

CANADA / JUDGMENT

R. v. Ravelo-Corvo

2020 BCSC 358

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 358 R. v. Ravelo-Corvo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ravelo-Corvo,

2020 BCSC 358

Date: 20200306

Docket: 27730

Registry: Vancouver

Regina

v.

Renert Alexander Ravelo-Corvo

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Corrected judgment: The text of the judgment was corrected on the front page where changes were made on August 12, 2021.

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

October 21-22, 2019

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December 2, 4-5, and 18, 2019

February 3, 4, and 6, 2020

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Vancouver, B.C.

March 6, 2020

Table of Contents

I. INTRODUCTION. 3

II. LEGAL PRINCIPLES. 4

A. Sexual Assault 4

B. Mistake of Fact 6

C. Unlawful Confinement 9

D. Assessing Credibility. 10

III. SUMMARY OF THE PARTIES' POSITIONS. 12

IV. SUMMARY OF EVIDENCE. 12

A. L.T.'s Testimony. 12

B. The Accused's Testimony. 17

C. A.J.'s Testimony. 21

D. CCTV Video. 22

E. Evidence from L.T.'s and A.J.'s Cell Phones. 23

F. Admissions. 24

V. CREDIBILITY ASSESSMENTS. 24

A. L.T.'s Credibility. 25

B. The Accused's Credibility. 30

VI. DID L.T. CONSENT TO SEXUAL ACTIVITY?. 32

VII. DID THE ACCUSED HAVE AN HONEST BUT MISTAKEN BELIEF IN COMMUNICATED CONSENT?. 33

VIII. DID THE ACCUSED UNLAWFULLY CONFINE L.T.?. 37

IX. VERDICT. 41

I. INTRODUCTION

[1] Renert Alexander Ravelo-Corvo has been charged and has pled not guilty to two counts:

- (1) on or about May 8, 2016, he sexually assaulted the complainant (whom I will refer to as L.T.) contrary to s. 271 of the Criminal Code; and,
- (2) on or about May 8, 2016, he confined L.T. without lawful authority contrary to s. 279(2) of the Criminal Code.

[2] The Crown submits on the whole of the evidence it has proven every element of both charges, and convictions should follow. In particular, it submits the evidence proves beyond a reasonable doubt that L.T. did not consent to the sexual activity that took place. It also submits it has proven beyond a reasonable doubt that the accused did not have an honest but mistaken belief in communicated consent.

[3] With regard to the second count, the Crown submits L.T. was a highly credible witness, and together with all other evidence, no reasonable doubt remains that the accused did confine L.T. without lawful authority. It also points out that the charges are independent of one another, and therefore a finding of not-guilty on one does not necessarily impact the conclusion on the other.

[4] The accused submits the Crown has failed to prove either charge beyond a reasonable doubt. With regard to the charge of sexual assault, he submits the complainant consented to sexual activity. Alternatively, he asserts he had a reasonable but mistaken belief that she communicated consent by her conduct.

[5] With regard to the charge of unlawful confinement, he denies that he intended to or did restrict her ability to move. He also submits that L.T.'s evidence regarding the alleged confinement is not credible, or at the very least raises a reasonable doubt.

II. LEGAL PRINCIPLES

A. Sexual Assault

[6] The legal test for proving sexual assault is not in dispute. To prove the actus reus, the Crown must establish three things: (i) the accused touched the complainant; (ii) the touching was for a sexual purpose; and, (iii) the absence of consent to the touching. In this case, there is no dispute that sexual activity took place so the first two elements have been met.

[7] The Criminal Code sections directed at consent are:

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.

Consent

(1.1) Consent must be present at the time the sexual activity in question takes place.

Question of law

(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

No consent obtained

(2) For the purpose of subsection (1), no consent is obtained if

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(a.1) the complainant is unconscious;

(b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);

(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.

- [8] Case law also informs the law on the issue of consent, and *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, remains a leading case. At paras. 27-30, the Court articulates the guiding principles, which I have distilled to the following:
- a) The presence or absence of consent is measured subjectively with reference to the complainant's state of mind about the touching, at the time it occurred.
 - b) Since the complainant's testimony is the only direct source of evidence about her state of mind, an assessment of her credibility is key to the analysis.
 - c) That assessment of credibility must be done in the context of the whole of the evidence, including measuring the totality of the complainant's conduct and whether it is consistent with her testimony of non-consent.
 - d) The accused's perception of the complainant's state of mind is not relevant at this stage of the analysis; it is only relevant to *mens rea*.
 - e) Thus, if the trial judge believes the subjective testimony of the complainant that she did not consent to sexual touching, the Crown has discharged its obligation to prove the absence of consent.
- [9] There is no defence of implied consent to sexual assault in Canadian law. In other words, the trial judge can only come to one of two conclusions regarding the presence of consent; either the complainant consented, or she did not. There is no third option. The test is subjective, meaning the critical component is the complainant's state of mind. Thus, if the trier of fact accepts the complainant's testimony that she did not consent, the absence of consent is established "no matter how strongly her conduct may contradict that claim" (*Ewanchuk* at para. 31).
- [10] Also helpful is this passage from *R. v. Tayo Tompouba*, 2019 BCSC 1529 at para. 55:
- The complainant must provide "actual active consent throughout every phase of the sexual activity": *R. v. J.A.*, 2011 SCC 28 at para. 66. The Code requires "ongoing, conscious consent" to "each and every sexual act" and consent can be revoked at any time: *J.A.* at paras. 3, 34 and 43; and *Barton* at para. 88.
- [11] The accused's perception of the complainant's state of mind regarding consent is not relevant to the *actus reus*, but it is an element of the *mens rea*. That is because the accused is entitled to be acquitted if the sexual touching was done under an honest mistake of fact; the fact in question is the presence of communicated consent.
- [12] To establish *mens rea*, the Crown must prove the accused intended to touch the complainant (*Ewanchuk* at para. 41). The Crown must also prove beyond a reasonable doubt that the accused did so knowing the complainant did not consent, or being either wilfully blind or reckless as to the presence of consent (*Ewanchuk* at para. 42).

B. Mistake of Fact

- [13] In *R. v. Barton*, 2019 SCC 33, the Supreme Court of Canada refined the legal principles underlying the defence of honest but mistaken belief in consent in sexual assault cases such that "the judicial lexicon" is now an "honest but mistaken belief in communicated consent". It did so in order to "focus all justice system participants on the crucial question of communication of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent" (at para. 92, emphasis in original).
- [14] The Court went on to explain why this clarification was, in its view, necessary. At para. 93, the Court comments that any attempt by the accused to rely on "negotiations" cannot include "an agreement involving broad advance consent to any and all manner of sexual activity" because that would amount to a mistake of law, not fact.
- [15] Thus, the accused's speculation as to the complainant's state of mind is insufficient to constitute the defence of mistake of fact in the context of a sexual assault. The evidence must demonstrate that the accused believed the complainant communicated consent. Therefore, an assertion that the accused believed that, in the complainant's mind, she wanted to be sexually touched despite not expressing that desire, will not constitute a defence.
- [16] The Criminal Code places certain restrictions on the defence:

Where belief in consent not a defense

273.2 It is not a defense 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
 - (i) the accused's self-induced intoxication,
 - (ii) the accused's recklessness or wilful blindness, or
 - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (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; or
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

- [17] The defence is an attempt to negate proof of mens rea, so it is considered from the perspective of the accused. What matters is whether the accused believed the complainant effectively said "yes" through her words and/or actions (*Ewanchuk* at para. 47). To put it more precisely (at para. 49):

In the context of mens rea - specifically for the purposes of the honest but mistaken belief in consent - "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.

