

CANADA / JUDGMENT

R. v. Smith

2025 BCSC 1944

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1944 R. v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Smith,

2025 BCSC 1944

Date: 20251003

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Rex

v.

Gene Kenneth Kacy Smith

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Before: The Honourable Madam Justice Sukstorf

Oral Reasons for Judgment

Counsel for the Crown:

P.A. Weir

Counsel for the Accused:

J.D.A. Watt

Place and Dates of Trial:

Victoria, B.C.

August 6, 8, 11-15, 2025

September 29, 2025

Place and Date of Judgment:

Victoria, B.C.

October 3, 2025

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- [1] THE COURT: These are my reasons on whether the Crown has proven beyond a reasonable doubt that Mr. Smith is guilty of sexual assault. If a transcript is ordered or this decision is published, I reserve the right to edit these reasons to insert the full citations and make minor editorial changes. Neither the result nor the reasoning will change.

I. Introduction

- [2] On August 6, 2024, the accused, Gene Kenneth Kacy Smith, was arrested and charged with sexually assaulting C.T. on or about August 4, 2024, in Central Saanich, British Columbia.
- [3] The complainant, C.T., alleged that after an evening of drinking at a shared residence at 92 Etienne Road, she went downstairs to the basement with Mr. Smith, where she later became unconscious in a chair and awoke on more than one occasion in Mr. Smith's bed to find him having sexual intercourse with her. She testified that she told him to stop, but he told her to "shut up" and continued.
- [4] Mr. Smith admitted that a sexual encounter took place, but gave a very different account of the circumstances. He testified that it occurred only once, briefly, on the upstairs couch in the early evening. He denied that C.T. was unconscious, denied that she objected, and denied ever telling her to "shut up" or turning up the music to mask sounds.
- [5] The identity of the accused, the intentional nature of the touching, and its sexual character are not in dispute. The only live actus reus element is the absence of consent. The live mens rea element is whether Mr. Smith knew of, was reckless as to, or was wilfully blind to a lack of consent.

II. Issue

- [6] Framed this way, consent and Mr. Smith's knowledge of any lack of consent are the determinative questions in this case.

III. Summary of Evidence

A. C.T.'s Evidence

1. Direct Testimony

- [7] C.T., who is a 62-year-old member of the Tsartlip First Nation, testified that she lived at 92 Etienne Road, a two-storey home formerly owned by her late husband and located on the South Saanich 1 Reserve in British Columbia. She occupied the upstairs main bedroom, and her son, Joseph, and a family friend, Noah, also stayed upstairs. Mr. Smith, C.T.'s late husband's son, was living in the basement, which contained a bed, an armchair, a television, and laundry facilities, but lacked a kitchen or bathroom. The basement was connected to the upper level by an internal staircase without barriers.
- [8] On Sunday, August 4, 2024, C.T. was drinking on the upstairs patio with Joseph, Mr. Smith and Noah. After Joseph left to get more beer, Mr. Smith invited C.T. downstairs for another drink. She went with him; Noah did not join them. C.T. recalled sitting in his armchair before becoming unconscious.
- [9] C.T. described herself as intoxicated. When asked what that meant to her, she said she was "pretty drunk." When asked if she could stand and move around in that condition, she replied, "not really," and added that when she is drunk, "I don't remember things."
- [10] C.T. then explained the following course of events:
- a) First episode: C.T. testified that she awoke on the accused's bed, naked from the waist down. At first, she said she was lying on her back. She then described being on her hands and knees with the accused behind her, having penile-vaginal intercourse. She stated there had been no discussion about sex and that she told him to stop, but he told her to "shut up." She said the accused then told her to turn onto her back, which she did, and intercourse continued despite her objections. She described the room as dimly lit by a lamp and the television, which was also playing music.
 - b) Second episode: C.T. testified that she fell asleep and awoke about 15 minutes later to find herself again on her hands and knees with the accused behind her, having intercourse. She again told him to stop. He told her to "shut up" and, when she said people upstairs might hear, he replied that they could not and turned up the music.
 - c) Third episode: C.T. testified that she fell asleep a second time and awoke to find him "on her again," still telling her to "shut up" and keep quiet. She recalled him saying that no one upstairs could hear and that he turned the music up louder. She said intercourse continued until the accused became too drunk and went to sleep.
- [11] C.T. told the Court that she kept telling Mr. Smith to get off her, but the more she said it, the angrier he became, telling her to "shut up" and to be quiet.

