

CANADA / JUDGMENT

## R. v. Leary

2024 BCSC 2103

### COURT

Supreme Court of British Columbia

### DECIDED

19 November 2024

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2024 BCSC 2103 R. v. Leary

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Leary,

2024 BCSC 2103

Date: 20241119

Docket: 113754

Registry: Kamloops

Rex

v.

**Gord James Leary**

This matter is subject to a publication ban imposed pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46. Identifying information has been removed from this version of the judgment to comply with the court order.

Before: The Honourable Justice B. Smith

Reasons for Judgment

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Place and Date of Trial:

Kamloops, B.C.

October 15-18, 2024

Place and Date of Judgment:

Kamloops, B.C.

November 19, 2024

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## Introduction

- [1] Gord James Leary is charged on a two-count indictment with two offences under the Criminal Code, R.S.C. 1985, c. C-46 [Code]: sexual assault, contrary to s. 271, (count 1); and assault by choking or strangling, contrary to s. 267(c) (count 2). On each count, the complainant is T.M.
- [2] The charges relate to events alleged to have occurred at Mr. Leary's residence late on the evening of March 5, 2022. It is alleged that during the course of what started as an unremarkable meeting between two friends, Mr. Leary sexually assaulted T.M. in a number of ways, and assaulted her by choking or strangling. The assaultive behaviour is alleged to have continued for some time, following which T.M. left Mr. Leary's residence and went home.
- [3] T.M. was the only witness at trial.
- [4] The issue on the charge of sexual assault is whether the Crown has proven that T.M. subjectively did not consent to the sexual activity in question. The issue on the charge of assault is whether the Crown has proven that the alleged assaultive activity occurred at all. In essence, defence submits I should reject T.M.'s evidence about the alleged offences.

## General Legal Principles

### Presumption of Innocence

- [5] The presumption of innocence is the first and most important principle of law applicable to every criminal case. Mr. Leary enters the proceedings presumed to be innocent, and the presumption of innocence remains throughout the case unless the Crown, on the evidence before me, satisfies me beyond a reasonable doubt that he is guilty.
- [6] Two rules flow from the presumption of innocence. One is that the Crown bears the burden of proving guilt. The other is that guilt must be proved beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

### Burden of Proof

- [7] The burden of proof rests with the Crown and never shifts. There is no burden on Mr. Leary to prove he is innocent. Mr. Leary does not have to prove anything.

## Reasonable Doubt

- [8] A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt which arises logically from the evidence or from an absence of evidence.
- [9] It is virtually impossible to prove anything to an absolute certainty, and the Crown is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. I must not find Mr. Leary guilty unless I am sure he is guilty. Even if I believe Mr. Leary is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to Mr. Leary and find him not guilty, because the Crown has failed to satisfy me of his guilt beyond a reasonable doubt.
- [10] The requirement of proof beyond a reasonable doubt applies to each of the essential elements of the offences. The Crown must prove that Mr. Leary did each of the elements that make up the offences. It does not apply to individual items of evidence. I must decide, looking at the evidence as a whole, whether the Crown has proved Mr. Leary's guilt beyond a reasonable doubt.
- [11] If I have a reasonable doubt about Mr. Leary's guilt arising from the evidence, the absence of evidence, or the credibility or reliability of one or more of the witnesses, then I must find him not guilty.

## Assessment of Credibility and Reliability

- [12] The court's fact-finding role requires an assessment of two things. First, a witness's credibility; second, the reliability of their evidence.
- [13] The assessment of a witness's credibility and the reliability of their evidence requires me to consider factors such as: the witness's ability and opportunity to observe events; the firmness of their memory; their ability to resist the influence of interest to modify their recollection; whether their evidence harmonizes with independent evidence that has been accepted; whether they change their testimony in direct and cross-examination; whether their testimony seems unreasonable, impossible or unlikely; whether they have a motive to lie; and their demeanour generally: *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 B.C.C.A. 296.
- [14] Credibility assessments may not be purely intellectual and may involve factors that are difficult to verbalize: *R. v. M.(R.E.)*, 2008 SCC 51 at para. 49. They must not be based on emotional evaluations, stereotypes, guesswork, or impermissible reasoning, but grounded in reason and made as objectively as possible: *R.C.T. v. A.K.T.*, 2023 BCSC 654, at para. 11. I may believe some, all, or none of a witness's evidence: *R. v. B.T.*, 2020 BCSC 1185, at para. 42.

- [15] I must be cautious when considering demeanour, because I have no baseline for assessment, and courtrooms can be unfamiliar and intimidating environments, to which people react differently: B.T. at para. 43.
- [16] It is with these general principles in mind that I consider the evidence.
- [17] I will begin by identifying the position of the parties. I will then summarize the evidence. I will then discuss the applicable Code provisions and legal principles regarding the offence of sexual assault, the defence of honest but mistaken belief in communicated consent, and the offence of assault by choking or strangulation, before turning to my analysis and determination of the issues.