- [18] On this point, the Court in *Ewanchuk* at para. 45 cited, with approval, Justice L'Heureux-Dubé's concurring reasons in *R. v. Park*, [1995] 2 S.C.R. 836 at para. 39, where she elaborated that the Crown does not necessarily have to prove the complainant was saying "no"; the mens rea is also satisfied "when it is shown that the accused knew that the complainant was essentially not saying "yes"" (see also *Barton* para. 91).
- [19] It is well established that there must be an air of reality to the accused's attempt to negate mens rea with his assertion of mistake of fact: *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120 at 133; *Tayo Tompouba* at paras. 57-58. In *Barton* at para. 121, the Court reiterated this point and added:

This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused honestly believed the complainant communicated consent. This Court recently confirmed that where there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, the defence of honest but mistaken belief in communicated consent must not be left with the jury (see *R. v. Gagnon*, 2018 SCC 41).

- [20] In *R. v. J.A.*, 2011 SCC 28 at para. 34, the Court stated consent of the complainant must be specifically directed to each and every sexual act, negating the concept of broad advance consent, or future sexual activity of an undefined scope (see also *Barton* at para. 99). Also, the consent must be to the activity "at the time it occur[s]" (*Ewanchuk* at para. 26).
- [21] Furthermore, the complainant's silence, passivity or ambiguous conduct does not constitute consent, and it would be a mistake of law for a court to so find: *Ewanchuk* at para. 51, citing *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3. Nor can the accused rely on a purported belief that lack of agreement to sexual touching constituted an invitation to more persistent or aggressive contact: *Ewanchuk* at para. 51.
- [22] *Barton* is also important for the Court's clarification of the "reasonable steps" requirement. At para. 103, the majority stated that the reasonable steps requirement under s. 273.2(b) remained "underdeveloped, and academic commentators have highlighted the need for greater clarity", and given that, "a few comments and observations are warranted to promote greater clarity in the law and provide guidance for future cases".
- [23] The majority provides that clarity at paras. 104-113, and the following propositions emerge:
- a) 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" (at para. 104).

- b) The accused is not required to take "all" reasonable steps, but the defence is not unlimited. At para. 104, the majority stated that "[s]ection 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent - no reasonable steps, no defence."
- c) In determining whether there were reasonable steps, the Court remarks that the enquiry is highly fact-specific and contextual and it would be unwise to attempt to draw up an exhaustive list.
- d) However, the Court did identify things that clearly are not reasonable steps, including reliance on stereotypical assumptions about women or rape myths. It is in this light that reliance on a complainant's silence, passivity or ambiguous conduct does not meet the reasonable steps requirement.
- e) Furthermore, an accused's attempt to test the waters by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered reasonable.
- f) Moreover, the threshold for satisfying the reasonable steps requirement is elevated with more invasive sexual activity and/or greater risk posed to the health and safety of those involved.

C. Unlawful Confinement

- [24] There is no dispute about the legal test to prove this charge. This is a general intent crime. The Crown must prove beyond a reasonable doubt the actus reus which consists of 3 elements: (i) confinement, (ii) without lawful authority, and (iii) lack of consent to the confinement.
- [25] The first two elements are measured objectively, whereas the third one is subjective: *R. v. Niedermier*, 2005 BCCA 15 at para. 48. There was no assertion of lawful authority in this case, but the accused denies the complainant was confined.
- [26] At para. 44 in *Niedermier*, the Court of Appeal repeats Justice Cory's definition (while on the Ontario Court of Appeal in *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 at 473) of unlawful confinement as "physical restraint, contrary to the wishes of the person restrained, but to which the victim submits unwillingly, thereby depriving the person of his or her liberty to move from one place to another". He also noted that "confinement need not be by way of physical application of bindings."
- [27] To meet the mens rea requirement, the Crown must prove beyond a reasonable doubt that the accused had the intent to deprive the person of physical movement. This does not require the Crown to prove that the accused also restrained the ability of the person to escape, only that their physical liberty was restricted: *R. v. Magoon*, 2018 SCC 14 at para. 64.

- [28] Lastly, the Crown does not have to prove any specific motive or reason for the restraint because this is a general intent crime. Specifically, in this case, to establish guilt, there does not have to be a finding that the accused restrained the complainant for the purpose of committing a sexual assault.
- [29] It is important to note that the limitations on what constitutes an honest but mistaken belief in communicated consent for sexual assault contained in s. 273.2, and refined in *Barton*, do not apply to the offence of unlawful confinement.

D. Assessing Credibility

- [30] In *R. v. Hurst*, 2019 BCSC 307 at paras. 5-12, Mr. Justice Brundrett helpfully discusses the proper approach to assessing credibility and reliability in criminal cases, and without repeating it, I adopt his analysis. He starts by noting that the trier of fact cannot reduce a verdict to a binary choice between the Crown's and accused's versions of events. Even if the accused's evidence is not believed, the court may have a reasonable doubt and, in that case, an acquittal must follow.
- [31] *R. v. W.(D.)*, [1991] 1 S.C.R. 742, remains the primary case for outlining the approach to assessing reasonable doubt in criminal trials where there is conflicting testimony. It is well established that the approach has an added consideration emanating from (among others) *R. v. H. (C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.). The approach is distilled to the following:
- a) Where there is conflicting evidence on the establishment of an element of the offence, if the trier of fact believes the evidence of the accused, the trier of fact must acquit.
 - b) If the trier of fact does not believe the testimony of the accused, but the trier of fact has a reasonable doubt, the accused must be acquitted.
 - c) Even if not left in doubt by the accused's evidence, the trier of fact must ask whether, on the basis of the whole of the evidence that is accepted, whether the trier remains unconvinced beyond a reasonable doubt of the guilt of the accused, and if so, there must be an acquittal.
 - d) If after considering all the evidence, the trier of fact is unable to determine who to believe, the accused must be acquitted.
- [32] In *R. v. A.M.*, 2014 ONCA 769 at para. 13, the Ontario Court of Appeal notes the significance of inconsistencies (within a witness' trial testimony, or between trial testimony and other statements given, whether under oath or not) to the credibility assessment, stating:

Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned: *G. (M.)*, at p. 354.

- [33] Also helpful are passages from *R. v. M.A.*, 2019 BCSC 640 at paras. 118-135 and *R. v. Rochemont*, 2017 BCSC 930 at paras. 106-107.

III. SUMMARY OF THE PARTIES' POSITIONS

- [34] The alleged offences took place in the accused's apartment in the early morning hours of May 8, 2016. The Crown's position is that after running into each other at a night club, L.T. agreed to leave with the accused in order to have a conversation with him. It was too loud to have a conversation in the club.
- [35] It is common ground that L.T. explained that she was romantically interested in the accused's friend, R., and she knew the accused's then girlfriend, J. and L.T. did not want to get in the middle of them. It is not disputed that she mentioned these in the context of why she was uninterested in engaging in sexual activity with the accused. It is also agreed, these topics came up a number of times.
- [36] They ended up in the accused's apartment which is where the accused admits sexual activity took place. L.T. testified she did not consent to that activity. She also testified that before the alleged sexual assault, the accused restricted her movements when she tried to leave his apartment.
- [37] As I understand it, the defence theory is that L.T. struggled in her mind about engaging in sexual activity with the accused while walking to his apartment, and perhaps even in the apartment. However, he submits they engaged in mutual kissing, and she agreed to have sex. In the alternative, he submits he had an honest but mistaken belief that she communicated consent to sex. He denies that he restricted her ability to leave at any time.

