraught with danger. In *R. v. J.C.*, 2021 ONCA 131, Paciocco J.A. recently discussed two rules that identify impermissible reasoning relating to plausibility.
- [85] The rule against ungrounded common sense assumptions requires me to avoid speculative reasoning that invokes assumptions that are not grounded in the evidence or appropriately supported by judicial notice. There is no bar on relying on common sense or human experience to identify inferences that arise from the evidence, however it is impermissible to use human experience to introduce new considerations that do not arise from the evidence.
- [86] The second rule is the rule against stereotypical inferences. It prohibits reliance on stereotypes or erroneous common sense assumptions about how a sexual offence complainant is expected to act. It also prohibits the drawing of inferences from stereotypes about the way accused persons are expected to act. It is important to emphasize that stereotypical assumptions and generalizations are capable of operating against an accused.

For example, it has been held to be an error to use assumptions about female behaviour as the basis for accepting a complainant's testimony about her lack of consent or to undermine the accused's credibility: *R. v. Cepic*, 2019 ONCA 541 at para. 15; *R. v. Kodwat*, 2017 YKCA 11 at para. 41.

Analysis

The issue to be determined

[87] Mr. Jajja admitted that he touched [name of complainant redacted] in a sexual manner and that he intended to do so. Given [name of complainant redacted]'s lack of memory, there is no direct evidence that she did not consent. The evidence focused on her capacity to consent. Mr. Jajja did not testify about being mistaken. He said [name of complainant redacted] was a willing and enthusiastic participant in the sexual activity. The submissions advanced on his behalf did not raise the defence of honest but mistaken belief in communicated consent or that he should be acquitted because of a failure on the part of the Crown to establish the mens rea elements of the offence. The only issue is whether the Crown has established beyond a reasonable doubt that [name of complainant redacted] was incapable of consenting.

The credibility of the collateral witnesses

[88] There was not much, if any, controversy about the testimony of the collateral witnesses, [name of witness redacted], [name of witness redacted], [name of witness redacted], and Mr. Minhas. I do not have any concerns about the credibility or reliability of the evidence of any of them. I am satisfied that they answered the questions put to them both truthfully and carefully. I accept their evidence.

The credibility of [Name of Complainant Redacted]

[89] Defence counsel did not challenge [name of complainant redacted]'s testimony that she had no memory of what took place. The defence acknowledged that, generally, [name of complainant redacted] testified in a candid and forthcoming manner, but submitted that she minimized the extent of her memory from the evening in question in a manner that diverged from a statement she gave to police. The defence submitted this undermined the suggestion that she was passed out or unconscious in the hotel room, and corroborated Mr. Jajja's evidence that she was not passed out, unconscious, or incapacitated.

[90] I disagree with that submission. I found [name of complainant redacted] to be a credible and careful witness. She testified in a reasonable and forthright manner and I accept her evidence.

[91] In my view, the defence overstated the extent and materiality of any inconsistency between [name of complainant redacted]'s testimony and her statement to police. In her evidence in chief, [name of complainant redacted] testified she had no memory. The defence characterized her statement to the police as having some memory of speaking to someone in the hotel room. However, when the entire portion of the police statement in question is considered, it is apparent that [name of complainant redacted] was attempting to explain that she did not actually have any memory of what happened in the hotel room, and to distinguish between an actual memory and some vague, nebulous feelings. She was attempting to provide the police with as much detail as possible while being careful to ensure that they understood that she did not actually remember. [Name of complainant redacted] did not testify that she was passed out or unconscious. She said she had no memory. There is no material inconsistency. In any event, that she may have had some vague, nebulous feeling of someone speaking to her, but no actual memory, is not material.