#### Position of the Parties

##### Crown

- [18] Crown submits:
1. T.M.'s evidence proves both charges beyond a reasonable doubt;
  2. nothing in T.M.'s evidence raises a reasonable doubt;
  3. Mr. Leary knew T.M. did not consent; and
  4. Mr. Leary did not have an honest but mistaken belief in communicated consent.

##### Defence

- [19] Regarding the charge of sexual assault, defence submits Crown has failed to prove an essential element of the actus reus of the offence; namely, that T.M. subjectively did not consent to the sexual activity in question.
- [20] Regarding the charge of assault by choking or strangling, defence submits Crown has failed to prove that the alleged assaultive activity occurred at all.
- [21] Defence submits T.M.'s evidence is not credible or reliable, such that I should reject her evidence outright, or be left in a reasonable doubt about whether Mr. Leary committed either of the alleged offences.

##### T.M.'s Evidence

- [22] T.M. testified over the course of three days, including two days of cross-examination.
- [23] T.M. is a singer. Singing has been a part of her life since she was a child. She has performed and taught singing to adults and children for many years.
- [24] T.M. has known Mr. Leary for approximately 15 years.

- [25] At the time of the alleged offences, T.M. and Mr. Leary had been friends for a long time. She trusted him. They had fun together. They exchanged flirtatious texts. She found him attractive.
- [26] In January 2022, Mr. Leary texted T.M. to tell her he was going through a separation and did not want her to find out about it on Facebook. Sometime in February 2022, they met and went for a walk. They made plans to meet on Valentines Day. Those plans did not come to fruition.
- [27] On the evening of March 3, 2022, T.M. and Mr. Leary went for dinner at a restaurant. She said he was having a tough time following his separation, and was somewhat depressed and feeling down. To cheer him up she brought him a gift basket, which included bubble bath and a candle. They discussed his separation. He told her he was not looking for a girlfriend. She told him she was not looking for a "fuck buddy", which she understood to mean casual sex with a friend, and no relationship. She did not want to have any such relationship because she becomes too personally attached to people once she is intimate with them. She was not upset by him saying that he did not want to have a girlfriend, and he did not appear to be upset by what she told him about not looking for a "fuck buddy". She thought it was a very open, honest conversation, and she wanted to be very clear with him that she was not interested in sex.
- [28] On March 5, 2022, T.M. posted a video to her Facebook account. She recorded the video in a bathroom where she was taking a cold shower. She could not be seen in the video, but could be heard making noises. She recorded the video because she was participating in a cold shower challenge, in which for 80 days participants agreed to take a cold shower every day and abstain from consuming alcohol. She was then three weeks into the cold shower challenge.
- [29] Mr. Leary, who was one of her Facebook friends, responded to her video post with a sexually suggestive text. From the content of his text, she understood her video had sexually aroused him. She texted him back, making a comment about how interesting it was that pain sounds like pleasure and pleasure sounds like pain.
- [30] They agreed to meet that evening. He offered to pick her up, but she declined his offer, because he said he had been drinking. She offered to go to his residence instead. She thought the plan was that they would then decide whether to go somewhere else.
- [31] All the texts from Mr. Leary had the notation "- gord leary" at the bottom, which she understood meant that they were texts from his work phone. At some point in their communications, he wrote something which she understood to mean that he was sexually frustrated. She responded "similar", because it had been a long time since she had been sexually intimate with anyone.

- [32] At about 10 p.m. on the evening of March 5, 2022, T.M. went to Mr. Leary's residence. She had not been there before. He lived with his son, who stayed with him every other week. He also had tenants who lived in the basement. When she arrived, he was there. His son was not there, but she thought his tenants were.
- [33] T.M. and Mr. Leary hugged in the entrance hall, where she took off her boots, before putting her jacket and purse on an island in the kitchen area. He took her on a tour of his residence. She provided a detailed description of the layout of his residence in her evidence. After the tour, he went to the fridge in the kitchen, took out a bottle of red wine and asked her if she wanted any. She said no, because she was participating in the cold shower challenge. Instead she got a non-alcoholic beer from her bag. Mr. Leary drank some of the red wine. She thinks he filled his glass twice. She did not think he was drunk. She had not consumed any intoxicating substances.
- [34] T.M. sat on the loveseat in the living room. Mr. Leary sat on a chair positioned close by, perpendicular to the loveseat. He turned on the fireplace and the TV and played music. They talked about various things: his son, his son's sports, photography, possibly going to a music festival, and other outdoor activities. They did not have any discussion about sexual contact between them, or continue the discussion they had at dinner two days earlier at the restaurant, or talk about her cold shower video post.
- [35] For the duration of their conversation, T.M. stayed on the loveseat. On two occasions, Mr. Leary got up to go to the washroom. After he returned from the bathroom the first time, there was nothing noteworthy about his demeanour, but when he returned from the bathroom the second time, he was completely different. His jaws were clenched, his eyes were "icy and cold", he got on top of her on the loveseat, straddled her and started kissing her really hard on the lips. She was sitting on the loveseat with her back straight up. He was straddling her by her hips. He leaned forward and put his hands on the top of the loveseat, so that she was pinned in position. He touched her breasts over her lace bra and roughly attempted to move it to the side. She was surprised he did not rip it in the process.
- [36] Mr. Leary then unbuckled T.M.'s belt and unzipped her jeans. She said "I'm not sure about that". He responded, "I'll tell you what to think", in a way she perceived as sneering and dismissive. At this point, he was still straddling her, but with less space between them than before.
- [37] T.M. was confused because this was not what she and Mr. Leary had talked about at dinner two days earlier at the restaurant. She also felt conflicted, because he was acting aggressively and not like the person she knew. She was scared. He did not ask her if he could kiss her, and she did not ask him to. He did not ask her if he could lift her sweater or touch her breast, and she did not ask him to. She did not want him to kiss her. When asked if she did, she said, "No, not the way he was kissing me, it was so aggressive". When asked if she wanted his hand on her breasts, she said, "No".