IV. SUMMARY OF EVIDENCE

A. L.T.'s Testimony

- [38] At the time of the incident that led to the charges, L.T. and the accused had known each other for about a year because they were in the same social circle.
- [39] L.T. had plans with her best friend, A.J., to go out on the evening of May 7, 2016, to a particular night club. Prior to going to that club, L.T. and A.J. met up with some other friends at another friend's, D.'s, house. While there, L.T. snorted a line of cocaine about half an hour before they left for the club.
- [40] She recalls that at the time, the cover charge at the club increased after 11 p.m., and as a result she believed they did arrive just before 11 p.m. Coincidentally, the accused was at the club, but they had not made plans to meet up.
- [41] L.T. testified that she agreed to leave the club with the accused because she wanted to talk to him to explain why she did not want to get involved with him. She recalls saying that to him in the club, but agreed the noise level in the club would make it difficult for him to hear. When they left the club, a number of people they knew were standing around the entrance

to the club. L.T. testified that because of these people she waited until she and the accused walked around a corner to say what she wanted because she did not want to embarrass the accused. She testified that the accused told her he wanted to go home and asked if she would accompany him. Her testimony was that she said that was not a good idea.

- [42] L.T. testified she told the accused she did not want to have sex with him. She said she was interested in the accused's friend, R. Also, she knew J., who L.T. believed was the accused's girlfriend at the time, and L.T. did not want to get in the middle of them. During her testimony once or twice she described that she viewed it as unethical or immoral to have sex with the accused given these circumstances.
- [43] They continued to walk, but L.T. testified she was unaware that the accused was heading to his apartment. It was only when they got to the front entrance of the building, she realized that's where they were. Although she had been to his apartment before, they walked down an alley she was unfamiliar with before turning to be in front of the building. She testified she told the accused at that point that she would come up to his apartment, but only to use the bathroom and to get a glass of water. When they got into the elevator, the accused tried to kiss her, but she resisted.
- [44] L.T. testified during her direct evidence that at some point the accused told her that he had spoken to R., who stated he did not care if the accused and L.T. had sex. CCTV video tape of the two of them in the elevator was entered at trial by consent (this evidence is discussed below), and part of it was played during L.T.'s cross-examination. During playback, L.T. spontaneously identified a point in the video when she said the conversation about R. not caring if L.T. and the accused had sex occurred. She added that she said to the accused that if R. told him that, the accused would not mind if she called R. to confirm the conversation. At that point, the accused admitted to her he never had that conversation with R. She agreed in cross-examination that the accused also said to her that it would be all right for the two of them to have sex because they did not have to tell R.
- [45] L.T. testified that when they got into the apartment, she went to use the bathroom, and the accused followed her into it, which she found weird. She immediately went to the kitchen and drank a glass of water.
- [46] The bathroom in the accused's apartment has two doors; one leads into the hallway close to the exit door of the apartment and the other leads into the bedroom.
- [47] While in the kitchen, she got a phone call from a friend (L.) who was wondering where L.T. was (evidence about calls and text to and from L.T.'s phone is discussed below). L.T. and her friends had made plans while at the club to go to a different club, which was an after-hours club. L.T. testified that she told L. on the phone that she was at a friend's place which was close by and she would leave soon. She testified that while she was on the phone in the kitchen, the accused tried to kiss her but she pushed him away. L.T. testified the two of them did not kiss in the apartment and that was the only attempted kiss she recalled while in the apartment.

- [48] After finishing her water, L.T. went into the bathroom and closed the door. She began using the toilet and while still seated, she said the accused opened the door from the hallway and looked in without knocking. She told him to close the door, which he did. She said at that point she was worried and felt scared and knew she wanted to leave the apartment. She finished using the bathroom, and opened the door leading to the hallway, wanting to leave.
- [49] L.T. says the accused blocked the doorway. She said he was standing with his shoulder against the frame. She tried to get past him, but he put his hand on the other side of the door frame and she could not get passed him. She stated twice that she wanted to leave, but he did not move. It became clear to her he was being difficult so she did not think continuing to talk would work. She decided to go through the bathroom and use the other door in order to escape (via the door that led to the bedroom).
- [50] She said she tried to go fast, but by the time she left the bathroom and was in the bedroom, the accused had already stepped a couple of feet into the bedroom from the hallway. She said she tried to go around him, but he was in her way.
- [51] She told him she wanted to leave. He was walking towards her so she backed up; he was telling her to stay and why it was OK to have sex even though she was interested in R. She said no, and again stated she wanted to leave. She was backed up close to the bed, so she decided to sit on the bed and say something like "see, even sitting on the bed doesn't change anything and the answer is still no". When asked why she sat on the bed, she said she now felt it was a stupid thing to do, but that it never occurred to her that he would sexually assault her. She thought at the time that by actually sitting on the bed and saying she had not changed her mind, maybe he would stop trying to convince her to have sex.
- [52] She stood up, but testified that the accused pushed her onto the bed (onto her back) and got on top of her. He straddled her. She again said she wanted to leave and did not want to have sex. He was telling her that it was OK for them to have sex, he kept trying to convince her and was "shushing" her. She was trying to get up but could not; she tried to roll to get away. She said she tried but could not succeed in pushing him off and she thought she heard something snap, perhaps her purse. However, she came to believe what snapped was a body chain she was wearing. She said the accused took her phone away and put it towards the top of the bed.
- [53] She testified that while he was on top of her, she told him the only way he would have sex with her, is if he raped her.
- [54] She said he was holding her down, moved her skirt and underwear aside and digitally penetrated her. She said she froze and she was scared. She testified she did not consent to the digital penetration of her vagina.
- [55] She noticed a glass of water on the night stand. She asked him if she could at least have some water. He said yes and let her scoot towards the headboard. She thought maybe she would be able to escape, but he grabbed her.

- [56] He was still trying to convince her to have sex and he said again that it did not matter about R. She said she didn't care about that anymore and she just wanted to leave. He said no, he wanted to have sex with her and cuddle. She said she wanted to leave, she did not want to have sex or cuddle. She was scared.
- [57] It was dark in the room and she saw her phone light up and it rang. The phone was between the headboard and mattress so she turned her back to the accused, lay on her stomach to reach for the phone. She could see that A.J. was calling.
- [58] While she was on her stomach, the accused moved her skirt and underwear out of the way. She recalls texting A.J. at that time believing that the accused was about to rape her. She sent two texts one immediately after the other saying: "Renert is trying" and "Rape". She says he then penetrated her with his penis. She did not consent to sexual intercourse.
- [59] She recalls picking up a call from A.J. while the accused was still forcing intercourse on her. Intercourse stopped while she was on the phone with A.J., and she believed she would be able to leave. She got up, adjusted her clothing and finished her call with A.J.
- [60] The accused then pushed her onto the bed and held her down and again forced intercourse on her. She said she did not consent to this second instance of intercourse. She said she again froze, was just laying wanting the intercourse to end. At one point she felt he had stopped holding her down so she was able to push him off because he was not expecting it.
- [61] She got up and tried adjusting her clothes but he pushed her down again. She immediately stood up. She hit him in the head, told him to "get the fuck off me". She said he looked shocked, she believed because she yelled. She pushed him away hard and he fell into some shelves. As she began to run out, he was saying "let's talk, let's talk" but she continued and left the apartment.
- [62] CCTV video shows L.T. in the elevator at 2:53:51, and she is engaged in a phone call. The Crown also introduced CCTV video showing her leaving the lobby of the building at 2:55 and she appeared still to be on a phone call. She said she met up with A.J. and they went to St. Paul's hospital.

B. The Accused's Testimony

- [63] The accused's testimony was consistent with L.T.'s that they had not made plans to meet up but ran into each other at the club. He agreed they left together and walked to his apartment. However, he testified that he invited L.T. to come to his apartment and that she agreed.