The credibility of Mr. Jajja

- [92] The Crown submitted that Mr. Jajja's evidence should be rejected in favour of other conflicting, credible evidence (specifically, the photographs, video surveillance, and testimony of Mr. Minhas), and that there are significant and overwhelming problems with the substance of Mr. Jajja's evidence and the manner in which he testified.
- [93] Defence counsel submitted that the Crown failed to undermine Mr. Jajja's credibility or reliability on any significant point, and emphasized that Mr. Jajja's evidence is not to be held to a higher standard than is the evidence of [name of complainant redacted] or any of the other witnesses.
- [94] I agree with the Crown's characterization of Mr. Jajja's evidence. Of course, I cannot hold Mr. Jajja to a higher standard than the other witnesses, but [name of complainant redacted]'s evidence stood up to scrutiny and was not even subject to significant challenge.
- [95] Mr. Jajja was, at times, unresponsive or evasive in cross-examination. In his evidence in chief he described his level of intoxication when leaving [name of nightclub redacted] as happy and buzzed, but drunk or intoxicated by the time he and [name of complainant redacted] got to the Hotel, although he had not had anything to drink in the interim. When asked in cross-examination specifically about his level of intoxication, he appeared reluctant to answer. He said he was buzzed but also drunk. When asked if he considered drunk different from buzzed he said drunk is when you are a bit intoxicated. When asked if "a bit" meant "small", he said something like drunk is drunk. Eventually he said that someone who can't walk is very drunk, and indicated that he was not that drunk. Later he said he was drunk, not a little drunk. Still later he said that he forgot to wear a condom because he was intoxicated, which suggests a fairly high level of impairment that is not consistent with merely being buzzed when he left [name of nightclub redacted].

- [96] Mr. Jajja's recollection was selective, in a manner that aligned with his interests. He displayed a good recall of neutral details or details that none of the other witnesses would have knowledge of, but he claimed not to recall details about which there was independent evidence. For example, he claimed to remember that after vomiting on [name of complainant redacted] he tried to get napkins from the pizza place but they were busy so he went to 7-11 to get the wipes; he tried to hail 10 to 15 taxis before Mr. Minhas stopped; and very specific details of what he and [name of complainant redacted] each did in the hotel room before, during, and after the sexual activity. But he had no recollection of carrying [name of complainant redacted]'s purse, Mr. Minhas asking if [name of complainant redacted] was going to vomit, of asking Mr. Minhas to help get [name of complainant redacted] out of the taxi, or of [name of complainant redacted] saying "no, no, no" when he told her to get out.
- [97] I appreciate that much time passed between the events of the night in question and Mr. Jajja being contacted by the police such that an imperfect memory is to be expected. However, as noted, he did remember many innocuous details. Defence counsel submitted that the many details Mr. Jajja recalled about what he and [name of complainant redacted] did in the hotel room was not self-serving, but in my view it was self-serving because the details created a measure of time between [name of complainant redacted] entering the room in what the other evidence establishes is an obviously intoxicated state and the commencement of the sexual contact.
- [98] There were also some internal inconsistencies in Mr. Jajja's evidence and areas where his evidence evolved. For example, initially he testified that [name of complainant redacted] was sleepy, not drunk, and that her difficulty walking across the hotel parking lot was caused by her feet slipping in his vomit that was still inside her shoes. Later, after taking the lunch break and likely reflecting on the plausibility of that evidence, he acknowledged that [name of complainant redacted] was drunk and that, together with the vomit in the shoes, was the reason she had difficulty walking.
- [99] There were also material external inconsistencies between Mr. Jajja's evidence and the independent evidence of Mr. Minhas, the photographs, and the video.
- [100] As mentioned, Mr. Jajja initially said he did not think [name of complainant redacted] was drunk or very drunk, despite very clear evidence to the contrary in the form of the photographs, the video surveillance from outside the Hotel, and Mr. Minhas' testimony. Similarly, he claimed that when he and [name of complainant redacted] got to the Hotel he was also drunk, even though he was only buzzed when he left [name of nightclub redacted], yet he appeared sober to Mr. Minhas and he does not display any physical signs of intoxication in the photographs or the video surveillance.
- [101] Mr. Jajja denied having difficulty getting [name of complainant redacted] out of Mr. Minhas' taxi, but Mr. Minhas said he asked for help getting her out and that he had to direct her to get out a few times to which she responded no, no, no.