- [38] T.M. ended up laying on the loveseat with her face to the ceiling and Mr. Leary on top of her. She is unsure how she came to be in that position. She said that at the time Mr. Leary weighed about 200 lbs. and she weighed about 130 lbs. She said that when he was on top of her it felt "crushing". He was kissing and biting at her breasts and grabbing them aggressively. She said, "I was getting pretty scared and tried to figure out what was happening and why he was so different from the person I thought I knew". He said he was in control and that she had to accept that. She was almost certain she did not say anything other than "I'm not sure about that" while he touched her on the loveseat. She believes he decided he wanted to go to the bedroom. He communicated this to her. She thinks he said, "Let's go to the bedroom".
- [39] They went to the bedroom. Mr. Leary went to the left side of the bed, T.M. went to the right side of the bed. Her jeans were already half off. She understood she was to take off her clothes, and that is what she did. She said, "I was a robot. I just took off my clothes". She does not remember if he was talking to her at that point. When they got on the bed he immediately took over. He was twisting and pinching her nipples and squeezing her breasts really hard. She said to him "Don't leave a mark" and he just snapped back at her.
- [40] T.M. became very emotional when she described what happened next. She said that Mr. Leary then wrapped his hands around her throat and started choking her. He said, "You're an empath, aren't you?". He straddled her and his hands were holding hers above her head. When he was grabbing her breasts, he used one hand to pin both of hers. He put his hands around her throat multiple times. At one point, she pried his fingers off her throat and said to him "That's my money maker", in reference to her throat, because as a singer she relies on her throat and voice to make a living. She said "he knows that".
- [41] When T.M. said "That's my money-maker", it seemed to register with Mr. Leary, because when he later grabbed her throat again he did not grab it so hard.
- [42] This was the first time anyone has ever had their hands on T.M.'s throat. It scared her because he was clearly choking her. He never asked if he could put his hands around her throat. She said "No, no, no. He did not ask." She was again very emotional at this point in her evidence.
- [43] T.M. thinks that when Mr. Leary put his hands around her throat she was shallow breathing, because she was scared. She is familiar with her own breathing because of her training as a singer. For her, shallow breathing means breathing from the upper part of her lungs. She was asked if his choking her affected her breathing, and she said, "I'm unsure", but she was so shocked and scared that she does not remember.
- [44] When Mr. Leary had his hands on T.M.'s throat, she was "absolutely terrified". She had never been choked. Singing was her livelihood and she did not know what he was capable of at that point. She was asked if it affected her subsequent actions and she said, "I feel like I went into survival mode." She needed to get out of the situation.

