

CANADA / JUDGMENT

R. v. Lavergne-Bowkett

2013 BCSC 1737

COURT

Supreme Court of British Columbia

DECIDED

21 June 2013

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

2013 BCSC 1737 R. v. Lavergne-Bowkett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lavergne-Bowkett,

2013 BCSC 1737

Date: 20130621

Docket: 26095

Registry: Vancouver

Regina

v.

Avery Paul Lavergne-Bowkett

Restriction on Publication: Pursuant to 486.4 C.C.C.

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment

Counsel for the Crown:

D. Boblin

Counsel for the Accused:

G.P. Barnes

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 8 - 12 and 16, 2013

Place and Date of Judgment:

Vancouver, B.C.

June 21, 2013

Introduction

- [1] THE COURT: Mr. Lavergne-Bowkett pleads not guilty to a two-count indictment. The first count is that on or about December 7, 2009, at Vancouver, British Columbia, he sexually assaulted A.B., causing bodily harm to her, contrary to s. 272(2)(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The second count is that on the same date and in the same place, with the intent to enable himself to commit sexual assault, he attempted to render A.B. insensible by choking her, contrary to s. 246(a) of the Code.
- [2] There is no issue regarding identity. There is no dispute that the accused touched the complainant and that the touching was of a sexual nature. The issues are whether the complainant consented or whether the accused had an honest but mistaken belief that the complainant communicated consent to engage in the sexual activity.

Legislation

- [3] The Code provides:

Assault

265. (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;

Application

- (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Consent

- (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
- (a) the application of force to the complainant or to a person other than the complainant;

- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

Accused's belief as to consent

- (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Sexual assault with a weapon, threats to a third party or causing bodily harm

272. (1) Every person commits an offence who, in committing a sexual assault,

- (b) threatens to cause bodily harm to a person other than the complainant;
- (c) causes bodily harm to the complainant; or
- (d) is a party to the offence with any other person.

Meaning of "consent"

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

Where no consent obtained

- (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
 - (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (b) the complainant is incapable of consenting to the activity;
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (2) not limiting

- (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from the accused's
 - (i) self-induced intoxication, or
 - (ii) recklessness or wilful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Overcoming resistance to commission of offence

246. Every one who, with intent to enable or assist himself or another person to commit an indictable offence,

- (a) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance, or
- (b) administers or causes to be administered to any person, or attempts to administer to any person, or causes or attempts to cause any person to take a stupefying or overpowering drug, matter or thing,

is guilty of an indictable offence and liable to imprisonment for life.

Elements of the Offence

- [4] In accordance with s. 265(1)(a), a person commits an assault when he intentionally applies force to another person, directly or indirectly, without the consent of that other person. The subsection applies to all forms of assault, including sexual assault.
- [5] Sexual assault is not expressly defined in the Code. The offence comprises an assault committed in the circumstances of a sexual nature, such that the sexual integrity of the complainant is violated.
- [6] Section 272(1) establishes that every person commits an offence who, in committing a sexual assault, causes bodily harm to the complainant.
- [7] The actus reus of sexual assault is established by proof of three elements:
 - 1. touching;
 - 2. of a sexual nature; and

3. the absence of consent.
- [8] The first two elements are established on an objective standard. The absence of consent is subjective and is to be determined by reference to the complainant's objective internal state of mind towards the touching at the time it occurred.
- [9] Sexual assault is a crime of general intent. The Crown need not prove that Mr. Lavergne-Bowkett had any mens rea regarding the sexual nature of his behaviour. Sexual assault does not require sexuality or sexual gratification. The Crown must prove that the accused intended to touch the complainant in order to satisfy the basic mens rea requirement.

Consent

- [10] The mens rea of the offence is established when the accused knew that the complainant was not consenting to the sexual act in question or was reckless or wilfully blind to the absence of consent.
- [11] The accused may raise the defence of honest and mistaken belief if he believed that the complainant communicated consent to engage in sexual activity. There are limits on cases where the accused may rely on this defence in accordance with s. 273.1(2) and s. 273.2, and I am referring to *R. v. J.A.*, [2011] 2 S.C.R. 440 at para. 24.
- [12] The limits on mistaken belief and communicated consent include consent to the specific activity in accordance with s. 273.1(2)(d), consent to continue in accordance with s. 273.1(2)(e), and mistaken belief based on self-induced intoxication, recklessness or wilful blindness, or failure to take reasonable steps to ascertain consent, s. 273.2.
- [13] Subsections 273.1(2)(d) and (e) provide that if the complainant expresses, by word or conduct a lack of agreement, no defence of mistaken belief will be available. It is an error of law for the accused to believe that the complainant is consenting after she expresses a lack of agreement, referring to para. 40 of *J.A.*
- [14] Section 273.2 describes where belief in consent is not a defence. The subsection does not require the accused to take all reasonable steps, but it does require the accused to act as a reasonable person would in the circumstances by taking reasonable steps to ascertain whether the complainant was consenting.
- [15] Ambiguity is not consent. The accused is not entitled to take ambiguity as the equivalent of consent. Those reasonable steps must be taken at the time of the activity, referring again to *J.A.* at para. 43.