- [102] I prefer the independent evidence on all of these points.
- [103] Central aspects of Mr. Jajja's evidence were unreasonable in ways that aligned with his interest.
- [104] First, his initial testimony that [name of complainant redacted] had difficulty walking across the hotel parking lot because her feet were slipping in his vomit, which was still inside her shoes, was not plausible. The video surveillance shows [name of complainant redacted] having very significant difficulty walking, far more difficulty than one would expect from slippery feet or shoes. In addition, slippery feet would not provide an explanation for her upper body position, bent over and leaning forward with her head hanging down and her face directed towards the ground. Further, on Mr. Jajja's account, at least an hour had passed between him vomiting outside the pizza place and [name of complainant redacted] staggering across the hotel parking lot. During that time he said they had walked a lot [location redacted], went into another hotel lobby, and [name of complainant redacted] had used a bathroom somewhere. It is not plausible that she had a significant amount of vomit in her shoes but did not, during that hour, remove her shoes and clean up the vomit. It is also not plausible that she had so much vomit in her shoes that she could not walk on her own across the hotel parking lot, but she could walk a lot [location redacted] before going to the hotel. Finally, Mr. Jajja's evidence that enough of his vomit got into [name of complainant redacted]'s shoes to cause her feet to slip is itself implausible. [Name of complainant redacted] testified that when she woke up in the hotel room she was wearing her socks. From the video surveillance at the Hotel it is apparent she is wearing ankle boots. Common sense dictates that it would not have been possible for enough of Mr. Jajja's vomit to get inside the ankle boots, while she was wearing them, to cause her feet to slip, especially since she was also wearing socks.
- [105] Second, Mr. Jajja's claim that after he and [name of complainant redacted] had sex, [name of complainant redacted] demanded \$1,000 and he eventually agreed to pay her \$500, was not plausible. This conclusion is not based on speculative reasoning that invokes general common sense assumptions about whether a person like [name of complainant redacted] would demand money for sex. However, as already discussed, there is no bar on relying on common sense or human experience to identify inferences that arise from the evidence. Someone who wants to be paid for sex with a stranger would very likely, almost certainly, state their price and demand payment before engaging in the sex, not after. Additionally, if [name of complainant redacted] demanded money and if Mr. Jajja agreed to pay her \$500 and offered to take her with him to an ATM to get the money, [name of complainant redacted] almost certainly would have gone to increase the odds that he would actually pay. She would not likely have remained behind in the hotel room because of the likelihood that he would not return.
- [106] Defence counsel submitted there was no reason for Mr. Jajja to make up this story about [name of complainant redacted] demanding money. I do not agree. The story painted [name of complainant redacted] in a poor light and Mr. Jajja as a victim of her grift. Also, he

could have thought that the story would help explain why [name of complainant redacted] left a large group of friends to go to a hotel to have sex with a virtual stranger. I emphasize that I am not relying on any assumptions about whether she would likely have done that, but Mr. Jajja may well have considered it in his interest to provide an explanation for her behaviour.

- [107] Third, Mr. Jajja's description of [name of complainant redacted] being the aggressor or initiator of the sexual contact is extremely unlikely given her condition when she entered the hotel room, which again is apparent from the photographs, video surveillance, and Mr. Minhas' personal observations. She was entirely passive during the taxi ride and while Mr. Jajja booked the room. She remained slumped over with her head almost in her lap. After Mr. Jajja got her out of the taxi, she could barely walk, even with him supporting her. When compared to what is obvious about her condition as she entered the hotel room, the only reasonable explanation for his description of her assuming the role of sexual initiator is fabrication.
- [108] Each of these aspects of Mr. Jajja's testimony on its own may not be overly troubling but taken together they showed a very concerning pattern and, ultimately, entirely undermined his credibility.

Capacity to consent

- [109] As I have said, there is only one real issue; has the Crown established beyond a reasonable doubt that [name of complainant redacted] was incapable of consenting to the sexual contact that occurred.
- [110] I do not believe Mr. Jajja's evidence to the extent it was exculpatory and his evidence does not raise a reasonable doubt. However, the rejection of his evidence is not proof of his guilt. I have to go on to assess the evidence I do believe and decide whether that evidence persuades me beyond a reasonable doubt that [name of complainant redacted] was incapable of consenting. I must find Mr. Jajja not guilty if there is a reasonable possibility that [name of complainant redacted] had the capacity to consent. Even if the most likely inference that emerges from the evidence is that [name of complainant redacted] was incapable of consenting, that is not enough to convict. That she was incapable must be the only reasonable inference that the evidence permits.
- [111] [Name of complainant redacted]'s testimony that she would not have consented to sexual contact by Mr. Jajja is nothing more than a statement of her assumption or belief about how she would have behaved at a time she does not remember. I place no weight on that.
- [112] In determining whether [name of complainant redacted] had the capacity to consent, I start by determining her condition when she entered the hotel room.