- [12] After the third episode, C.T. testified that she went upstairs without pants, wearing only a black shirt, and slept on the living room couch. She stated that when she woke the next morning, she was naked from the waist down. She told the Court that she believed she must have taken her pants off, possibly in the bathroom. She explained that when she drinks too much, she sometimes wets herself. When asked by Crown counsel if she remembered removing her pants, she said she did not.
- [13] The next morning, C.T. testified that she drank beer outside with Joseph and Mr. Smith. No one discussed the sexual episodes.
- [14] C.T. also said that on Monday morning, she showered, woke her son, and told him she was going to her sister's house. She testified that her purpose in going was to tell her sister what had happened with Mr. Smith. On August 6, 2024, accompanied by her sister's son, Phillip, C.T. attended the RCMP detachment to report that she had been "raped."

2. Cross-Examination

- [15] Under cross-examination, C.T. acknowledged that in August 2024, she was living primarily at her sister Lucia's residence, along with her daughter Cecilia and nephew Phillip. She stated that she would go to 92 Etienne Road to drink alcohol because she was not permitted to drink at her sister's home. She agreed she is an alcoholic, has been drinking since age 19, and has had related health problems, blackouts, and memory gaps. She confirmed she has developed a high tolerance to alcohol and that excessive drinking affects her perception and recollection. To be more specific, she agreed that she could drink a flat of beer (i.e., 24 cans) alone and "still be fine." It would take more than a flat of beer for her to become intoxicated.
- [16] On the first evening, C.T. admitted to sharing the flat of beer she had brought to 92 Etienne amongst four people: herself, Mr. Smith, Joseph, and Noah. When they ran low on beer, she gave her bank card to Joseph and he and Noah went to buy more beer. She agreed that when Joseph and Noah went to get more beer, she was not drunk. When Joseph and Noah returned from purchasing more beer, Noah refrained from drinking, as he had to work the next day.
- [17] Under cross-examination, defence counsel suggested to C.T. that sexual intercourse occurred on the couch upstairs when Joseph and Noah left to get more beer. C.T. initially agreed, then said no, and then said she did not recall, but later admitted it was possible, given her poor memory from drinking. She also confirmed again in cross-examination that when intoxicated, she sometimes wets herself and may not recall removing clothing.
- [18] The defence challenged C.T.'s account of the alleged sexual assault. Specifically, the defence challenged her recollection that the incident occurred downstairs in the basement, noting she had not told police about going downstairs for a drink, sitting in a chair, and later waking on the bed. C.T. agreed these details were first given in court and that she has a poor memory.

- [19] C.T. also accepted that in her police statement, she did not mention the specific details that she testified to in court, such as being on "all fours," Mr. Smith telling her to "shut up," or turning up the music. She ultimately agreed he had not said "shut up" or "keep quiet" during intercourse. She also confirmed telling police she thought she could have been drugged, but later said it was more likely from drinking heavily.
- [20] Despite the outline of events that she recounted in direct examination, under cross-examination C.T. agreed that the intercourse was brief and involved her being on her back, without position changes, but stated that Joseph and Noah were upstairs at the time. She further testified that after she and Mr. Smith had sexual intercourse, he fell asleep. However, it was put to her by the defence that in her police statement, she stated that Mr. Smith went upstairs to use the bathroom. When asked what happened, C.T. adopted the version she had explained to the police: that Mr. Smith had gone upstairs to use the bathroom.
- [21] After the incident, C.T. stayed at the residence, continued drinking with others, and later returned to her sister's home without seeking medical attention.
- [22] C.T. agreed that she had known Mr. Smith, who is her late husband's son, for over 20 years and had frequently socialized, played pool, watched movies, listened to music, and consumed alcohol with him both upstairs and downstairs at 92 Etienne. The defence reviewed photographs of the property with her to confirm the layout and the items located in the basement.
- [23] The defence suggested there was a dispute between C.T. and Mr. Smith over the ownership of the house and she admitted she did not want him living there and had told police she wanted him gone. C.T. acknowledged that she has difficulty with dates and times, was unsure exactly when the alleged incident occurred, and gave different dates to the police. She agreed she might have come to the residence on Thursday, August 1, 2024, to drink.