- [16] Mistaken belief in the communication of consent, like any other defence, must be considered by the trier of fact, if the evidence put forward is such that, if it is reasonably believed by a reasonable jury, properly charged, could have acquitted: *R. v. Cinous*, [2002] 2 S.C.R. 3. An air of reality requires evidence of reasonable steps by the accused to ascertain whether the complainant was consenting.
- [17] The air of reality test requires the court to assess whether, on all the evidence, the accused has met the evidential burden that a real issue exists. The court must consider whether the evidence is reasonably capable of supporting the inference the accused wishes the court to draw.
- [18] To be legally effective, consent must be freely given. Thus, even if the complainant consented or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question which factors prompted her apparent consent. The Code defines a series of conditions under which the law will deem the absence of consent of assault, notwithstanding the complainant's ostensible consent or participation. Section 265(3) provides that submission by reasonable force, fear, threats, fraud, or the exercise of authority is ineffective. The concern is whether the complainant made up her mind about the conduct in question. In accordance with s. 265(3)(b), there is no consent as a matter of law when the complainant believes that she was choosing between permitting herself to be touched sexually or risking being subject to the application of force.

Burden of Proof and Credibility

- [19] In every charge under the Code, the Crown must prove the elements of the case and disprove any available defence beyond a reasonable doubt.
- [20] Reasonable doubt was defined by the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36, where the Court provided a summary of how the definition of reasonable doubt should be explained:
- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
 - the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
 - a reasonable doubt is not a doubt based upon sympathy or prejudice;
 - rather, it is based upon reason and common sense;
 - it is logically connected to the evidence or absence of evidence;
 - it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and

· more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[21] When the accused testifies, the court must consider R. v. W.(D.), (1991), 63 C.C.C. (3d) 397 (S.C.C.) instruction:

1. if you believe the evidence of the accused, you must acquit;
2. if you do not believe the testimony of the accused but were left in a reasonable doubt, you must acquit;
3. even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the balance of evidence you do accept, you are convinced beyond a reasonable doubt by the evidence of the guilt of the accused; and
4. after careful consideration of all the evidence you are unable to decide whom to believe, you must acquit.

Summary of the Evidence

[22] A.B. and Mr. Lavergne-Bowkett were students in the same course at the same college that met Monday evenings. They were friendly. Before December 7, 2009, they had socialized once with a group of others.

[23] December 7, 2009, was the last day of classes for the course. The complainant and Mr. Lavergne-Bowkett, along with other students, planned a celebration. The group planned to go to the Roxy night club on Granville Street in Vancouver. Mr. Lavergne-Bowkett was employed there as a DJ. The complainant understood that Mr. Lavergne-Bowkett had asked his boss to allow their group into the night club without a cover charge.

[24] After the class, A.B. and Mr. Lavergne-Bowkett drove to Vancouver with others in different cars. The first stop was a liquor store. The next stop was Mr. Lavergne-Bowkett's apartment, where the group drank and ate pizza. While they were at the apartment, Mr. Lavergne-Bowkett was in the kitchen on the phone for part of the time. The complainant formed the impression that Mr. Lavergne-Bowkett was speaking with his girlfriend and that they were fighting.

[25] After a few hours, the group left the apartment for the Roxy, again in separate vehicles. A.B. and Mr. Lavergne-Bowkett drove downtown with others to meet at the Roxy.

[26] There the group had drinks. After about an hour, everyone left but A.B. and Mr. Lavergne-Bowkett. Mr. Lavergne-Bowkett asked A.B. if she wished to stay for another drink. She agreed. She says that she did not wish to stay, but she did because she felt bad for Mr. Lavergne-Bowkett. She understood that he had had a fight with his girlfriend and that he had gone to a lot of trouble talking to his boss and getting the group into the Roxy without having to pay a cover charge. Mr. Lavergne-Bowkett says that A.B. did not appear reluctant to stay.