- [45] T.M. said she was lying on the bed in a diagonal position. Mr. Leary moved her. At some point her head was at the top of the bed. He was straddling her at her upper legs and waist. She was unable to move her hands. He was pinning her with his body weight. She said he was "wrenching at my breasts", it was "so hard" and "it was painful". She exclaimed "Easy Gord" and made other exclamations of pain, including "ouch". She feels her wincing and pain were evident on her face. At the time, his face was facing hers and they were between six and 12 inches apart from each other. She does not recall him responding, but at no time did he say, "Is this okay?" or "Is this good for you?". He never asked her if he could touch her breasts. She was scared and trying to figure out what to do and how she could get through it. He did not listen. She felt like she did not have a voice and she would just have to survive the experience.
- [46] When they were face-to-face, Mr. Leary's eyes were open. T.M. knows this because she recalls his eyes "were so cold". Her recollection is that he was looking right at her. Her exclamations of pain were sufficiently loud that he covered her mouth so that the tenants would not hear. He said "I don't want the tenants to hear". He may have told her to be quiet.
- [47] Mr. Leary then forced oral sex on T.M. multiple times, to the point that she became over-stimulated and it was really painful. She had multiple orgasms. She eventually also faked having an orgasm, because she thought it would make him stop. She was asked what it felt like when she was over-stimulated by the oral sex and she said that it felt like "starting to burn, crampy almost". She asked him for a break. He did not stop or give her a break. He said "you'll be done when I say you're done" and continued performing forced oral sex. He never asked her if he could perform oral sex on her. She never asked for it. She did not want it. The forced oral sex was after he had his hands on her neck.
- [48] After the forced oral sex, Mr. Leary penetrated T.M.'s vagina with his penis, thrusting so aggressively that it hurt her. She put his penis in her mouth, thinking that it would make him orgasm, and that would make him stop. It did not, and he stopped her after about 30 seconds.
- [49] When Mr. Leary penetrated T.M.'s vagina with his penis, her body did not change positions. She was lying on her back looking at the ceiling. He did not ask her if he could put his penis in her vagina. She never asked him to do so and she did not want it. She said he just thrust really aggressively, pushed her legs really wide open, to the point her knees were up by her ears. He was hurting her hips. He just kept thrusting. She was trying to think of ways to get out of the situation. At one point, he let her get on top of him, but then he threw her off, flipped her over on her back, got on her again and continued thrusting his penis into her vagina.

- [50] At some point, T.M. asked Mr. Leary if he had been watching a lot of pornography. She did so because he was being so aggressive. He responded, "All the porn I want or need is right here." At the time, she thought he was maybe filming what was going on. She asked him if he had a camera set up. He said no. She thinks she had this thought because he and a former partner had a camera.
- [51] Eventually Mr. Leary pulled his penis out of T.M.'s vagina and ejaculated. She knows that he ejaculated because there was semen on his stomach and on hers. After he ejaculated, he wiped himself off and got under the bedsheet. She wiped herself off and did the same. She said he looked pleased with himself. She said there was nothing intimate about the sex, and that she lay as far apart from him on the bed as possible. She said that at this point "I was freaking out inside". He kept asking, "What are you thinking?" She said she was thinking, "What the fuck just happened, why did my friend just choke me", but she did not say so. Mr. Leary did not use a condom, and nor did she. They did not have any discussion about condom use. They did not have any discussion about sexually transmitted infection status.
- [52] After the forced sexual activity, Mr. Leary and T.M. engaged in some small talk for about ten minutes. Her mind was reeling. She felt really awkward. She then got up and put clothes on. He found one of her earrings lying in the carpet. She went to the hall to put on her boots. She felt "out of it", like she was drunk, even though she was not. She said goodnight and went home.
- [53] T.M. got home at about 2:30 a.m. on Sunday, March 6, 2022. She thinks she took Gravol to help her sleep. After she woke up she could barely walk. Her hips were in pain and her insides felt like they had been through a meat grinder. She had to wear soft clothes because her nipples were swollen and sore. She had bruising on her neck.
- [54] T.M. and Mr. Leary exchanged texts on March 6, 2022. She does not know who initiated contact. She asked if he was hung over and he responded, "Yes, you could say that. My head's pounding." She referenced bruises on her breast, and he responded with what she perceived to be a joke, to which she did not respond.
- [55] Mr. Leary subsequently sent her other texts that day, to which she did not respond. He apparently started to get concerned that she had not responded. Eventually she said that she needed to deal with work, and that they would meet at some point and discuss what had happened.
- [56] T.M. took photographs on the afternoon of March 6, 2022, which show bruising on her left breast. She also had bruising on her neck and her right breast. It took over a week for the bruises to fade. She took more photographs on March 10, 2022, again showing the bruising on her left breast.
- [57] She said it was painful to walk on March 6, 2022, and the pain only started to subside by the following Tuesday or Wednesday.

- [58] T.M. and Mr. Leary met on Thursday, March 10, 2022. She had prepared notes on her phone about what she wanted to tell him. He sat and listened. At the end, she asked him what he would do if his daughter told him what she had told him, and he said, "I'd beat the shit out of the guy" and "basically I'm a rapist". She believes the photographs of the bruising on her left breast surprised him. She told him they had never discussed choking, and there was never a safe word. She does not think he responded. He said multiple times that he was embarrassed and sorry. That confused her because she considered something like food on her face to be embarrassing, sexual assault was not just embarrassing. She does not recall him denying anything, or presenting any alternative version of events.
- [59] T.M.'s meeting with Mr. Leary lasted 45 minutes to an hour, at the end of which she was quite exhausted and cold. She got into his vehicle with him, and he insisted on driving her the very short distance to her residence. He wanted to hug her. She said no.
- [60] They had further text communications after that, in which Mr. Leary apologized again. T.M. indicated to him that she was going to go to counselling. He said he would be willing to go with her if that would help. She stopped having text communications with him after she realized that contact with him was not helpful for her mental health. She did not see him again after their meeting.
- [61] T.M. said, "The only thing that was consensual [on March 5, 2022] was the hug when I first walked in the door."