B. Mr. Smith's Evidence

1. Direct Testimony

- [24] Mr. Smith is a 40-year-old member of the Tsartlip First Nation. He testified that he has a Grade 11 education, was unemployed and on income assistance at the time of the alleged offence, does not use drugs, and has been an alcoholic since his 20s. Although he acknowledged a criminal record, no particulars were led, and I place no weight on it for any purpose. Mr. Smith has known C.T. since childhood through his father and stated that their relationship was good before the allegations. He had lived in the basement at 92 Etienne for approximately 10 years and had previously seen C.T. intoxicated, become unconscious, and sometimes require medical attention.
- [25] Mr. Smith stated that the events began on a Thursday. He testified that when he first woke up around 11 am, he found C.T. sitting alone in the living room with the TV off. He asked if anything was wrong. C.T. was beside a flat of beer, and he joined her in drinking. Joseph called, looking for C.T., and then came over. Later, Noah arrived from work. When the beer

ran out, Joseph and Noah took C.T.'s bank card and took a cab to buy more, leaving Mr. Smith and C.T. alone in the living room. While alone on the couch, they kissed, and C.T. leaned back and started removing her pants while he removed his. Mr. Smith testified that they then had brief sexual intercourse with C.T. on her back, which he estimated lasted less than two minutes. He said he "went soft," they stopped, and both dressed. He denied asking her to turn over, denied any sex from behind, and denied turning up any music.

- [26] Mr. Smith testified that Joseph and Noah returned with more alcohol, and they continued drinking inside and briefly outside. The next day (Friday), Joseph again obtained alcohol with C.T.'s bank card, and they continued to drink. Mr. Smith testified that he then went downstairs to play video games and later learned from Noah that C.T.'s sister picked her and Joseph up at about 6 pm that day. He emphasized that he could remember the timing because he was subject to a court-ordered curfew, which required him to remain at home on Saturday, and he recalls being alone at the residence on that day. Mr. Smith stated that he was arrested approximately three days after the incident.
- [27] Mr. Smith denied that C.T. passed out during intercourse, denied telling her to "shut up," and maintained there was only one sexual encounter on the upstairs couch. He said C.T. was never downstairs during the relevant period. He described everyone's intoxication level at the time of the sexual encounter as "buzzed." He acknowledged that, in his police interview, he initially denied having sex because he was embarrassed to admit that he had had sex with his father's ex-wife and that he told the officer he had not been drinking because he was under a court-ordered no-alcohol condition.

2. Cross Examination

- [28] On cross-examination, Mr. Smith testified as to why he believed the events occurred on a Thursday. He explained that on Saturday, when he was required to remain at home, he recalled being at home with no one else present. He acknowledged, however, that he had not made any contemporaneous notes and that his recollection of the day was pieced together after his arrest.
- [29] Mr. Smith confirmed that he had known C.T. for many years and regarded her as having played a stepmother role. He said that their relationship was positive and that they always got along. He testified that, even after the drinking and intercourse, when C.T. left on Saturday, he believed their relationship remained positive.
- [30] Mr. Smith acknowledged that he and C.T. had had arguments in the past, particularly concerning the ownership of the residence at 92 Etienne. He maintained, however, that those disputes did not arise on the day in question.
- [31] When referring to his earlier statement to the police, Mr. Smith acknowledged saying that C.T. did not "make stuff up." He confirmed in cross-examination that, in his experience, she had been honest and upfront and that he had never known her to be vindictive or malicious, except during their arguments over the residence.