- [27] The accused gave A.B. another drink and then they went into the DJ booth, which is a raised platform over the dance floor which is surrounded by half walls. It is a small space.
- [28] Mr. Lavergne-Bowkett stood behind A.B. in the booth. She says that Mr. Lavergne-Bowkett began rubbing his pelvis against her back. Mr. Lavergne-Bowkett says that they were rubbing up against each other, acknowledging that he instigated this. A.B. says that Mr. Lavergne-Bowkett was also trying to put his hands down her pants from the front. She does not recall Mr. Lavergne-Bowkett saying anything. She says that she said out loud several times to him, "No, you have a girlfriend and I have a boyfriend and this can't happen."
- [29] Mr. Lavergne-Bowkett disagrees that he tried to put his hands down her pants. He says he did not do that, nor is it something that he would do. He says that A.B. did not ask him to touch her, but he assumed it would be okay. He says that she did not say yes.
- [30] The accused says that A.B. said she had a boyfriend. He says he responded by saying, "Sorry", and backed off initially, and then persisted in making sexual advances to A.B. Mr. Lavergne-Bowkett says she did not say no. Rather, she said, "We shouldn't do this because I have a boyfriend." The accused said he apologized, not for what he was doing, only that he did not mean to come on so strong.
- [31] The accused says that based on the contact he had with A.B. in the DJ booth and her reaction, there was no basis for him to conclude that she would not want to have sex with him. He describes A.B. as flirting and smiling.
- [32] When A.B. said she was ready to go home, Mr. Lavergne-Bowkett suggested that they have another drink at her apartment. She agreed. There was no discussion of anticipated sex in the apartment at that time. The accused acknowledges that sex could have been on his mind, but he did not assume that A.B. inviting him back to her apartment meant that he could have sex with her at that time.
- [33] The complainant's apartment was close to the Roxy. The complainant says that they left by the front door. The respondent says they left by the back door. In any event, they walked to A.B.'s apartment and took the elevator up to the floor where her apartment is located.
- [34] The complainant says that when they got to the apartment door or inside the apartment, rather, she realized that her place was a mess and she started cleaning it up and calming her dog down. She says that Mr. Lavergne-Bowkett went to the kitchen and fixed himself a drink.
- [35] A.B. says that when she walked by the kitchen, Mr. Lavergne-Bowkett grabbed her by the arm and flung her against the counter. She says that some of her martini glasses were smashed as a result. She says that Mr. Lavergne-Bowkett said to her, "Sorry, you must have been drunker than you thought."

- [36] The accused says that he and A.B. started kissing and touching in the kitchen. The accused says he leaned in first and he initiated the contact. He says there was no conversation about having sex at that time.
- [37] The complainant says that the first sexual contact was in the office of her apartment, which is across the hall from the kitchen. She says she went into the office to look for something and that Mr. Lavergne-Bowkett followed her in. He was between her and the door. She says he was trying to kiss her and trying to get her to put her hands down his pants. The complainant says that she said "no" and pushed him away. She says Mr. Lavergne-Bowkett said, "Sorry, I don't know what was wrong with me, I'm not one of those guys " The complainant said that she said "no", and repeated, "You have a girlfriend and I have a boyfriend. This can't happen."
- [38] The complainant says that Mr. Lavergne-Bowkett managed to get his hands down her pants. She pushed them away and noticed that he had blood on his hands. The complainant could feel wetness on her jeans and on her legs from the crotch down through the thighs and on the back of her legs. She said she did not feel pain in her vaginal area.
- [39] The accused says he did not try and put his hands down A.B.'s pants in the office. They were kissing in the office. He does not have a full, clear recollection of what occurred in the office, but says that he would have remembered something severe like the vaginal injury. The accused was not aware that the complainant was bleeding from her vagina at that time. He did not say when he realized that.
- [40] The accused says that while they were in the office, A.B. did not show any resistance to him. He agrees that she said, "We shouldn't do this, I have a boyfriend." He says that he did not take that as a "no", as she was kissing him back. She says he never pushed him away or said, "No, I don't want this." The accused says, "We were making out and it was mutual. I was not using force or holding onto her to make her kiss me."
- [41] The complainant and Mr. Lavergne-Bowkett agree that they moved to the bedroom from the office, but neither can recall how that occurred.
- [42] The complainant says she remembers that Mr. Lavergne-Bowkett was on top of her on her bed, and he had both hands around her neck and was squeezing her throat and pushing her down on the bed. She says she was pinned to the bed. She says she saw stars and her vision was starting to cloud over. She said she could not move her torso or her head. She could also not say anything. She could not breathe and she was afraid that she would pass out. The complainant says that Mr. Lavergne-Bowkett started to get, in her words, "really rough" and would continue to choke her, slap her, and pull her hair, as he was trying to pull off her shirt and her pants, and he was slapping, choking, and pulling her hair. It was, in her words, "really rough and really forceful". The complainant says that she remembers Mr. Lavergne-Bowkett forcing his penis into her vagina and that it hurt in her vaginal area. She says that Mr. Lavergne-Bowkett still had his hands around her neck. The complainant says she decided to play along, thinking that if Mr. Lavergne-Bowkett ejaculated, he would then

leave. She says she was too scared to do anything else.