#### Sexual Assault

- [62] The Crown must prove each of the following essential elements of the offence of sexual assault beyond a reasonable doubt:
1. that Mr. Leary touched T.M. directly or indirectly;
  2. that the touching was intentional;
  3. that the touching took place in circumstances of a sexual nature;
  4. that T.M. did not consent to the sexual activity in question; and
  5. that Mr. Leary knew, or was reckless, or was willfully blind that T.M. did not consent to the sexual activity in question.
- [63] Unless I am satisfied beyond a reasonable doubt that the Crown has proved all of these essential elements of the offence of sexual assault, I must find Mr. Leary not guilty.

## Consent - s. 273.1 of the Code

- [64] Section 273.1(1) of the Code defines consent as the voluntary agreement of the complainant to engage in the sexual activity in question. Section 273(1.1) states that consent must be present at the time the sexual activity in question takes place. Section 273.1(2) sets out circumstances in which no consent is obtained.
- [65] Consent is a foundational principle on which Canada's sexual assault laws are based: *R. v. G.F.*, 2021 SCC 20 at para. 1. This is demonstrated in the centrality of consent to both the actus reus and the mens rea elements of the offence: *R. v. Kirkpatrick*, 2022 SCC 33 at para. 28.
- [66] At the actus reus stage, consent is assessed from the point of view of the complainant, whereas at the mens rea stage the focus shifts to the accused and his steps to ascertain consent: *R. v. Barton*, 2019 SCC 33 at paras. 89-90.
- [67] If the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there is no consent - plain and simple: *R. v. Ewanchuk*, [1999] 1 SCR 330 at para. 31; *Barton* at para. 89.

## Mens Rea and Honest But Mistaken Belief in Communicated Consent

- [68] In the context of mens rea, and specifically for the purposes of the defence of honest but mistaken belief in communicated consent, consent means that the complainant had affirmatively communicated by words or conduct her agreement to engage in the sexual activity with the accused: *Ewanchuk* at para. 49. The focus here is on the mental state of the accused, and the question is whether the accused honestly believed the complainant effectively said "yes" through her words and/or actions: *Barton* at para. 90.
- [69] In order to establish the defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct: *Barton* at para. 91. As Justice L'Heureux-Dubé stated in *R. v. Park*, [1995] 2 SCR 836 at para. 44:

As a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary": *Barton* at para. 91 [Emphasis in original.]

- [70] The availability of the defence of honest but mistaken belief in communicated consent is not unlimited. Section 273.2 of the Code limits access to the defence for certain offences, including sexual assault. Pursuant to s. 273.2(b), the defence is not available where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.
- [71] As the Court stated in *Barton*:

- [104] Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent - no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time [citations omitted]. Notably, however, s. 273.2(b) does not require the accused to take "all" reasonable steps, unlike the analogous restriction on the defence of honest but mistaken belief in legal age imposed under s. 150.1(4) of the Code [citations omitted].
- [72] What constitutes reasonable steps to ascertain consent is highly fact specific, and certain things, such as reliance on rape myths, or stereotypical assumptions about women and consent, or attempts to "test the waters" by engaging in non-consensual sexual activity, clearly are not reasonable steps: Barton at paras. 106-107.
- [73] There are circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. As stated in Barton:
- [108] For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.

### **Consent - s. 265(4) of the Code**

- [74] Where the accused is charged with one of the various forms of assault, including sexual assault, and asserts belief in consent, the presence or absence of reasonable grounds is simply a factor to be considered in assessing the honesty of the accused's assertion: s. 265(4). In contrast, by operation of s. 273.2(b), where the accused is charged with a sexual offence under ss. 271, 272, or 273, a failure to take reasonable steps, in the circumstances known to the accused at the time, is fatal to the defence of honest but mistaken belief in communicated consent: Barton at para. 111.

### **Stereotypes and Myths About Sexual Assault Complainants**

- [75] In *R. v. Kruk*, 2024 SCC 7, the Court provided a partial list of recognized myths and stereotypes about sexual assault complainants, stating:
- [36] This Court has repeatedly recognized the prevalence of myths and stereotypes about sexual assault complainants, some of which include the following:
- Genuine sexual assaults are perpetrated by strangers to the victim;

- False allegations of sexual assault based on ulterior motives are more common than false allegations of other offences.
- Real victims of sexual assault should have visible physical injuries.
- A complainant who said "no" did not necessarily mean "no", and may have meant "yes".
- If a complainant remained passive or failed to resist the accused's advances, either physically or verbally by saying "no", she must have consented -- a myth that has historically distorted the definition of consent and rendered rape "the only crime that has required the victim to resist physically in order to establish nonconsent".
- A sexually active woman (1) is more likely to have consented to the sexual activity that formed the subject matter of the charge, and (2) is less worthy of belief -- otherwise known as the "twin myths", which allowed for regular canvassing of the complainant's prior sexual history at trial, regardless of relevance, thereby shifting the inquiry away from the alleged conduct of the accused and towards the perceived moral worth of the complainant [Citations omitted.]