[32] Finally, Mr. Smith confirmed that he is an alcoholic. He stated that he is not a daily drinker, but rather a binge drinker who finds it difficult to stop once he begins. He admitted that binge drinking can cause lapses in memory and changes in perception. He also admitted that he has difficulty understanding what others are saying or doing when he is intoxicated.

IV. Legal Framework

A. Elements of the Offence

[33] Mr. Smith is charged with one count of sexual assault, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46.

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

- a) that Mr. Smith is the person who committed the offence on the date and in the place described in the indictment;
- b) that Mr. Smith touched C.T. directly or indirectly;
- c) that the touching by Mr. Smith was intentional;
- d) that the touching by Mr. Smith took place in circumstances of a sexual nature;
- e) that C.T. did not consent to the sexual activity in question; and
- f) that Mr. Smith knew that C.T. did not consent or was reckless or wilfully blind to that lack of consent.

[35] Section 273.1(1) of the Criminal Code defines consent as the "voluntary agreement of the complainant to engage in the sexual activity in question." Section 273.1(2) specifies that no consent is obtained if the complainant is unconscious or incapable of consenting for any reason.

[36] In *R. v. J.A.*, 2011 SCC 28, the Supreme Court of Canada ("SCC") held that a complainant must be conscious throughout the sexual activity to consent. In *R. v. G.F.*, 2021 SCC 20, the Court clarified that capacity is a precondition to subjective consent: a complainant must be capable of forming a conscious and voluntary agreement at the time of the act: at paras. 24, 42-47. Incapacity may arise from intoxication or other impairment, but not every degree of intoxication negates capacity: *G.F.*, at para. 84.

[37] To establish the non-consent actus reus element of sexual assault, the Crown may prove either incapacity or subjective non-agreement: *G.F.* at paras. 84-90; *J.A.* at para. 126.

- [38] The Court in G.F. identified four requirements for capacity. A complainant must be capable of understanding: (1) the physical act; (2) that it is sexual in nature; (3) the specific identity of the partner; and (4) that participation is a choice, meaning they may refuse: at para. 57. If the Crown proves beyond a reasonable doubt that any one of these elements was absent, subjective consent cannot exist: at para. 58.
- [39] G.F. also confirmed there is no rigid order for assessing capacity and agreement. A finding of either incapacity or absence of agreement is sufficient to establish a lack of consent: at para. 53.
- [40] To establish the mens rea of sexual assault, the Crown must prove that the accused knew the complainant was not consenting or was reckless or wilfully blind to that fact: R. v. Ewanchuk, [1999] 1 S.C.R. 330 at para. 23, 1999 CanLII 711. No defence of honest but mistaken belief in communicated consent was advanced; accordingly, s. 273.2 is not engaged.

B. Presumption of Innocence and Reasonable Doubt

- [41] Two rules flow from the presumption of innocence: one is that the Crown bears the burden of proving guilt, and the other is that guilt must be proven beyond a reasonable doubt. These two rules ensure that no innocent person is convicted of a crime.
- [42] Mr. Smith enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until the prosecution has, on the evidence presented before the Court, satisfied me beyond a reasonable doubt that he is guilty of the charge of sexual assault.
- [43] A reasonable doubt is not an imaginary or frivolous doubt. It is based on reason and common sense and logically arises from the evidence or its absence: R. v. Lifchus, [1997] 3 S.C.R. 320 at para. 39, 1997 CanLII 319.
- [44] Even a firm view that the accused is probably guilty is insufficient. If the Crown does not prove guilt beyond a reasonable doubt, I must give Mr. Smith the benefit of the doubt and acquit him: Lifchus at para. 39.
- [45] Absolute certainty is not required. However, the standard lies closer to proof to an absolute certainty than proof on a balance of probabilities: R. v. Starr, 2000 SCC 40 at para. 242, citing Lifchus.