- [113] I have found that [name of complainant redacted] drank at least the equivalent of eight alcoholic drinks in the 90 minutes between 10:30 p.m. and midnight. I have no difficulty concluding that she suffered a blackout and has no recollection of the period from when she was in the [name of nightclub redacted] nightclub with friends to when she woke up about five and a half hours later in the hotel room. I accept her evidence to this effect and her experience, as relayed by her in her testimony, is consistent with Mr. Rosland's evidence about blackout.
- [114] I also have no difficulty concluding that [name of complainant redacted] was severely intoxicated when she entered the hotel room. Again, she drank at least the equivalent of eight drinks over the 90 minutes between 10:30 p.m. and midnight. She was in a blackout. She was sitting on the ground while Mr. Jajja hailed Mr. Minhas' taxi. From the photos in the taxi and the video at the Hotel, in combination with Mr. Minhas' personal observations, it is clear that her gross motor control was severely deteriorated. Even her fundamental core functions were compromised. She was slumped over throughout the taxi ride and, from her body movements depicted on the video surveillance at the Hotel, I am satisfied that she could not have stood or walked without Mr. Jajja's support. Her physical presentation in the roughly 12 minutes between getting into the taxi and entering the hotel room is consistent with what Mr. Rosland characterized as heavy or severe intoxication, the highest level in his hierarchy.
- [115] [Name of witness redacted]'s evidence of [name of complainant redacted]'s condition shortly after midnight when [name of complainant redacted] left the nightclub with Mr. Jajja does not detract from this conclusion. It is inconsistent with the clear and strong evidence that [name of complainant redacted] was very intoxicated by the time she got into the taxi at 1:14 a.m. There is no credible evidence that [name of complainant redacted] did not ingest any intoxicating substance after leaving [name of nightclub redacted] and before getting into the taxi. For the reasons I have already expressed, I do not accept Mr. Jajja's evidence that she did not. While I cannot find that she did ingest anything else, the possibility that she did weakens the probative value of [name of witness redacted]'s observations of her condition around midnight. Even if [name of complainant redacted] did not ingest any intoxicating substance after leaving the nightclub, I am satisfied by Mr. Rosland's evidence that her alcohol absorption would have peaked about 30 minutes after her last drink, almost certainly after her interaction with [name of witness redacted].
- [116] As I have said, intoxication alone, even severe intoxication, does not equate to incapacity, nor does absence of memory. Evidence of specific acts or utterances by the complainant that suggest the complainant had an operating mind, was capable of making decisions, or was in control of her actions, may give rise to a reasonable inference that she was not incapable, while evidence suggesting a loss of awareness may properly ground a finding of incapacity.