- [64] The accused testified he was not thinking about having sex with L.T. when he invited her to his apartment. He said he wanted to go home to rest because his friends were headed to an after-party and he might want to join them. He does agree that at least twice while they walked to his apartment, she brought up the topic of R. and J. in the context of why she did not want to have sex with him. During cross-examination, he said during the walk home he knew she did not want to have sex with him.
- [65] They got to the entrance to his building, and he agreed that L.T. said at that point, she would only come up to his apartment to use the bathroom and get a glass of water. They went into the elevator and the accused admitted that he tried to kiss L.T. and she rejected him.
- [66] During cross-examination the accused at first denied there had been any conversation where L.T. suggested she would phone R. to confirm the conversation the accused claimed to have had with R. However, when viewing the video in the elevator, and being directed to a point when L.T. is looking at her phone, he stated "yes, maybe" that could have been when that conversation took place.
- [67] He says when they got into the apartment, they went to the kitchen. He said L.T. did not try to first use the bathroom, and he did not follow her in. He does recall her getting a call from a friend when she was in the kitchen.
- [68] After having a glass of water, L.T. then went to use the bathroom. He said she was in there for too long, which he estimated might have been 3 or 4 minutes. He agreed that without first knocking or calling her name or saying anything, he opened a door to the bathroom. He stated he probably said "are you ok?" while he opened the door, but agreed he said nothing prior to opening the door. He testified he did that because he thought she might be doing drugs or using her phone so he wanted to check on her. However, he testified that he was in the bedroom and opened that door into the bathroom, not the one that led to the hallway.
- [69] The accused denies that he ever prevented L.T. from leaving the apartment by blocking her way out of the bathroom or otherwise. Instead, he said she came out of the bathroom and into his bedroom. He testified he was already sitting on the bed, and she sat down next to him.
- [70] He said he started kissing L.T. and she was "kissing him back". He said they were kissing for a while and he started "grabbing her everywhere". He was asked during his direct testimony what happened next, and his answer was that L.T. grabbed her phone, they stopped kissing for a minute but then kissing resumed. He could not say how long they kissed, but after that intercourse happened. He said after intercourse she pushed him off, which shocked him.
- [71] During cross-examination, he agreed that L.T. told him "many times" she did not want to have sex with him, including possibly in the bedroom. Yet he denied he was trying to convince L.T. to have sex with him. Nevertheless, he admitted that he told L.T. that J. was moving away and R. would not care if they had sex so there was no problem to the two of them having sex. He also told her that they did not have to tell R. if they had sex. In any

event, he agreed that while in the bedroom L.T. did say words to the effect that the only way sex would occur would be if he raped her. Although he denied taking her phone away, he agrees he put it at the top of the bed.

- [72] He gave more details about the sexual activity during cross-examination. He described that he moved her underwear aside and touched her vagina; however, he could not recall if he digitally penetrated her vagina. He agreed that he never verbally asked L.T. at any time if he could touch her vagina and that L.T. did not say at any time that she wanted him to touch her vagina.
- [73] He said they continued kissing, and he was lying on top of L.T. After touching her vagina, he then decided to take his penis out of his pants. He agreed L.T. did not say anything to indicate she wanted the accused to take his penis out of his pants. He said that he had intercourse with L.T., but that it did not last "very long", maybe only a few seconds. He agreed he did not say anything before proceeding to intercourse and that L.T. did not say she wanted to have intercourse with him. He agreed L.T. did not attempt to undress him nor did she touch his penis. He admitted she was not touching his body with her hands.
- [74] He acknowledged that touching a woman's vagina is more intimate than kissing and that intercourse is even more intimate than that.
- [75] The accused was asked several times during cross-examination what made him believe L.T. wanted to engage in sexual activity with him. His consistent answer was she was "kissing him back". He specifically agreed that L.T. did nothing else and said nothing else to indicate that she wanted the accused to touch her vagina or have intercourse. He agreed she did not use her hands to touch him.
- [76] The accused agreed that in his mind, at the very least, L.T. was not sure about having sex with him. When asked if it crossed his mind that he should confirm if she was sure about engaging in sexual activity, the accused responded with words to the effect that "when things like that happen, things happen naturally, you're not asking should I do this or that, it happens naturally".
- [77] On another occasion during cross-examination, when the accused was asked what L.T. did to indicate she wanted intercourse, the accused answered it was because "she did not reject". At still another point during cross-examination, he said in addition to kissing him back, L.T. was "grinding" and that was a sign that he took that she wanted him to touch her vagina. When asked to explain what he meant by "grinding", however, he essentially returned to his initial position that L.T. did not move her body.
- [78] He also answered "that's right" to the following: "you were going to keep going until she said no". He gave the same answer to this statement: if a woman is kissing you, you can go as far as sexual intercourse as long as she doesn't say no.

- [79] He agreed that between the time they left the club and L.T. left his apartment, L.T. said she did not want to have sex with him at least five times. He elaborated, unsolicited, that "a woman changes her mind every second".
- [80] He claimed that intercourse stopped when L.T. wanted it to end. He agreed she pushed him away and that he was surprised by that behaviour.
- [81] He testified the next day R. called him to report what L.T. was saying, but he did not elaborate on what R. told him. Because of that conversation, the accused sent the following text messages to L.T. on May 8, 2016 at about 1:12 p.m., to which she did not reply:

"Hey"; "R u ok?"

"Why did u have to tell [R.] then anything happen?"

"I dont really remember what happen but we didnt do anything"

"[complainant's first name]?"

"Lets forget about it n dont need to tell [R.] cuz nothing happen".

C. A.J.'s Testimony

- [82] A.J. has known L.T. for at least 10 years; both described each other as being best friends. Her recollection is that she made plans to meet up with L.T. on May 7, 2016, and that L.T. came to her house before they went to D.'s house.
- [83] She testified that they aimed to get to the club just before 11 p.m., to avoid the higher cover charge. She saw the accused hanging around L.T. in the club. She was not with L.T. the entire time they were in the club. She saw L.T. later, and L.T. told her she was leaving with the accused. According to A.J., L.T. said she wanted to talk to the accused to tell him she was not interested in him, and that he should leave her alone. A.J. recalled seeing L.T. leave with the accused. She testified she did not think L.T. would be gone very long with the accused.
- [84] A.J. testified that her group of friends had made plans to go to another club, and that they aimed to get there before 3 a.m., again to avoid a higher cover charge. She stated that L.T. knew about these plans.
- [85] Upon arrival at the first club, she and L.T. checked their coats in together, so before leaving to head to the other club, she retrieved her coat and saw L.T.'s coat was there. She called L.T. because she wanted to know where L.T. was. That call was not picked up.
- [86] She then got the text messages described earlier from L.T. She kept calling L.T. until L.T. picked up. Although the phones connected for a while, A.J. said there was no communication. She heard a lot of noise; L.T. was crying and A.J. could not understand anything L.T. was saying. The phones disconnected and she tried calling L.T. back a few times. When L.T. finally picked up, A.J. told L.T. to meet her at the corner of Smithe Street.

- [87] A.J. was asked to describe L.T.'s demeanour when they met up. She said L.T. was "crying hysterically" and shaking and that she was so emotional she could not even speak. She said she had never seen L.T. like that before.
- [88] During cross-examination, A.J. was asked why she told the police officer during her interview on May 31, 2016, that "events were blurry". She answered because she was in shock. However, she agreed when confronted, that what she actually told the officer was that events were blurry because she had been drinking.