C. Credibility and Reliability

- [46] In this case, the determination of guilt ultimately hinges on the credibility and reliability of the evidence presented by C.T. and Mr. Smith.

- [47] It is not unusual for the evidence presented to the court to be contradictory. Witnesses may have different recollections of events, and the court must decide which evidence it accepts as credible and reliable.
- [48] Many factors influence the assessment of the credibility and reliability of evidence. These include a witness's opportunity to observe the events and their reasons to remember them. The court considers whether there was something specific that aided the witness's recall and whether the events were noteworthy, unusual, or striking or, conversely, relatively unimportant and therefore understandably more difficult to recollect. Consistency within a witness's own testimony and with uncontradicted facts is also an important consideration.
- [49] Credibility is not an all-or-nothing proposition. A court may accept all, some, or none of a witness's evidence. A finding that a witness is credible does not require the trier of fact to accept all of that witness' testimony without qualification. Importantly, credibility is not synonymous with proof: *R. v. Clark*, 2012 CMAC 3 at para. 47.
- [50] Another factor in assessing a witness' testimony is their apparent capacity to remember. Credibility concerns veracity; reliability concerns accuracy. These are related but distinct concepts. A witness whose evidence on a point is not credible cannot provide reliable evidence on that same point: *R. v. H.C.*, 2009 ONCA 56, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (O.N.C.A.).
- [51] Conversely, a sincere witness may truthfully recount what they believe happened. Still, for reasons such as the passage of time, intoxication, or the frailties of memory, their account may not be accurate. In short, the testimony of an honest witness may nonetheless be unreliable: *Morrissey* at 526.
- [52] Importantly, to support a conviction, the testimony must be both credible and reliable.

D. Assessing Credibility Where the Accused has Testified or with Competing Versions of Events

- [53] The SCC provided guidance to trial judges in assessing a case where the accused has testified, and where credibility is a central issue, in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93 (S.C.C.). This is commonly referred to as the *W.(D.)* test.
- [54] Since the SCC first enunciated the *W.(D.)* test, the test has also been held to apply not only to the testimony of an accused, but also to defence witnesses other than an accused (see *R. v. Haroun*, [1997] 1 S.C.R. 593 at paras. 12-13, 1997 CanLII 382, Sopinka J. dissenting, citing *R. v. Challice* (1979), 45 C.C.C. (2d) 546 at 557, 1979 CanLII 2969 (O.N.C.A.), and *R. v. Morin*, [1988] 2 S.C.R. 345 at 357, 1988 CanLII 8), as well as in circumstances where a conflicting exculpatory account emerges through Crown witnesses or in any other evidence (see *R. v. B.D.*, 2011 ONCA 51 at para. 114).

[55] To assist judges in identifying reasonable doubt in the context of conflicting testimonies, in W.(D.) the SCC recommends that a trial judge consider the exculpatory evidence of the accused in three steps:

- a) If I believe the evidence of the accused, I must acquit.
- b) If I do not believe the accused's evidence, but it leaves me with a reasonable doubt, I must acquit.
- c) Even if the accused's evidence does not leave me in doubt, I must ask whether, on the evidence I do accept, the Crown has nevertheless proven guilt beyond a reasonable doubt. If not, I must acquit.

See W.(D.) at 758.

[56] Further, in R v. C.W.H. (1991), 68 C.C.C. (3d) 146 at 155, 1991 CanLII 3956 (B.C.C.A.), Justice Wood suggested an addition to the second part of the three-part test set out in W.(D.). He stated at para. 50 that:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[57] A trial is not an inquiry to determine what happened; we may never know everything that happened. It serves only to determine whether the Crown has proven the elements of the offence beyond a reasonable doubt. The W.(D.) framework aims to prevent a conviction where reasonable doubt exists.

[58] Of course, the above tests taken alone are oversimplifications of the analysis that a trial judge must undertake. Most often, the judge must apply the W.(D.) test at various stages of the evidence, concerning the critical elements or vital points of the decision-making process, such as the elements of the offence or defence.