- [43] The accused says that when he and A.B. were in the bedroom, she did not demonstrate any reluctance. He says he does not recall every detail, including how their clothes came off. He says that she responded to him in a mutual way. He says he was not restraining her and was not holding her down. He says that he was not choking A.B. or engaging in rough sex. The accused says he did have his hands on the top of A.B. shoulders during sexual intercourse, but they were not around her neck.
- [44] Mr. Lavergne-Bowkett says that rough or violent sex is not what he likes to do. He says, "I had a girlfriend who was interested in it. It is not my go-to sex. It does not turn me on that much." He did not suggest that he engaged in rough sex with A.B.
- [45] Mr. Lavergne-Bowkett says that A.B. said, "I really shouldn't be doing this - I have a boyfriend." The complainant says that Mr. Lavergne-Bowkett found a vibrator she kept in a table next to her bed. She says he was holding it and using it to hit her in the face. She says he shoved it down her throat and put it inside her vagina while he was choking and slapping her and pulling her hair. The accused says he did not make A.B. perform oral sex. He did not grab her head or force her onto his penis. He did not use the vibrator to hit her in the face. He says that A.B. showed no reluctance to oral sex, nor did she say she did not want to. He says he did not use the vibrator as a weapon and did not assault her with it.
- [46] A.B. says Mr. Lavergne-Bowkett asked whether she had anything sexy to put on. She had a nurse's outfit that she said she used at Halloween. She says that he told her to put it on and she did and tried to play along, because, she said, she did not want to get hit again. She says that the accused also found her orange lace nightgown and that he threw it at her and told her to put it on.
- [47] In regard to the nurse's outfit and the orange nightgown, Mr. Lavergne-Bowkett says he could see them in A.B.'s closet from the bed. He suggested that she put on the nurse's outfit and then the orange nightgown, and he suggested it for sexual arousal. He says she did not show any resistance. She put it on, and they had sex again while she was wearing the nurse's outfit and the orange nightgown.
- [48] The accused says that the vaginal injury occurred during intercourse. He says that this has occurred with previous girlfriends who complained of vaginal bleeding and soreness. He says that he believes it was caused because of the size of his penis.
- [49] At some point, the complainant and Mr. Lavergne-Bowkett agree that they moved into the living room. Mr. Lavergne-Bowkett played A.B.'s guitar and they watched TV together. The complainant says that Mr. Lavergne-Bowkett started, in her words, "sexual stuff" on the couch again. She got up and went to the bathroom. She says he followed her into the bathroom, pushed her over the sink, and put his penis in her vagina from behind her.

- [50] A.B. says that while they were on the couch, Mr. Lavergne-Bowkett kept putting his penis in her vagina. She says it was really hurting and she was bleeding, and that she asked him to stop because it was hurting her. She says Mr. Lavergne-Bowkett would listen and pull back, and then grab her by the hair and make her give him oral sex with his penis in her mouth.
- [51] The complainant and Mr. Lavergne-Bowkett say they had sexual intercourse several times. The complainant said she did not resist as she just wanted "it to be over".
- [52] The accused says that A.B. was responsive throughout the time he was in her apartment. She did not cry. He says that A.B. said she had a boyfriend, but he did not consider that to be a no. He thought she was suggesting that this might not be the greatest idea for them to be cheating, but says, in his words, "She was not pitching a no to me."
- [53] The accused says he was not rough with A.B. He says that she was not resistant to his advances, sexual intercourse or oral sex, or to the sexual intercourse in the bathroom.
- [54] The complainant and the accused say that as he was put on his jeans to leave, Mr. Lavergne-Bowkett noticed blood on his jeans. The complainant says that Mr. Lavergne-Bowkett said, "Where did this come from?" She responded, "You scratched me", to which he responded, "I don't have nails." Mr. Lavergne-Bowkett says he is a habitual nail biter.
- [55] The complainant says that she thought Mr. Lavergne-Bowkett was angry about the blood on his jeans. She said she offered to clean it up or buy new jeans. They tried to rub it out with a laundry additive.
- [56] The accused says that when they were at the door as he was leaving in the morning, A.B. said, "I don't want you to tell anybody at the school and I won't tell anyone either." The complainant says she was confused and scared and did not want him to tell people that she wanted to have sex with him and that they had had sex. The accused says that he understood from those words that A.B. did not want the other classmates to know that they had "hooked up". He says they hugged and kissed and said goodbye and that it was mutual.
- [57] The complainant says that after Mr. Lavergne-Bowkett left, she called her boyfriend at work and her best friend. She did not tell either of them what occurred. She says that she wandered around in a daze. She had a shower and tried to watch TV. She washed her jeans in the washing machine. She says that it was painful to go to the bathroom, because she described a piece of skin hanging out of her vagina, which she said hurt and was bleeding. She says her boyfriend called her back and said words like, "I will get this guy. I will kick his ass." The complainant was disappointed in her boyfriend's response. She then went to see a friend whom she told of the events with Mr. Lavergne-Bowkett.

- [58] The complainant also spoke to a counsellor before she went to see the police on the evening of December 8, 2009. When she saw the police, she gave a statement to Constable Savage, which Constable Savage followed up by questions and answers. That statement is in written form. She then went to the Vancouver General Hospital where Constable Savage met with her. A.B. was examined there by Dr. Carolyn Hall.
- [59] On December 9, 2009, A.B. re-attended at the police station and gave another statement that was recorded on video and transcribed. On that same day, Constable Savage and her partner went to the apartment. They seized the nurse's outfit, the orange nightgown, and the sheets. The nurse's outfit and the sheets had blood on them. A.B. says that she offered her jeans which she had washed but, she says, still contained bloodstains at the crotch. The police did not take them.
- [60] The accused was arrested in February 2010. He said two months had elapsed since he and A.B. had had sex in her apartment and that as a result he does not have an explicit recollection of everything that occurred that night. The accused explains that he remembers being at the complainant's apartment and having sex, but there was nothing particularly memorable about the night and he did not recall the details until he was required to after his arrest two months later.
- [61] The nurse's outfit and the orange nightgown were analyzed by the RCMP forensic lab in Ottawa. They contained DNA of both the complainant and the accused.