D. CCTV Video

- [89] The accused admitted the authenticity and continuity of certain CCTV footage, as well as the accuracy of the time and date stamps. Five video segments were entered into evidence:
- a) The first is time stamped 2:19 a.m. and lasts about 30 seconds. It shows L.T. and the accused walking up to the accused's building. The accused opened the door for L.T. and they entered into the building. They both testified that at this point, L.T. said the only reason she was coming up to his apartment was to use the bathroom and get a glass of water.
 - b) A short video shows them walking through the lobby to the elevator.
 - c) There is video of the two of them inside the elevator. L.T. got into the elevator and stood in the back-left corner. After pressing a button, the accused grabs L.T.'s arm and pulls her to the middle of the back of the elevator and stands very close in front of her. He attempts to kiss her, but she turns her head away, clearly avoiding the kiss. He tries again to kiss her by putting both his hands behind her head but she resists. At one point L.T. is clearly looking down at her phone, and during cross-examination she pointed out that is when she told the accused she would call R. to confirm the accused's conversation, after which the accused admitted the conversation with R. did not happen. The accused admitted that this may have happened at this point (see above, para. 66).
 - d) The fourth video segment entered into evidence takes place after the incident in the apartment that led to the charges. It shows L.T. entering the elevator at 2:53:51 a.m. and she is engaged in a phone call. She leaves the elevator about 30 seconds later.
 - e) A fifth segment shows her exiting the lobby through the main entrance and she is still on the phone. She opens the door, looks up and then walks back into the lobby, re-emerging about 30 seconds later. Her testimony was that she briefly went back into the lobby to get the address of the building.

E. Evidence from L.T.'s and A.J.'s Cell Phones

- [90] After a voir dire, the following activity from L.T.'s and A.J.'s phones in the early morning hours of May 8, 2016, was ruled admissible and entered into evidence at trial:

- a) L.T. got a call from L. at 2:22 a.m. which lasted 57 seconds. Both the accused and L.T.'s testimony was consistent that she was in the kitchen in his apartment during this call.
- b) The following communication or attempted communication between L.T. and A.J. was extracted from L.T.'s cell phone:
 - i. 2:44:49 a.m. - A.J. called L.T. but the call was not answered.
 - ii. 2:45 a.m. - L.T. sent two texts one immediately after another to A.J.: "Renert is trying" and "Rape".
 - iii. 2:46:31 a.m.- A.J. called L.T. but the call was not answered*.
 - iv. 2:47:26 a.m. - A.J. called L.T. and the call was not answered.
 - v. 2:48:54 a.m. - A.J. called L.T. and the phones connected for 1 minute and 34 seconds.
 - vi. 2:52:06 a.m. - A.J. called L.T. and the call was not answered.*
 - vii. 2:53:25 a.m. - A.J. called L.T. and the phones connected for 1 minute 49 seconds.

*The cell phone data indicates the phones connected for less than 5 seconds.

F. Admissions

[91] The accused admitted to the following events which occurred after the alleged assault:

- a) L.T. attended the Sexual Assault Service at about 5:30 a.m. on May 8, 2016.
- b) L.T. was interviewed by a Constable Michelle Allen on May 19, 2016 and May 25, 2016.
- c) On May 26, 2016, L.T. gave the police the cell phone she had used on May 7 and 8, 2016, and consented to its search.
- d) A.J. was interviewed by Constable Allen on May 31, 2016.

[92] The accused also admitted to the voluntariness of a statement he gave Constable Allen on August 11, 2017.

V. CREDIBILITY ASSESSMENTS

[93] The accused admits sexual activity took place between he and L.T. He could not recall if he digitally penetrated L.T., but he admitted to touching her vagina. The accused also testified that he had sexual intercourse with L.T., although he claimed it occurred with her consent. L.T. testified that there was a second instance of sexual intercourse, which the accused denied.

- [94] Given the foregoing, the Crown has proven the first two elements of the actus reus of the sexual assault, but it must also prove beyond a reasonable doubt that L.T. did not consent to the sexual activity. In addition, it must prove that the accused intended to touch L.T. in a sexual manner knowing she did not consent, or being either wilfully blind or reckless as to the absence of consent.
- [95] L.T. and the accused's credibility are key issues.
- [96] There was commonality between the testimony of L.T. and the accused on a number of matters. However, there are some key facts where their evidence is in conflict. Accordingly, resolving those disputes requires me to assess both L.T.'s and the accused's credibility. In doing so, I am mindful of the W.D. framework and its application to the accused's credibility and reasonable doubt.

A. L.T.'s Credibility

- [97] Crown submits L.T. was a highly credible and reliable witness. Crown submitted that L.T. testified in a straight-forward manner. Crown also asserted L.T. provided a long and detailed account of what happened in response to a single question, consistent with a strong and reliable recall of events.
- [98] Crown also asserted there were no inconsistencies in L.T.'s description of the material facts of the sexual assault during her direct testimony, nor between what she said in direct and cross-examination. Crown also contends that even though L.T. was extensively cross-examined her testimony on the essential elements of the offences did not waver.
- [99] The defence challenges L.T.'s credibility on a number of grounds and focussed on particular portions of her testimony.
- [100] Defence counsel submits L.T. admitted to issues with her memory and this negatively impacts her credibility. L.T. did state a few times when recalling events that sometimes "things were a blur", or her recall of particular things came to her in "flashes". She also admitted that she sometimes had trouble with the sequence of certain events.
- [101] Defence maintained that L.T.'s memory of what happened could have been affected by her alcohol and drug consumption. L.T. testified that she had four drinks at the club. She also admitted she had about two drinks that day in the early afternoon, at the beach. She denied having any other drinks during the day. A.J. thought L.T. may have had a drink or two before getting to the club, but could not say how many drinks L.T. had at the club.

- [102] L.T. testified that in 2016 she often drank more, and had drunk much more than four drinks on other occasions. She testified that she did not feel drunk on May 7 and 8, 2016. She also stated she was not "wobbly" when walking. The CCTV evidence was consistent with that aspect of her testimony. Furthermore, the accused testified he did not perceive L.T. was intoxicated. L.T. admitted the cocaine she snorted would have affected her, but she denied that she was still experiencing those effects by the time she got to the club.
- [103] The defence also challenged L.T.'s credibility based on what she told the police at the hospital after the alleged assault. L.T. acknowledged that at the hospital on May 8, 2016, she reported only one instance of vaginal penetration. However, in her subsequent police interview and statement, she described three instances of penetration.
- [104] During cross-examination she acknowledged this discrepancy. She testified that she told Constable Allen during her interview that she was in shock and felt traumatized at the hospital on the offence date; she recalls she had trouble putting sentences together. At trial, she explained what she said to the police at the hospital was not the whole truth. She stated her police statement given to Constable Allen represents her best recollection of what happened.
- [105] Also relevant to this issue is a portion of A.J.'s testimony. She was asked to describe L.T.'s demeanour when she met up with L.T. after L.T. left the accused's apartment. A.J. said L.T. was crying hysterically, shaking and having difficulty speaking because she was so emotional. A.J. said she had never seen L.T. in that state in the many years that she has been friends with L.T. A.J. was not challenged on that recollection.
- [106] The defence also challenged L.T.'s credibility with regard to the timing of what she described as the second instance of forced intercourse. The accused focusses on the time between L.T. ending the phone call with A.J. and the time when she entered the elevator as revealed on the CCTV; that period is about 3 minutes and 20 seconds.
- [107] The accused submits based on L.T.'s testimony all of the following things must have happened in that period: L.T.'s phone call with A.J. finished, the accused pushed her down onto the bed; the accused held her down and again forced intercourse on her; she froze, but when she felt he was not holding her down again, she pushed him off; she stood up and he pushed her down again; she stood up immediately, wacked him in the head and yelled at him; she pushed him away (he fell into some shelves) and she then left the apartment, pushed for the elevator and got into the elevator.
- [108] The accused submits L.T.'s testimony about what happened during that time could not happen, or at the very least, the evidence is improbable enough to raise a reasonable doubt about the veracity of her testimony.
- [109] Turning to consider the defence submissions about L.T.'s credibility, I agree with Crown that L.T.'s recall of the material facts of the assault was thorough and consistent throughout her testimony. In answer to one open-ended question, she recounted a complete narrative

of events during the relevant time. Her subsequent recounting of the material facts in both direct and cross-examination was consistent with her original narrative. L.T. was not evasive or defensive during cross-examination. She agreed with reasonable propositions put to her even where it modified her previous testimony (although nothing of material importance in her testimony was modified).