[59] In other words, the rule in W.(D.) applies to any exculpatory evidence, regardless of its source, which means it applies to anything that indicates the accused could be innocent or gives the accused a favourable position in terms of the facts.

[60] What this means is that evidence on vital issues where the accused is believed could raise a reasonable doubt on what the Crown is required to prove beyond a reasonable doubt to secure a conviction (see David M. Paciocco, "Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment" (2017) 22 Can. Crim. L. Rev. 31).

V. Positions of the Parties

A. Defence

- [61] In his submissions, defence counsel emphasized that the Crown bears the burden of proof beyond a reasonable doubt and that this case rests exclusively on C.T.'s evidence, which he says is unsafe to rely upon.
- [62] The defence points to C.T.'s poor memory, shifting accounts of when and where the events occurred, and inconsistencies between her direct evidence, cross-examination, and her police statement. For example, C.T. said the incident happened on August 2 or August 4, that her son was 23 or 32, and that intercourse occurred after she became unconscious downstairs or possibly upstairs on the couch. The defence submits these contradictions go to the heart of reliability and are not collateral details. Counsel further argues that C.T. had a motive to fabricate because she wanted Mr. Smith removed from the house, which was the subject of an ownership dispute between the two. After making the complaint, Mr. Smith was prohibited from returning, and C.T. has now moved back into the house.
- [63] The defence contends that Mr. Smith was a forthright witness whose evidence was consistent with his police statement and that any lies were explained by embarrassment rather than guilt. Defence counsel concludes that "you cannot be sure of [C.T.'s] evidence" and therefore argues that the Crown has failed to discharge its burden.

B. Crown

- [64] Crown counsel submits that C.T. was a credible and reliable witness on the essential facts. While she struggled with detail, the Crown argues that she was "painfully honest about the effects of alcohol" and did her best to answer questions. The Crown stresses that her account of the sexual assault remained consistent on its core elements: that she awoke in Mr. Smith's bed, that he was penetrating her, and that she told him to stop but he told her to "shut up."
- [65] The Crown argues that any inconsistencies concerned peripheral matters and are attributable to C.T.'s age, alcoholism, and trauma and ought not to raise a reasonable doubt. Counsel submits that her testimony aligns with the jurisprudence in *R. v. Perrone*, 2014 MBCA 74, aff'd 2015 SCC 8, *R. v. Chen*, 2023 BCSC 745, and *R. v. W.F.G.*, 2022 BCSC 519, aff'd 2024 BCCA 65, where complainants with memory gaps or who were suffering from severe intoxication were nonetheless found reliable on the core of their evidence.
- [66] In contrast, the Crown says Mr. Smith's version of events is implausible, manufactured after learning that DNA evidence might be found, and riddled with contradictions, such as whether intercourse occurred on the couch or elsewhere and whether he was "sauced" or merely "buzzed."
- [67] I turn now to the application of these principles to the facts before the Court.

VI. Application to the Legal Principles

- [68] Witnesses are not presumed to be telling the truth. I cannot start by assuming that C.T. is truthful, as that would shift the burden of proof to the defence and undermine Mr. Smith's presumption of innocence. Instead, I must weigh each witness's evidence on the whole of the record with no presumption in mind other than the presumption of innocence.
- [69] The role of the court is to determine whether the alleged offence has been proven beyond a reasonable doubt, recognizing that it may not be possible to determine with certainty what occurred.
- [70] Although there were no witnesses to support this specific allegation, there is no legal impediment to convicting an accused on the uncorroborated evidence of a complainant, provided the Crown proves the particulars and essential elements of the offence beyond a reasonable doubt. This, however, requires the court to scrutinize the evidence with great care.
- [71] In assessing credibility, I placed little weight on demeanour alone. My focus is on internal and external consistency, plausibility in light of undisputed or objective facts, and the totality of the surrounding circumstances. I have also avoided reliance on stereotypical assumptions about how a complainant "ought" to behave before or after an alleged assault. I draw no adverse inference from C.T.'s lack of immediate medical attention, her continued social contact with Mr. Smith the next morning, or the timing of her report, as these factors are not determinative of consent.
- [72] Disbelieving an accused does not fill gaps in the Crown's case. Instead, the burden remains on the Crown to establish every essential element beyond a reasonable doubt on the whole of the evidence.