[76] Other common myths and stereotypes, include:

1. individuals who consult with mental health professionals are not credible and reliable;
2. failure to immediately report a sexual offence means that it did not occur;
3. drug and alcohol use demonstrates bad character; and
4. a "real victim" will avoid all contact with the perpetrator: R. v. J.J., 2022 SCC 28 at para. 132.

[77] It is prohibited to rely on myth and stereotypes that undermine the credibility of sexual assault complainants: Kruk at para. 31. Similarly, it is an error of law to judge a complainant's credibility based on the correspondence between their behaviour and the expected behaviour of the stereotypical victim of sexual assault: R. v. A.R.J.D., 2018 SCC 6 at para. 2.

## Assault

[78] The Crown must prove each of the essential elements of the offence of assault beyond a reasonable doubt:

1. that Mr. Leary applied direct or indirect force to T.M.;
2. that Mr. Leary's application of force to T.M. was intentional; and
3. that T.M. did not consent to the application of force.

## Assault by Choking or Strangling

[79] Section 267(c) of the Code provides that it is an offence to choke, suffocate, or strangle a person in committing an assault.

[80] Chokes, suffocates or strangles are not defined in the Code.

- [81] With regard to the actus reus and mens rea of s. 267(c), in *R. v. Laite*, [2023] N.J. No. 5, the court held:
- [137] section 267(c) does not require that the accused intended to constrict a complainant's airway or ability to breathe. Section 267(c) incorporates the mens rea for an assault. Thus it requires proof of an intentional application of force without consent. In contrast to section 265(1)(a), section 267(c) specifies the type of force that must be proven: choking, suffocating or strangling. This is proven if the accused places their hand or hands around a person's neck and applies any force, no matter how minimal.
- [82] This articulation of the essential elements of the offence in s. 267(c) was adopted and applied in *R. v. A.K.*, [2023] O.J. No. 5854 at paras. 103-104; *R. v. S.B.*, 2024 ABCJ 150 at para. 80; and *R. v. Ebenga*, 2024 ABCJ 80 at para. 81. None of these decisions are binding on me, but I find them persuasive. I agree with Crown that the interpretation in these decisions is consistent with the reasoning of Justice Sopinka in *R. v. DeSousa*, [1992] 2 S.C.R. 944 at 966:

There are many provisions where one need not intend all of the consequences of an action. As was pointed out in *Hess*, supra, there must be an element of personal fault in regard to a culpable aspect of the actus reus, but not necessarily in regard to each and every element of the actus reus. The requirement of fault in regard to a meaningful aspect of the actus reus is necessary to prevent punishing the mentally, and morally, innocent and is in keeping with a long line of cases of this Court including *Rees*, supra, and *Pappajohn*, supra. In many offences, such as assault or dangerous driving, the offence is made out regardless of the consequences of the act but the consequences can be used to aggravate liability for the offence. For example, both assault and assault causing bodily harm have identical mens rea requirements and the element of causing bodily harm is merely used to classify the offence. No principle of fundamental justice prevents Parliament from treating crimes with certain consequences as more serious than crimes which lack those consequences.

- [83] An assault which causes bodily harm and an assault in which the complainant is choked, suffocated or strangled are both subsections of s. 267 of the Code. Assault and assault causing bodily harm have the same mens rea. There is nothing in the wording of the section to suggest that an assault in which the complainant is choked, suffocated or strangled has any additional mens rea component.
- [84] Accordingly, I find that to prove assault by choking or strangling, the Crown must prove that Mr. Leary intentionally placed his hand or hands around T.M.'s neck and applied force, but need not also prove that in doing so he intended to constrict her airway or interfere with her ability to breathe.