- [110] Defence counsel submitted she had a faulty memory because of the expressions used to describe her recall, including that events appeared in her memory in "flashes" or were a blur. However, L.T. never used those qualifiers when describing any of the sexual acts or her mental state regarding them. She did express some uncertainty about aspects of her recollection in terms of the sequence of events, but not the sequence of the sexual acts. Instead, she admitted to some uncertainty regarding what exactly was happening at the various times identified in the forensic evidence when A.J. was trying to call her, as well as when their phones connected. However, she was clear and consistent about when the particular instances of sexual touching occurred in relation to the text messages she sent A.J.
- [111] In my view, these admitted uncertainties do not detract from her credibility. It would be surprising if L.T. was able to recall exactly what was happening each time her phone rang. Her testimony about the specific actions that constituted the sexual assault, and their sequence did not change. I do not find that L.T.'s memory was demonstrated to be faulty in any way.
- [112] Nor am I persuaded that L.T.'s credibility is negatively impacted by her drug or alcohol consumption. Based on the consistency of A.J.'s and L.T.'s recollection that they remembered the time they arrived at the club because of an increase in the cover charge, I do find they arrived just before 11 p.m. The video evidence shows L.T. arriving at the accused's apartment at 2:19 a.m. The accused testified it would have taken about 20 minutes to walk from the club to his apartment. Accordingly, I find that L.T. spent about three hours at the club, and in that time I accept her evidence that she had four drinks. There was no evidence presented to contradict L.T.'s testimony that she was not drunk and was not incapacitated in any way.
- [113] Defence counsel submitted that it is possible the drug she snorted was either not cocaine, or was cocaine laced with some additive that may have affected L.T. hours later. Defence counsel specifically tied that suggestion to the possibility that L.T. blacked out momentarily. The problem is that position does not match the evidence. Neither the accused nor L.T. described any moment where L.T. blacked out. Instead she explained that her body "froze", but she did not describe having a gap in her memory or consciousness during that time. Moreover, the accused's argument on this point is based on speculation and has no factual foundation in the evidence.
- [114] Accordingly, I do not find L.T.'s memory or her mental state at the time of the events were negatively impacted by her drug and alcohol consumption.

- [115] As to the difference between her initial report to police at the hospital (that there was only one act of vaginal penetration), and her police statement and trial testimony that there had been digital penetration and two instances of forced intercourse, I accept L.T.'s explanation for the difference. I find her emotional state when she was at the hospital made it difficult for her to accurately report to police at that time every aspect of what happened. The explanation matches A.J.'s observations. The accused testified that just before L.T. left his apartment, she "jumped like crazy" which is more consistent with her being in a heightened emotional state. In my view, L.T.'s explanation makes sense in the context.
- [116] The accused also challenged L.T.'s credibility based on what I will call an improbable timing argument. L.T. described that after finishing the phone call with A.J., the accused pushed her down (on her back) and forced intercourse on her a second time. The accused's testimony was firm during cross-examination that there was only one incident of sexual intercourse.
- [117] The accused says L.T.'s testimony about when the second forced intercourse happened, and how long it lasted, raises at least a reasonable doubt about its occurrence, thereby diminishing L.T.'s credibility. The defence raised this timing argument during closing submissions and did not confront L.T. with it during cross-examination that her testimony should not be accepted because of the timing issue. Crown submitted I should place no weight on the submission for that reason. However, I need not address Crown's proposition because as I now explain, I do not accept the premise of defence's submission.
- [118] According to L.T.'s testimony, the second instance of forced intercourse happened after she got off the phone with A.J. and before she left the apartment. Looking at the phone log data and the CCTV of when L.T. entered the elevator, defence counsel calculated that time to be about 3 minutes and 20 seconds, which I accept is plausible. Defence counsel submitted the events L.T. described happening between those two events simply could not have occurred (see above, paras. 59- 62, 107), or at least I should have a reasonable doubt about her testimony.
- [119] I do not agree. L.T. testified that while it felt like a long time, events happened quickly. This is consistent with the accused's trial testimony that intercourse was over "very quickly", perhaps in seconds. Taking that into account and applying common sense, I do not agree that it is improbable the actions described by L.T. could have occurred in just over three minutes, nor am I left with any doubt about that. I accept L.T.'s testimony, and do not agree her recounting of the second act of forced intercourse negatively impacts her credibility.
- [120] For all those reasons, I do not agree with the accused's submissions that L.T.'s credibility was impaired. I found L.T. to be credible and reliable.

B. The Accused's Credibility

- [121] Crown counsel submitted the accused's credibility was impaired because of inconsistencies between his trial testimony and what he said during his police interview. Crown also applied to confront the accused at trial with testimony given during the s. 276 voir dire, and with the limitation that such testimony could only be used to assess credibility and not for the truth of what was said, defence counsel did not object. I ruled the questions were permissible on that basis: *R. v. Darrach*, 2000 SCC 46 at para. 67.
- [122] Crown submits the inconsistencies of his answers during his police interview decreases his credibility. Crown also points to what it says are significant differences in material facts between what the accused told the police and his admissions at trial that sexual activity took place. Its position is that these inconsistencies seriously taint the credibility of the accused.
- [123] During cross-examination the accused admitted he made the following statements during the police interview (these are presented in chronological order from his interview):
- a) When leaving the club with L.T., he told his friends who were standing outside that nothing would happen because L.T. was "R.'s girl". He confirmed at trial that statement to police was true.
 - b) L.T. told him she was interested in R. so nothing would happen between her and the accused and the accused said OK, and said they would not do anything. At trial he agreed that statement to the police was true.
 - c) He denied there was any sexual activity with L.T. on May 8. Instead, he said they were talking in his apartment and suddenly she started screaming and left, running.
 - d) Later, he said he and L.T. spoke in his room for about 10 to 15 minutes, then he fell asleep and she left (he awoke to the door closing).
 - e) Still later, he said they were kissing while laying on the bed and he tried to put his hand or finger on or in her vagina but she protested and that's when she left.
 - f) He then said he tried to put his penis in her vagina while they were kissing but he probably just put it "next to her".
- [124] During the voir dire, he admitted intercourse took place and said it may have lasted 10 to 15 minutes. At trial he said it only occurred for a short time, maybe seconds.
- [125] Crown submits that the accused basically gave at least five different versions of what happened while in his apartment.

- [126] In response, counsel for the accused submitted the inconsistencies do not impair his credibility at trial. Defence counsel submitted the accused was not very articulate and the court ought to take into account that English was not his mother tongue. The accused also testified he was nervous during the police interview, although he also said he did not know what to say.
- [127] However, the accused was specifically asked and confirmed during his direct testimony that he believed his English was very good. During his testimony, I did not discern him to be inarticulate because of any difficulties with English.
- [128] Although I accept like anyone, the accused may have been nervous talking to police, I am not persuaded that nervousness can explain the number and degree of inconsistencies in the information he gave to police about the extent of sexual activity with L.T. The accused also stated that he did not know what to say to the police, however that is not necessarily the same as being nervous.
- [129] Overall, the accused simply could not explain the number of inconsistencies within his interview with police and between those and his trial testimony. I also find the nature of the inconsistencies to be telling. The accused could not explain (other than relying on nervousness) why over the course of his interview with the police his recall changed dramatically from there being no sexual activity of any kind to them kissing and his putting his penis "beside" L.T. Nor did he provide a believable explanation for his recall at the voir dire that intercourse lasted between 10 to 15 minutes but at trial, intercourse lasting merely seconds. These were not minor inconsistencies, but completely different versions of his interactions with L.T.
- [130] Accordingly, in terms of overall credibility, I agree that the accused's credibility was eroded by the inconsistencies during his police interview, between his trial testimony and what he told the police.