A. W.(D.) Test

- [73] Mr. Smith testified in his defence. Although a trial judge need not address the evidence in any set order, because Mr. Smith testified, I begin by applying the W.(D.) framework to his account: *R. v. S.S.M.*, 2024 BCCA 417 at para. 112.
- [74] As the SCC recommended in *W.(D.)*, a trial judge considers the accused's exculpatory evidence in three steps. I will begin with the first step, which is reviewing Mr. Smith's testimony and the exculpatory account advanced by the defence.
1. Do I Believe Mr. Smith's Evidence?
- [75] I do not.
- [76] Although I did find Mr. Smith credible on specific aspects of his testimony, overall, I find his evidence suffers from multiple vulnerabilities and inconsistencies, which compromise its reliability, which I summarize as follows:

- a) Inconsistency with police statement: Mr. Smith initially told police that he had not had sexual intercourse with C.T. At trial, he admitted that intercourse occurred, offering embarrassment as his explanation for the inconsistency. This was not a minor detail but a complete denial of the central fact. His willingness to lie to the police about the core issue gravely undermines his credibility.
 - b) Alcoholism and impaired perception: Mr. Smith described himself as an alcoholic and a binge drinker. He candidly admitted that binge drinking causes lapses in memory, changes in perception, and difficulty in understanding what others say or do. He also revealed that they drank heavily for two days and were "sauced." Despite these admissions, he gave categorical assurances that C.T. was merely "buzzed," unimpaired, never slurred her words, and never became unconscious. Given his own intoxication, I find that his capacity to make those assessments is highly questionable and his version of events is therefore unreliable.
 - c) Self-serving portrayal of intercourse: Mr. Smith said intercourse lasted "less than two minutes," that he stopped of his own accord, and that C.T. initiated by removing her pants. These details minimize his responsibility and shift it to C.T. They are inherently self-serving, and in light of his prior denial to the police, I am not sufficiently persuaded.
 - d) Relationship with C.T.: Mr. Smith insisted his relationship with C.T. was positive and continued to be "good" even after the incident. Yet he admitted to arguments with her over the ownership of the house. Further, the evidence suggested that after the complaint was made, he was not permitted to return to 92 Etienne, and C.T. moved back in. This selective minimization of conflict casts doubt on his reliability.
 - e) Acknowledgment of the complainant's honesty: In both his police statement and cross-examination, Mr. Smith confirmed that C.T. was generally honest, not vindictive, and not someone who "made stuff up." This undermines any suggestion that her allegations were maliciously fabricated.
- [77] Mr. Smith testified the events occurred on a Thursday, a view he reconstructed post-arrest by reference to a Saturday curfew. This timing sequence is addressed below. It does not alter my overall credibility assessment.
- [78] Considering these factors, I do not believe Mr. Smith's evidence.
2. Am I left in Reasonable Doubt by Mr. Smith's Testimony?
- [79] Since I do not accept Mr. Smith's testimony as true, I must ask whether it nonetheless raises a reasonable doubt. His account could only raise such a doubt if it reliably suggested that C.T. was sober enough to consent and did in fact consent.