Medical Evidence

- [62] Dr. Carolyn Hall was the physician who performed the sexual assault examination of A.B. She was qualified as an expert in family medicine and the forensic examination of sexual assault patients, including whether injuries are consistent or inconsistent with consensual or non-consensual sexual activity.
- [63] Dr. Hall is licensed to practice in British Columbia. She has been an examiner with the sexual assault service associated with the Emergency Department of Vancouver General Hospital since 1999. She took training then and since regarding sexual assault examinations three or four times a year. She has attended to patients for sexual assault care on at least 200 occasions and has examined other patients regarding sexual assault on 200 or 300 occasions where they have not been referred by the sexual assault service.
- [64] The defence objected to Dr. Hall giving evidence in respect of consensual or non-consensual sexual activity. I did not uphold that objection. Dr. Hall's evidence addresses whether the medical evidence is consistent with consensual or non-consensual sexual activity. It was specifically based on a female's physiological response to sexual activity.
- [65] I determined that Dr. Hall was not providing an opinion about consent; that is the ultimate issue which I must decide.

[66] Dr. Hall examined A.B. at 2:30 a.m. on December 9, 2009. She obtained A.B.'s consent and examined her from head to toe. She noted the following:

1. On the head, [A.B.'s] scalp was tender across the crown and the occiput, which is the back of the head; that is, she responded as though withdrawing to pain when palpitated in those areas.

[67] Dr. Hall says that the tenderness was consistent with her hair being pulled and with her head being pushed down against a surface.

2. Her ears were tender; particularly at the top end of the pinna, (the top part of the ear).

[68] Dr. Hall says this is consistent with pulling and pushing against her ear.

3. On [A.B.'s] left neck, there was a small, pale-green tender spot, round in shape, approximately 1 x 1cm.
4. On [A.B.'s] left neck towards the Adam's apple were two small, oval, pale green tender spots, approximately 0.5 x 1 cm in diameter.

[69] Dr. Hall says these areas were extremely tender and were caused by significant force. The mark on the right neck was well defined with marks on the left neck, and showed a pattern that was consistent with a right hand holding her neck from the front with a thumb on the right and two fingers on the left.

5. [A.B.] was generally sore when palpated on the shoulders; that is, she withdrew as though to pain.
6. A.B. also appeared tender across the entire area of both breasts; that is, she withdrew as though to pain when palpitated in that area.
7. On [A.B.'s] left chest below the ribcage, that is just above the waistline, she was very tender along the approximate location of the 12th rib and reddened in that area.
8. On [A.B.'s] left arm proximal, that is towards the shoulder, to the elbow on the inside surface was a small blue-red bruise, tender to palpitation, approximately 1 x 1 cm.

[70] Dr. Hall says that the mark on the arm was also discrete and well demarcated, and consistent with a right-hand grip, particularly a thumb mark.

9. On [A.B.'s] left inner thigh, approximately 6 cm below the pubic area, was an oval, vertically oriented bruise, bluish and pink, tender to palpate. Distal, that is towards the foot, from there, approximately 3 cm and further toward the middle of the left leg, was another bruise a bit larger, approximately 4 x 3 cm, tender to palpation.
10. On [A.B.'s] right leg, on the front, approximately 7 cm below the pubic area, there were three or four horizontally oriented scrapes, the largest measuring about 10 cm in length and excoriated or scraped off in the middle. The scrapes run parallel.

11. On the inside of [A.B.]'s right thigh, above her knee, almost at the top of the knee, was found a pink-blue, tender round bruise approximately 1 x 1 cm. Towards the back of the leg from there, but still on the inner thigh, at approximately 2 cm above the inner knee, was a 3 x 3-cm, black and blue very tender lesion.

[71] In respect of items 9, 10, and 11, Dr. Hall notes that these marks are discrete and tender, and A.B. found them to be painful on palpation. Dr. Hall says these marks are consistent with her thighs being pulled apart, either by hands, a knee or knees, or with an object.

[72] Dr. Hall also performed an anogenital examination. She states:

Speculum examination revealed a large torn tender area at the entrance of the vagina at the six o'clock position. That is, if the entrance to the vagina were to be viewed as the face of a clock, with the patient lying on her back. The tear had an area of thrombosis, that is a blood clot within it, and a loose flap of skin measuring approximately 2 x 1.5 centimetres.

[A.B.] was extremely tender throughout the genital exam and found it difficult to continue.

[73] Dr. Hall provides a summary:

The findings of the thrombosed tear at the entrance to the vagina, tenderness and bruises on the neck, both legs, breasts, ribs, pelvic area, and head are consistent with significant force being applied to those areas, including but not restricted to hair pulling grabbing, punching, pressure against or onto the vagina, and holding down.