VI. DID L.T. CONSENT TO SEXUAL ACTIVITY?

- [131] In order to prove the actus reus of sexual assault, Crown bears the burden to prove beyond a reasonable doubt that L.T. did not consent to the sexual activity that took place. The test is subjective, meaning what matters is L.T.'s state of mind. As noted above, L.T. testified she did not consent to any sexual activity.
- [132] L.T.'s memory of events was challenged, and she was asked many questions about the possible interpretation by the accused of her actions and words. However, at no point during cross-examination did counsel suggest to L.T. that she was untruthful in saying she did not consent. Instead, the accused challenged her on the timing of events, and whether there was two instances of intercourse.

- [133] The accused is entitled to challenge L.T.'s credibility in any way. However, I am mindful of the comments from Ewanchuk at para. 31, that there are only two options with regard to analyzing whether Crown has proven the *actus reus*: either L.T. consented, or she did not. As I understand the law, it is impermissible for me to conclude the Crown has not met that burden by finding that the accused has raised a "reasonable doubt" about L.T.'s subjective state of mind based on her conduct.
- [134] I believe L.T.'s testimony with regard to the lack of consent to sexual activity. My conclusion is also based on looking at the evidence as a whole. Specifically, I rely on my earlier conclusions about her credibility (paras. 109-120). I also take into account that L.T. was never challenged about the veracity of the first instance of forced intercourse that she described. It is undisputed that she said several times, including in the bed, that she did not want to have sex and that is consistent with her testimony about the absence of consent.
- [135] This leaves no doubt in my mind that L.T. did not consent to the sexual touching by the accused. Accordingly, the Crown has proven beyond a reasonable doubt that the *actus reus* of sexual assault occurred by the accused touching L.T.'s vagina and having intercourse without her consent.

VII. DID THE ACCUSED HAVE AN HONEST BUT MISTAKEN BELIEF IN COMMUNICATED CONSENT?

- [136] The accused submitted in the alternative that if I were to find L.T. did not consent, he had an honest but mistaken belief in her communicated consent.
- [137] Crown's position is that the accused's testimony at face value cannot exculpate him. Its position is that the accused's testimony confirmed he was reckless as to the presence of consent, and he took no reasonable steps to ascertain consent, thereby precluding the operation of mistake of fact. Accordingly, its position is that there is no need to resort to the W.D. framework on this issue because there is no conflict between the accused and L.T. on the facts material to the defence.
- [138] As summarized earlier, the accused said more than once that he believed L.T.'s "kissing him back" was sufficient for him to proceed to engage in sexual intercourse without taking any steps to confirm her continuing consent. And he did so when he acknowledged that he perceived her to be, at least, unsure about whether she wanted to have intercourse. When asked why, if he was unsure, he did not confirm consent, he answered words to the effect, "these things happened naturally" and people do not have to ask permission for every step in a sexual encounter. He specifically agreed, that if a woman "kisses you back" until she says no, any type of sexual activity up to and including intercourse can take place. He also relied on his view that "women change their minds every second".

- [139] Despite the foregoing, he agreed that on at least five occasions after they left the club, L.T. explicitly told him she did not want to have sex with him. This includes his acknowledgement that while in the bedroom she told him that the only way sex would happen is if he raped her.
- [140] It is also significant that he agreed L.T. never asked him to, nor did he ask her whether he could, touch her vagina or have intercourse. The accused relied purely on his position that she was kissing him back to proceed to vaginal touching and intercourse. He also acknowledged his understanding those acts were more intimate than kissing.
- [141] I add that L.T. testified there was no kissing in the apartment, which directly contradicts the accused's testimony that there was mutual kissing. There was other evidence from the two of them about kissing. L.T. said the only attempted kiss in the apartment was in the kitchen but she refused. She was not challenged on that assertion. The accused admitted L.T. clearly refused his kiss in the elevator. The accused agreed L.T. stipulated before going into his building that it was not to engage in sexual activity, and he agreed L.T. said a number of times in the apartment she was not interested in becoming sexually involved with him.
- [142] Taking those facts into account, and in light of all the evidence, I do not believe the accused that they engaged in mutual kissing in the bedroom, and I am left with no doubt about that.
- [143] In addition, L.T. testified that she said many times she did not want to have sex with the accused and that she wanted to leave the apartment, contrary to the accused's testimony that "nothing" was said during the sexual acts. Again, in light of all the surrounding circumstances I believe L.T. on this point, not the accused and I am left with no doubt about that.
- [144] During submissions, the defence suggested that it was possible the accused perceived L.T. was "playing hard to get", that her coming to the apartment, sitting on the bed were "symbolic signs in our culture" that could underlie a belief in consent. Counsel went so far as to submit the comment "you'll have to rape me" was a comment made in jest.
- [145] Besides resting on explicitly prohibited lines of reasoning which would amount to errors of law, those submissions do not conform to the accused's own testimony. He did not testify that he perceived L.T.'s comment about having to rape her was said in jest. He did not suggest L.T. was playing "hard to get"; he simply explained that she kissed him back and therefore he could proceed to engage in more intimate sexual acts until she said no. I also note that a perception a woman is "playing hard to get" cannot at law be taken to be an invitation for a person to become more assertive in pursuing sexual contact: see Ewanchuk at para. 51. Instead, it requires more care be taken to ascertain the presence of consent, not less.

- [146] The accused relied on *R. v. Aitken*, 2007 BCSC 1975, suggesting it was still good law and stood for proposition that there does not have to be a constant "checking-in" as sexual touching progresses. The progression of sexual activity in that case went from "spooning" to some touching, but not touching of the genitals. Accordingly, the case is distinguishable on the facts.
- [147] In addition, that case was decided 12 years before Barton clarified the law such that the defence is now an honest but mistaken belief in communicated consent. It is not clear to me if the analysis (especially at paras. 34-35) in *Aitken* would prevail today in light of Barton. In any event, compared to the sexual contact in this case, the touching in that case was described by the trial judge as "minor". That must have been a factor in the trial judge's analysis of what was communicated by the complainant's conduct during the activity in question.
- [148] I conclude that as a matter of law, the accused cannot rely on the defence of honest but mistaken belief in communicated consent. By his own testimony, nothing was said between the two of them about the sexual acts. I add that in any event, I have preferred L.T.'s evidence over the accused's, and find that she did say no, and I am left with no doubt about that.
- [149] The accused also admitted more than once that L.T. did nothing except allegedly kissing him back to indicate consent. Even if I had a reasonable doubt whether kissing occurred (which I do not, as indicated above, I have found it did not occur), there is a marked difference between consent to kissing and consent to vaginal touching and intercourse, as the accused himself acknowledged. Accordingly, it is a mistake in law for the accused to rely on L.T.'s alleged consent to kissing as consent to other sexual acts.
- [150] Furthermore, the accused acknowledged he took no steps to confirm whether L.T. was consenting to the vaginal touching or intercourse. As noted in Barton at para. 104, "no reasonable steps, no defense". Because I find, based on the accused's own testimony, that he took no reasonable steps, I agree with Crown that the W.D. framework is not critical to my conclusion on this issue. Even if it was applicable, I do not believe the accused on how the sexual acts occurred; I believe L.T. and I am left with no doubt about that. I find the evidence clearly establishes beyond a reasonable doubt that the accused was reckless with regard to the issue of consent.
- [151] I am satisfied beyond a reasonable doubt that the Crown has proven the accused touched L.T.'s vagina and had intercourse with her being reckless as to whether L.T. was consenting. I also find he took no steps to confirm affirmative consent to any sexual activity. I am left with no doubt on any of those conclusions.