## Discussion

### T.M.'s Credibility and Reliability

#### Credibility

- [85] I find T.M. credible.
- [86] T.M.'s testimony was comprehensive in its description of the events on March 5, 2022, including the days before and after. It did not seem unreasonable or unbelievable. Although she has no apparent motive to lie, I am aware deception does not always have a motive and I do not find she in fact has no motive to lie.
- [87] T.M. was thoroughly cross-examined for approximately two full days. She was confronted on key aspects of her testimony, and presented with alternative explanations, all of which she emphatically denied.
- [88] To the extent that T.M.'s testimony in court was shown to have been different to what she had previously written, she was able to explain the inconsistencies, while remaining clear and firm in her evidence and without being overly combative.
- [89] Mr. Leary points to various portions of T.M.'s testimony to impeach her credibility based on what he asserts is implausible, inconsistent and an intentional suppression of the truth.
- [90] I find that any discrepancies in her evidence to have been minor, reasonable, and explainable such that they do not impact my view of her credibility. I do not find T.M.'s testimony implausible. While there were some inconsistencies in T.M.'s evidence, none of them shake the core of her testimony about what happened to her on March 5, 2022. Her testimony providing context to explain the inconsistencies made sense. I do not accept that T.M. intentionally suppressed the truth.
- [91] Further, and with respect, many of the issues Mr. Leary raises concerning T.M.'s credibility rely on myths and stereotypes about sexual assault victims. Examples of this include defence's arguments about her testimony that:
1. It defies human reason and is inherently implausible that Mr. Leary's abrupt initial kiss on T.M.'s mouth, his unwanted touching while applying his weight to her, T.M. saying "I'm not sure about that", Mr. Leary saying "I don't care what you think" or "I'll tell you what to think" and "I'm in control now and you have to accept that", was enough to put her in a "robotic trance" that caused her to follow him into the bedroom where she continued to be sexually assaulted by him;
  2. It is implausible for T.M. and Mr. Leary to have been essentially silent on the couch other than the few utterances unless they were consensually kissing and engaging in foreplay;
  3. It is contradictory that T.M., who presented in court as a confident and intelligent woman, would become a "speechless and voiceless rag-doll" after Mr. Leary's forced sexual advances;

4. T.M.'s evidence is not credible because, as an accomplished, resilient woman, as opposed to a fictitious vulnerable person (such as a juvenile, young person, elderly person, or person with diminished mental capacity), she had the range of options available that any other person would have had that evening as someone who had driven themselves over to a friend's house for the purpose of having sex; and
  5. T.M.'s evidence was riddled with ambiguity and equivocation, in part because she conceded that she never said "no", "stop", "I don't want this", "I don't want to get naked", or "I want to leave", and did not leave.
- [92] Such arguments invite me to reason that T.M. is less credible or worthy of belief based on inferences that rely on myths and stereotypes about sexual assault victims that are prohibited by law. They also invoke assumptions about the type of women who can be sexual assault complainants. A common thread in these arguments are the myths and assumptions that a real victim of sexual assault will resist physically and that a lack of verbal objection or physical resistance constitutes consent. For me to reason that T.M.'s evidence is less worthy of belief because her evidence is that she remained silent and passive, or failed to resist Mr. Leary's advances, is to rely on myths and stereotypes about sexual assault complainants, and to judge T.M.'s credibility based on discrepancies between her behaviour and the actions of an expected victim of sexual assault. Such reasoning is an error of law, and I decline to engage in it.
- [93] Mr. Leary also argued that one of the possible motives for T.M. to have fabricated what he says is her sexual assault "narrative" is because he treated her unfairly or broke her heart. He says this does not flow from a myth or stereotype that women fabricate sexual assault allegations when they have been "scorned", but rather flows from the evidence about the conversation at dinner at the restaurant on March 3, 2022.
- [94] This argument is entirely without merit. The myth and stereotype that women falsely claim to have been sexually assaulted following consensual sexual relations that they subsequently regret, or to exact revenge on their sexual partners, is not impermissible because it arises out of insufficient evidence. Rather, this myth and stereotype is an impermissible inference based on widely-held ideas and beliefs that are not empirically true. Regardless of the strength of the evidence that a sexual assault complainant was scorned, it is an error of law to discredit them by relying on the myth and stereotype that scorned women fabricate allegations of sexual assault.
- [95] An example using another myth and stereotype is illustrative. Another jurisprudentially condemned line of reasoning is the notion that a complainant who does not dress modestly is more likely to have consented: Kruk at para 41. In this scenario, additional evidence showing how provocatively the complainant was dressed clearly does not make this notion any more permissible. Similarly, evidence that T.M. was scorned, which is extremely tenuous at best, does not make the notion she fabricated the sexual assault allegations because she regretted what was actually consensual sexual activity with Mr. Leary, or

because he broke her heart, any less of an impermissible myth and stereotype, nor does it make her any less worth of belief.

[96] T.M.'s demeanour in court was polite and dignified. The experience of testifying was clearly difficult for her. It is to be remembered that she was giving evidence in the formal setting of a courtroom about being the victim of a sexual assault by someone she considered a trusted friend; someone who suddenly and without warning violated her physical and emotional integrity.

[97] While T.M. was clearly emotional during some of her testimony, she did not display any overt animus towards Mr. Leary. In cross-examination, she was firm in her answers, but not argumentative.

### Reliability

[98] I find T.M.'s evidence was reliable.

[99] T.M. had a good ability and opportunity to observe the events that she testified about. She was there. She had not consumed any alcohol or other intoxicating substances which might have impaired her ability to perceive, understand or recall the events.

[100] Overall, T.M. has a vivid memory of the events she described. She demonstrated a good recall of details. It was obvious to me that she listened carefully to the questions. She was generally careful and precise. She was sometimes not responsive in her answers, but I did not get the sense that she was trying to be evasive. She was unclear about some details in her testimony, but in the circumstances, this did not raise a concern for me. Indeed, I may have had cause for concern if she claimed to recall every detail of the events with exactitude.