[74] Dr. Hall says that A.B. did not report that she was punched, and in her evidence A.B. did not say that she was punched.

[75] Dr. Hall explains her method of differentiating between non-consensual and consensual sexual activity. In consensual sex there are no signs of trauma. With non-consensual sex, there may be a tear at the entrance of the vagina and bruising and tenderness, as well as injuries to the vagina and the cervix. Dr. Hall considers whether the physical injuries are consistent with force or non-force. She says that if a woman says her vagina is sore and admits to a lot of sex, she will find that there is tenderness, redness, and swelling or bruising, and possibly discharge. However, Dr. Hall states, the vagina is not easily injured by sexual activity if the woman is aroused. If the woman is aroused, lubrication is part of the process and the vagina becomes longer, wider, and looser.

[76] Dr. Hall says that sometimes she cannot distinguish between non-consensual sex and rough sex, although generally parties who engage in rough sex take steps to avoid injury. Dr. Hall says that A.B.'s vaginal injury is not consistent with consent, even to rough sex. Dr. Hall considers that it is possible that A.B. did not feel pain when the vaginal injury occurred. She says that the injury would have bled briskly.

[77] Dr. Hall says the injury to the vagina and the thrombosis could have been caused by a fingernail or a foreign object applied with significant force. While Dr. Hall gave her evidence, Mr. Lavergne-Bowkett showed his fingernails to her. Despite having bitten

fingernails, Dr. Hall's opinion is that he could have caused the injury to the vagina and the thrombosis. She explains that nail biters develop a hard ridge, like a callous, at the end of their fingers, and that the vaginal tear was possible with the end of Mr. Lavergne-Bowkett's fingers. It is also possible that it resulted from his putting his hands down A.B.'s pants; the tighter the pants, the more likely the tear.

- [78] Dr. Hall says a large penis can cause soreness and possible redness to a woman's vagina, but with lubrication and enlargement of the vagina through arousal, it is rare for such an injury to result from a man's penis being too large. She says that lubrication can become less over repeated intercourse, and a woman becomes more exposed to redness and tenderness, and in those circumstances injury is possible.

Analysis of the Evidence

- [79] In cases such as this one where the complainant testifies and the accused testifies and denies the complainant's allegations, the court must consider the following factors in relation to that evidence: analysis of the testimonial factors, sincerity, opportunity to observe, ability to perceive, use of language, prior statements and whether they are consistent or inconsistent, independent evidence confirming or contradicting the witnesses, and demeanour. With those tools, the court must consider whether the complainant's and the accused's testimony is inherently probable or improbable.

The Complainant's Evidence

- [80] I will first comment on the complainant's ability to perceive the situation and make observations. The complainant says she cannot remember each event. She describes going numb and choking. She says that she did not put up any resistance to the accused's advances.
- [81] The accused points to inconsistencies in her evidence. He says that she minimized the amount she had to drink. She could not say how many drinks she had and how many drinks were poured. He says the evidence that the complainant gave about her jeans is inconsistent in respect of whether she offered them to the police or not. The accused argues that she minimized her relationship with him. He says that she was inconsistent about whether she returned to her bedroom after the police left. He points to the facts that the complainant did not seek help from the neighbours on her floor or in the apartment building during the events that she described with Mr. Lavergne-Bowkett. She did not resist and did not go to the police until later, much later on December 8, 2009.
- [82] I have considered the inconsistencies in the complainant's evidence carefully. I consider that they are not significant. Whether she drank or how many drinks she had or how many drinks were poured in my view is irrelevant. There is no issue about whether the complainant was drunk or whether her ability to perceive events was diminished by alcohol. In respect of the evidence about her jeans and whether she offered them to the police or not,

it was a decision of Constable Savage as to what has evidentiary value and what has not, and Constable Savage determined what she would seize and what she would not. I do not find that the complainant minimized her relationship with the accused. She described them as being friendly at school and the accused did not suggest otherwise. Whether she returned to her bedroom after the police left or not is immaterial. The complainant said she was dazed after the events and after she met with the police. The fact that the complainant did not seek help from the neighbours, did not resist, or did not call police immediately are not factors which diminish her credibility. These are factors which are no longer considered necessary or relevant to the court's consideration to the complainant's credibility.