- [117] In this case, there is no evidence that I accept of any acts or utterances by [name of complainant redacted] from about 1:14 a.m. when she got into Mr. Minhas' taxi that suggests she had an operating mind, was capable of making decisions, or was in control of her actions. Defence counsel submitted that [name of witness redacted]'s observations of [name of complainant redacted] outside the nightclub shortly after midnight raise a reasonable possibility that [name of complainant redacted] was capable of consenting even though she was in an alcohol-induced blackout. However, for the reasons I have already expressed, little if any weight can be given to [name of witness redacted]'s observations of [name of complainant redacted] around midnight.
- [118] There is a lot of evidence that, when taken together, suggests a lack of awareness on [name of complainant redacted]'s part from the time she got into Mr. Minhas's taxi to the time she entered the hotel room.
- [119] First, I have found that [name of complainant redacted] was severely intoxicated when she entered the room and, according to Mr. Rosland, severe intoxication is correlated with cognitive impairment. Second, she was unmindful of her personal belongings. She left her coat at [name of nightclub redacted] and Mr. Jajja carried her purse as they moved across the hotel parking lot. Third, she did not assert any control over the course of events as they were unfolding. It was Mr. Jajja who hailed the taxi, told [name of complainant redacted] it was time to go, instructed Mr. Minhas, booked the hotel room, paid for the cab, directed [name of complainant redacted] to get out of the cab, and guided her across the parking lot towards the room. Fourth, [name of complainant redacted] was unresponsive to stimuli. She did not respond to several texts and phone calls from [name of witness redacted], [name of witness redacted], and [name of witness redacted]. She did not get up off the ground on her own when Mr. Minhas stopped the taxi. She did not get out of the taxi on her own at the Hotel. Fifth, her conduct was irrational in that she repeatedly said no, no, no, when Mr. Jajja told her to get out of the taxi, but then she allowed herself to be guided out by him anyway. Sixth, there is evidence that she was unaware of her surroundings or where she was going. It appeared to Mr. Minhas that she did not know where she was and from the video surveillance outside the hotel it is apparent that she had to be propelled or guided across the parking lot towards the room.
- [120] For these reasons, I am satisfied beyond a reasonable doubt that at the time [name of complainant redacted] entered the hotel room she was severely incapacitated. The final question is whether I am satisfied beyond a reasonable doubt that she was still incapable when the sexual contact occurred. In other words, is it rationally possible that [name of complainant redacted] regained capacity by the time the sexual contact started?

- [121] The only evidence of when the sexual contact commenced is Mr. Jajja's evidence. As I have already explained, it was in his interest to claim that there was a gap in time between entering the room and commencing the sexual activity. Accordingly, I find that the latest the sexual contact commenced was about 45 minutes after [name of complainant redacted] entered the room. Is it rationally possible that she regained capacity within about 45 minutes?
- [122] There is no direct evidence that I accept of [name of complainant redacted]'s condition after she entered the hotel room. However, as I have explained, there is overwhelming evidence that she was severely intoxicated and severely incapacitated when she entered the room. Common sense and human experience satisfies me that her condition would not have improved to any material extent within 45 minutes. That common sense conclusion is reinforced by Mr. Rosland's evidence, and leaves me with no reasonable doubt that she did not regain capacity within about 45 minutes of entering the room.
- [123] From Mr. Rosland's evidence as a whole, I am satisfied that a 125 pound female, with the drinking experience of a social drinker and a blood alcohol concentration of about 200 mg/dL, would be heavily to severely intoxicated. He said he would not expect someone with a blood-alcohol concentration of 200 mg/dL to experience a marked improvement in their condition within an hour. He said he would expect such a person to remain heavily intoxicated an hour later. The evidence does not permit me to make any finding about [name of complainant redacted]'s actual blood-alcohol concentration, but Mr. Rosland's evidence as a whole supports the common sense conclusion that someone who is severely intoxicated would not experience a marked improvement within an hour.
- [124] In considering whether the evidence permits an inference other than guilt, I have considered the submission that Mr. Jajja's conduct after the sexual contact, specifically, that he left the room and went to the reception desk twice, returned to the room twice, and at one point turned the room light on, is inconsistent with someone who has just committed a sexual assault. I do not agree. I have rejected Mr. Jajja's evidence about [name of complainant redacted]'s condition at the time. His conduct after the fact is equivocal and does not raise a reasonable doubt about whether [name of complainant redacted] was incapable of consenting.
- [125] In summary, the only rational inference available on the evidence I accept is that [name of complainant redacted] was still incapable when the sexual contact occurred. I am satisfied beyond a reasonable doubt that at the time of the sexual contact, [name of complainant redacted] was not capable of providing subjective consent because she was not capable of understanding the physical act, that it was sexual in nature, who she was with, or that she had the choice to refuse to participate. All the elements of the offence have been established beyond a reasonable doubt.

Verdict

[126] For these reasons, I find Mr. Jajja guilty of sexually assaulting [name of complainant redacted] on October 1, 2016.

"Warren J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/18/2021BCSC1805cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-jajja-2021>

Prepared on 28 October 2026 · Esheria