[101] T.M. was not shaken in cross-examination on the important facts relevant to the core of her testimony about the events of the night of March 5, 2022. Where some inconsistencies were shown, I find them inconsequential. Two examples will suffice to illustrate my point. First, T.M. acknowledged testifying that she said to Mr. Leary "I don't know about that" when he first kissed her, whereas she said in her police statement that she said "I'm not sure about that". In cross-examination, it was suggested she did or might have also said "yet", which she categorically denied. Either of those two responses, with or without the addition of "yet" clearly raise the issue of consent. Second, T.M. acknowledged testifying that Mr. Leary said, "I'll tell you what to think", whereas in her police statement she claimed he said, "I don't care what you think". Again, both versions establish the point that Mr. Leary appeared to have no concern for whether T.M. consented.

[102] There is also some corroboration of T.M.'s evidence in the photographs of the bruising on her left breast.

[103] I have considered that T.M. testified that she was traumatized by the events of March 5, 2022. I recognize that while trauma might in some cases affect the reliability of a witness's testimony, there is no evidence of it having done so in this case.

[104] I find T.M.'s testimony is reliable concerning the events of March 5, 2022: what happened; how it happened; who did what; whether she consented to any of the sexual touching, and whether she was choked.

## Sexual Assault

### Actus Reas

[105] It is undisputed that Mr. Leary touched the complainant, that the touching was intentional, and that it took place in circumstances of a sexual nature. I accept these undisputed elements of the offence as proven beyond a reasonable doubt.

[106] The consent component of the actus reus of sexual assault is defined by T.M.'s state of mind at the time the touching occurred.

[107] T.M. testified that she did not consent to any of the ways in which Mr. Leary touched her: kissing her mouth and neck; touching, squeezing and twisting her breasts; grabbing her neck; forcing oral sex on her; and penetrating her vagina with his penis. T.M.'s evidence, in both direct and cross-examination was unambiguous, emphatic, and unshaken. I accept T.M.'s evidence that she did not consent to any of the touching, with the sole exception of the hug at the front door when she first arrived at Mr. Leary's residence. I have no reasonable doubt that T.M. did not consent.

### Mens Rea

[108] I find beyond a reasonable doubt that the Crown has proven the mens rea of sexual assault. Mr. Leary knew, or was reckless, or willfully blind that T.M. did not consent to the sexual activity in question.

[109] To the extent that T.M.'s words or actions could be characterized as ambiguous in her communication of non-consent, the law is clear the accused cannot rely on ambiguous conduct to persist in sexual activity.

[110] However, the evidence clearly shows that T.M.'s conduct in the circumstances of the offence was not ambiguous. Instead, T.M.'s conduct repeatedly demonstrated to Mr. Leary a lack of consent to the forced sexually activity that Mr. Leary must have known, or been reckless or willfully blind to. Examples of this conduct from the evidence include:

1. T.M. indicating to Mr. Leary on March 3, 2022, that she was not interested in casual sex with Mr. Leary;
2. T.M. saying "I'm not sure about that" when Mr. Leary unbuckled her belt and unzipped her jeans;

3. T.M. asking for a break from Mr. Leary's forced oral sex; and
4. T.M.'s various exclamations of pain, including "ouch" and "Easy Gord".

[111] On the evidence as a whole, Mr. Leary knew, ought to have known, or was wilfully blind to T.M.'s non-consent to the forced sexual activity on March 5, 2022. Mr. Leary's belief as to consent applies to his understanding of the conscious agreement of T.M. to engage in every act in the encounter. Mr. Leary is not entitled to rely on his belief of consent based on previous actions that constitute sexual assault, or on a belief that T.M. gave broad advance consent. I have no reasonable doubt Mr. Leary knew, should have known, or was wilfully blind to T.M.'s lack of consent.

### **Honest but Mistaken Belief in Communicated Consent**

[112] Looking at the evidence as a whole, I find no basis upon which to find that Mr. Leary had an honest but mistaken belief in communicated consent. Mr. Leary is not entitled to equate T.M.'s silence, passivity, or ambiguity with the communication of consent. The escalating intrusiveness of the forced sexual activity required Mr. Leary to take increasingly greater care in ascertaining consent. He took no reasonable steps, in the circumstances known to him at the time, to ascertain if T.M. was consenting.

### **Assault by Choking or Strangling**

[113] I have already found that T.M.'s testimony is reliable and credible such that I believe with certainty her testimony that she was choked by Mr. Leary on March 5, 2022, and she did not consent to Mr. Leary choking her.

[114] Accordingly, I find that the Crown has proven beyond a reasonable doubt that Mr. Leary choked or strangled T.M. by intentionally applying force to her neck without her consent.

### **Decision**

[115] Crown has met its burden of proving the offences charged beyond a reasonable doubt.

[116] On count 1, I find Mr. Leary guilty.

[117] On count 2, I find Mr. Leary guilty.

"B. Smith J."

B. SMITH J.

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