- [83] The complainant was cross-examined in respect of her prior statements. Some inconsistencies were exposed. None of them, in my view, undermine her credibility. For example, the complainant said in her evidence that she was choked multiple times. It was suggested to her that she had only mentioned that once in her statement to the police and not in the preliminary inquiry. In re-examination, it was demonstrated that she mentioned it more than once in her statements and also in the preliminary inquiry.
- [84] In respect of the complainant's demeanour, the court is cautioned to take great care in addressing this as a factor in credibility. Being a witness in court presents artificial circumstances. Some witnesses are more comfortable than others in giving evidence. I find that the complainant was firm, but not histrionic. There was nothing in her demeanour which diminished her credibility.
- [85] A.B.'s evidence is consistent with the medical findings of Dr. Hall. She says she noticed bleeding in the crotch area after Mr. Lavergne-Bowkett put his hands down her pants and touched her vagina. She did not feel pain right away, but there was quite a lot of blood. Dr. Hall confirmed that such a tear would not hurt at first and would bleed briskly. When they had sexual intercourse on the bed, there was blood, as there was on the nurse's outfit.
- [86] Dr. Hall's evidence is that the vaginal tear could have been caused by the ridges at the top of Mr. Lavergne-Bowkett's nails. Further, a vaginal tear demonstrates a lack of arousal in physiological terms; that is, a lack of lubrication and a lack of widening and loosening of the vagina. This latter feature is not dispositive of consent, but it is consistent with lack of consent.
- [87] Dr. Hall considers the tenderness and the bruises on the complainant's neck, legs, breasts, ribs, pelvic area, and head are consistent with significant force being applied to those areas, including but not restricted to hair pulling, grabbing, punching, pressure against or into the vagina, and holding down. A.B. describes those events having taken place, with the exception of punching.

The Accused's Evidence

- [88] In respect of his ability to perceive, Mr. Lavergne-Bowkett acknowledges that he has limited memory of the details of the event. He says that this is because two months elapsed between the event and his arrest, during which he did not think about the events in A.B.'s apartment. He had to go back and think about the details when he was arrested, and he could only remember some. He could not recall the chronology of events, including what activity, sexual or otherwise, occurred where and when. He could not recall how the complainant and respondent removed their clothing, how they got into the bedroom. He could not recall how many times they had intercourse or engaged in oral sex, or when he ejaculated, except when the complainant had the orange nightgown on.
- [89] I do not take anything from Mr. Lavergne-Bowkett's demeanour. He appeared to be as straightforward as possible, given the limits of his recollection. There were cases in cross-examination where he was asked for clarification of matters which should have been clear, questions about A.B.'s reluctance, resistance, and response, given that his entire defence depends on his assertion that A.B. consented, but he appeared confused about the questions. Nevertheless, I do not discount his evidence on that basis.
- [90] Mr. Lavergne-Bowkett's evidence regarding consent is not entirely contradictory of the complainant's. He says he heard the complainant say more than once, "We should not do this. I have a boyfriend and you have a girlfriend." He says he did not consider that to be a "no". He considered, in his counsel's description, that it was a matter open for negotiation. He suggests it is not usual for parties to sexual activity to discuss in advance whether it is okay. He did not ask the complainant if she wanted to have sex with him. He did not ask her if she wished to engage in oral sex. He says that he assumed that because she was responsive, not resistant, and showed no reluctance, that she consented to the sexual activity. He refers to his activities such as playing the guitar or watching TV, which, he says, demonstrate signs of consent. He says the complainant was responsive when they kissed goodbye.
- [91] I am not required to apply the W.(D.) test to this evidence. I accept the evidence referred to above. I will deal with whether this evidence demonstrates that the complainant was consenting or forms the basis of an honest and mistaken belief later in these reasons.
- [92] There are areas where Mr. Lavergne-Bowkett's explanations are at odds with the rest of the evidence. He says that it was the size of his penis which caused the vaginal tear. That explanation of the vaginal injury was, in Dr. Hall's opinion, not likely, and that the injury could have been caused by his calloused fingers. A.B. says she noticed blood from the time that they were in the office at the beginning of the events, and that the blood was on her jeans, on the sheets, on the nurse's outfit, and other places. The evidence supports that presence of blood. Mr. Lavergne-Bowkett apparently did not mention the blood until it appeared on his jeans which he put on in the morning. Before then, he could not remember any conversation about the blood, yet the evidence of the sheets and the nurse's outfit

demonstrate that A.B. was bleeding from her vagina throughout much of the sexual activity.

- [93] I find Mr. Lavergne-Bowkett's explanation as to the cause of A.B.'s vaginal tear to be lacking in credibility.
- [94] Mr. Lavergne-Bowkett states that he did not choke A.B. He says he placed his hands on her shoulders only. This is inconsistent with the marks observed by Dr. Hall on the complainant's neck, which Dr. Hall considered had been applied with significant force with the right hand. I am mindful of the accused's position that the complainant says that he used both hands around her neck, and that the marks are not consistent with both hands. However, it may be that the one hand was on the other hand, and that there were no marks demonstrated.
- [95] Mr. Lavergne-Bowkett says that he did not grab or slap the complainant, pull her hair, force her to have oral sex, or assault her with the vibrator. I find this to be inconsistent with the bruises and tenderness that Dr. Hall observed when she examined the complainant.
- [96] This evidence must be considered in accordance with the W.(D.) test. The test is to be applied to the totality of the evidence.
- [97] I do not believe Mr. Lavergne-Bowkett's evidence about the cause of the vaginal tear, as I have stated, nor do I believe his evidence that he did not choke, slap, grab, or pull A.B.'s hair or force her to have sex. The medical evidence is that the marks and tenderness on A.B.'s body were caused by the application of considerable force, consistent with A.B.'s version of events. I find Mr. Lavergne-Bowkett's account is inherently improbable, as it suggests that there should be no marks or tenderness at all on A.B.'s body.
- [98] Mr. Lavergne-Bowkett's counsel argued that the tenderness and marks resulted from rough sex. Dr. Hall's evidence does not support this, nor does the evidence of the accused, who said that he does not enjoy rough sex and he did not describe his activities with A.B as rough sex. I therefore cannot find that the markings on A.B.'s body were caused by rough sex.
- [99] As a result of all of the above, I am not left with any doubt about Mr. Lavergne-Bowkett's evidence.