VIII. DID THE ACCUSED UNLAWFULLY CONFINE L.T.?

- [152] The testimony of L.T. and the accused about the events immediately preceding and constituting the alleged confinement is for the most part consistent. However, there are significant points of difference. Therefore, I must apply the W.D. analysis to determine if the Crown has proven elements of unlawful confinement beyond a reasonable doubt.
- [153] L.T. testified that while she was using the toilet, the accused, without first knocking or calling out, opened the bathroom door that leads to the hallway, and looked in. She told him to shut it, which he did. She testified when she finished using the bathroom, she opened that same door to leave the apartment. However, the accused blocked her exit. She decided to escape from the other bathroom door, which required her to traverse his bedroom to reach the hallway. She testified that the accused again stood in her way by standing a few feet in front of the hallway door. She says he walked towards her and eventually pushed her onto the bed.
- [154] The accused denies that he blocked L.T. from leaving the bathroom, and then moments later, the bedroom. He admits to opening the door when she was using the toilet without first knocking, but said it was the door that led into his bedroom, not the one between the hallway and the bathroom. He also testified that she came directly into his bedroom when she was finished in the bathroom.
- [155] The Crown submits L.T.'s evidence was credible, but the accused's was not.
- [156] The defence submits L.T.'s evidence about the alleged confinement contained inconsistencies, which impaired her credibility. I disagree. Her testimony about trying to get out of the bathroom was consistent throughout her direct and cross-examination and she did not waver in her recall.
- [157] The accused raised other concerns about L.T.'s credibility, which I have already discussed earlier in this judgment (paras. 109-120). As noted in those paragraphs, I have not found L.T.'s credibility to be impaired based on those submissions and I adopt and rely on that analysis here.
- [158] Looking at the whole of the evidence about the alleged confinement, and taking into account what transpired in the evening leading up to that point, I find L.T.'s account has the ring of truth. To be clear, where their evidence was contradictory, I find L.T.'s testimony credible but not the accused's, and I am left with no doubt about that.
- [159] I accept that L.T. became scared and decided to leave the apartment when the accused opened the bathroom door without first calling out or knocking. She was not challenged about her fear.

- [160] During submissions the accused tried to downplay his opening the bathroom door without knocking as simply a lack of etiquette. He said he opened the door because he was concerned that L.T. was using drugs. There was no foundation given for that concern. He did not testify that he had been aware that night that L.T. had taken cocaine, or that he believed her to be a drug user generally. He also testified she did not appear to him to be intoxicated in any way.
- [161] He also stated he opened the door because he thought she might be on her phone. I do not understand, and he did not explain, how that would raise any concern about L.T.'s well being or indicate in any way a possible need for immediate attention.
- [162] Furthermore, even if either assertion was true, that would still not explain why the accused would open the door without first knocking or calling out to L.T. I find most people would find it at least upsetting, if not disturbing if, while using the toilet, someone opened the bathroom door without first knocking.
- [163] I find that the accused was interested in having sex with L.T. the whole time they were together. In the context of that, and what had already taken place between them, the accused's behaviour escalated from attempts to convince L.T. to have sex with him, to his committing the sexual assault. His restriction on L.T.'s movement was an aggressive step in that progression. In that context, I find his unannounced opening of the bathroom door was an aggressive prelude to his preventing L.T. from leaving the bathroom. I do not accept his submission that he had a benign explanation for opening the door and I am left with no doubt about that.
- [164] This conclusion is also supported by what I find to be his persistent sexual interest in L.T. During cross-examination, the accused testified he did not turn his mind to engaging in sexual activity with L.T. until they started kissing in his bedroom, but I do not accept his testimony on that point for a number of reasons.
- [165] L.T. testified she was surprised when they ended up at his building after leaving the club, but she was not concerned for her safety about going to his apartment to use the bathroom and get some water. Yet, she still made it clear she did not want to have sex. The accused agreed she made that statement. L.T. testified she made that statement because she was aware that the accused was interested in her but she did not want to have sex with him. She stated she had become aware earlier than evening he was interested in her sexually. This is supported by A.J.'s testimony that L.T. told her she was leaving with the accused to tell him she was uninterested in him.
- [166] L.T. stated that at worst, she thought the accused might try to kiss her, which again, the accused agreed happened in the elevator. I also accept her testimony that the accused made up a story that he had spoken to R. and R. was unconcerned if L.T. had sex with the accused. At first the accused denied that conversation, but when confronted with the video from the elevator, conceded the conversation may have taken place (see above, para. 66). He also agreed that he told L.T. they could have sex and lie to R. about it. Furthermore, the

accused accepted that at least on five occasions during the time they were together, L.T. stated she did not want to have sex with him. He agreed that while in the bedroom, L.T. said that the only way sex would happen, is if he raped her.

- [167] This undisputed evidence is not consistent with the accused's testimony that he did not think about sex with L.T. until they were in his bedroom. Instead, I find the accused had sexual interest in L.T. the entire time. His behaviour matches this conclusion. Unprompted, he tried to kiss her in the elevator. I also accept L.T.'s testimony that he tried to kiss her in the kitchen but she pushed him away. I also believe her testimony that he initially tried to follow her into the bathroom before going to the kitchen. I do not believe his denial about that and I'm left with no doubt. That behaviour is consistent with his unannounced opening of the door when L.T. was in the bathroom.
- [168] On the whole of the evidence, I find that he demonstrated a continued and sustained effort to persuade L.T. to have sex with him, notwithstanding what I find to be her consistent refusals.
- [169] I find the accused's pursuit of having sex with L.T. escalated when they got to his apartment. Rather than accepting her rejections, the accused's behaviour simply became progressively more aggressive. His testimony revealed a mindset consistent with recklessness about consent, including his beliefs that women change their mind about sex easily, that there is no requirement to check-in whether a woman wants to engage in more intimate sexual activity and his admission that he knew L.T. was at least unsure in her mind about having sex with him (see above, paras. 76, 79).
- [170] Having been unsuccessful with his attempts to kiss L.T., his opening the bathroom door without invitation was reasonably viewed by L.T. as a scary act. I believe L.T. that she wanted to leave at that point, and I find that to do so she opened the bathroom door that led to the hallway, and that she stated at least twice that she wanted to leave. I find that the accused placed his body in that doorway to physically block her exit. She would have no reason otherwise to take the route leading through his bedroom. I do not believe the accused's testimony that he was in the bedroom and opened the door from that side, and then sat on the bed while L.T. came into the bedroom directly from the bathroom. I accept L.T.'s testimony about these events not the accused's and I am left with no doubt about that.
- [171] I am satisfied beyond a reasonable doubt that the accused intentionally placed himself in the hallway doorway of the bathroom for the purpose and having the consequence of restricting L.T.'s movements. I find that he did so knowing that L.T. wanted to leave the apartment. Therefore, the Crown has proven beyond a reasonable doubt the essential elements of unlawful confinement.

IX. VERDICT

- [172] Mr. Ravelo-Corvo, please stand:

- a) on the first count, that on or about May 8, 2016, you sexually assaulted L.T. contrary to s. 271 of the Criminal Code, I find you guilty; and
- b) on the second count, that on or about May 8, 2016, you confined L.T. without lawful authority contrary to s. 279(2) of the Criminal Code, I find you guilty.

"Sharma J."

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