Has the Crown Established Lack of Consent Beyond a Reasonable Doubt?

- [100] I must consider the complainant's subjective internal state of mind towards the touching at the time it occurred. In respect of this consideration, I find the complainant's testimony that she did not consent to be established beyond a reasonable doubt. I find that she said, "No, we should not be doing this," several times over the period from the time they were in the DJ booth at the Roxy to the time that they were in her apartment, and that she said that in order to discourage the accused's sexual advances. The accused denies that she said "no", but he agrees that she said, "We should not do this. I have a boyfriend and you have a girlfriend." A.B.'s statement in that regard cannot be construed as consent. Even if I accept the accused's view that it was open for negotiation, there is no evidence that there was any

negotiation. Mr. Lavergne-Bowkett says they did not have a conversation at any time about whether A.B. was consenting to sex. He also agrees that she did not say "yes" or words to that effect at any time. He judged her consent on her responsiveness and lack of resistance. As the Code prescribes and the cases support, not resisting is not consent.

Did the Accused have an Honest Belief that the Complainant Consented?

[101] The accused says he had an honest but mistaken belief in consent, and that the mens rea aspect of the offence has not been established. I will review the evidence in this context, first to consider whether the defence has an air of reality, and if it does, whether I am convinced beyond a reasonable doubt the accused did not have an honest but mistaken belief in consent.

[102] Section 265(3) of the Code defines conditions under which the law will deem the absence of consent or participation. These include submission by reason of force, fear, threats, fraud, or the exercise of authority. Section 273.1(1) prescribes that no consent is obtained where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity or to continue to engage in such activity. Section 273.2(a) says that it is not a defence to the charge where the accused's belief arose from his recklessness or wilful blindness, or at subparagraph (b) that the accused believes the complainant consented or the accused did not take reasonable steps in the circumstances to ascertain that the complainant was not consenting.

Is there an Air of Reality to this Defence?

[103] Mr. Lavergne-Bowkett asserts that he believed A.B. was consenting to the sexual activity, based upon her responsiveness and her lack of resistance. He acknowledges that she did not expressly agree to sexual activity and that from the outset she repeated, "We should not be doing this. I have a boyfriend and you have a girlfriend."

[104] In order to establish an air of reality, Mr. Lavergne-Bowkett must point to some evidence which realistically supports that defence. The evidence which he says supports the defence includes A.B.'s willingness to stay with him at the Roxy after the others left and after he began rubbing up against her; her agreement to his returning with her to her apartment; her cooperation in the sexual activity, including putting on the nurse's outfit and the orange nightgown; and the non-sexual events, such as watching TV and Mr. Lavergne-Bowkett playing the guitar.

[105] In my view, none of these features support an air of reality to the defence. I find that the accused's belief arose from his recklessness or wilful blindness, or that he did not take reasonable steps to ascertain that the complainant was consenting. He did not take, in my view, any reasonable steps to ascertain her consent.

[106] I have accepted the evidence of the complainant and the medical evidence of strong force being applied to her which caused tenderness and bruises, in particular the marks on her neck which are consistent with choking. This application of force and A.B.'s fear are deemed to be an absence of consent. These findings negate an assertion that Mr. Lavergne-Bowkett had an honest but mistaken belief in her consent.

[107] I find that there is no air of reality to this defence.

Is the Accused Guilty of Count 1?

[108] On the basis of the evidence of the complainant and the medical evidence, and in consideration of Mr. Lavergne-Bowkett's evidence and the application of the W.(D.) principles, I am convinced beyond a reasonable doubt by the evidence of the guilt of Mr. Lavergne-Bowkett on Count 1. The Crown has proved all the elements of the offence, including that there was unwanted sexual touching, and that the accused had the intention to touch, knowing or being reckless of or wilfully blind to the lack of consent by words and actions from the complainant.

Is the Accused Guilty of Count 2?

[109] I have found that Mr. Lavergne-Bowkett applied a strong force to A.B.'s neck which left bruises on her neck. I have accepted the complainant's evidence that this was part of the reason that she did not resist to the sexual touching by the accused. There is no evidence, however, that Mr. Lavergne-Bowkett had the intention of choking her to render her unconscious or incapable of resistance.

[110] I find the accused not guilty of Count 2.

"Gropper 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/13/17/2013BCSC1737.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-lavergne-bowkett-2013>

Prepared on 30 October 2026 · Esheria