- [80] For the reasons already noted, without evidence, I cannot place weight on Mr. Smith's assertions about C.T.'s state of mind or physical capacity. He admitted that intoxication distorts his memory and perception and some of his evidence suggests he was drinking heavily at the time. In contrast, his testimony surrounding the sexual encounter indicated that they were merely "buzzed." Consequently, his categorical description of C.T. as unimpaired is not credible.
- [81] Nor do I accept Mr. Smith's self-serving portrayal that C.T. initiated the encounter by removing her pants or that he stopped out of reluctance after less than two minutes. These details, in the context of his dishonesty with the police and his minimization of conflict over the house, do not raise a reasonable doubt.
- [82] In short, Mr. Smith's evidence does not, on its own, raise a reasonable doubt.
3. Has the Crown Proven the Material Elements of Sexual Assault Beyond a Reasonable Doubt?
- [83] Even if I reject Mr. Smith's account, I must still consider whether the Crown has proven the offence beyond a reasonable doubt. For the reasons that follow, I do not accept C.T.'s evidence either. Her account suffers from its own weaknesses, which prevent me from relying on it as proof beyond a reasonable doubt.
- [84] I must have a clear understanding of how the critical moments of the sexual assault unfolded to determine whether C.T. consented to the sexual contact in question and, if not, whether Mr. Smith was aware that she had not given her consent.
- [85] The absence of consent is subjective and depends on a complainant's internal state of mind at the time. C.T. testified that she did not consent. While that evidence is significant, it is not determinative on its own. Her account must be assessed for credibility and reliability in light of all the evidence, including any ambiguous conduct she may have displayed.
- [86] As explained above, the Crown bears the burden of proving the absence of consent beyond a reasonable doubt. The test is not whether C.T. later regretted the encounter, but whether, at the relevant time, she did not want to engage in sexual activity and communicated that lack of agreement.
- [87] Difficulties of proof arise where a complainant has no recollection, or her memory is compromised by heavy alcohol consumption. C.T. testified that she either fell asleep or blacked out, and that when she regained awareness, Mr. Smith was having sex with her. She recalled waking up in the basement on his bed and gave evidence of what occurred during that period.
- [88] In assessing C.T.'s evidence, I remained mindful that she is an older witness who had never testified in court before, and that she acknowledged having challenges with her memory. As noted above, there is no single or "typical" way for a complainant to behave after a sexual assault. Given her admitted memory lapses, I have considered whether the totality of her conduct and her description of events are consistent with her claim of non-consent.

- [89] In addressing that issue, I examined the whole of the evidence, including Mr. Smith's testimony, the surrounding circumstances, and any available circumstantial evidence. The proper focus is whether the Crown has proven beyond a reasonable doubt that C.T. did not, in fact, agree to the sexual activity and that Mr. Smith knew of, was reckless about, or was willfully blind as to that lack of agreement.
- [90] With that framework in mind, I turn to the reliability of C.T.'s testimony. This requires close attention to both internal and external inconsistencies in her evidence, the circumstances in which her account was provided, and the degree to which her recollection can reasonably be relied upon.
- [91] C.T.'s evidence contains many vulnerabilities and inconsistencies, which I summarize below:
- a) Shifting description of sexual acts: In direct examination, C.T. described multiple sexual episodes, beginning with intercourse on her hands and knees and later on her back, punctuated by periods of falling asleep and waking. Under cross-examination, she agreed that intercourse was brief, occurred only with her on her back, and ended when the accused fell asleep. These inconsistencies regarding the physical violation that unfolded go to the core of her account.
 - b) Inconsistent location of intercourse: C.T. initially placed the intercourse in the accused's basement bedroom on his bed. However, when confronted with the suggestion that it occurred upstairs on the couch while Joseph and Noah were away buying beer, she alternated between agreement, uncertainty, and denial. Finally, she conceded it was possible, given her poor memory.
 - c) Contradictory account of Mr. Smith's words: C.T. initially testified that Mr. Smith told her to "shut up" and turned the music up to avoid detection. On cross-examination, she accepted that he had not told her to "shut up," though she maintained he said or implied he would turn the music up louder. I do not accept that Mr. Smith told C.T. to "shut up." Furthermore, the evidence that music was turned up to avoid detection is equivocal and unreliable in this case.
 - d) Shifting evidence as to who was present: C.T. variously said only Joseph had left the residence to buy beer and that Noah stayed behind, then agreed that both Joseph and Noah had gone together, but also stated that they were both upstairs in their rooms during the alleged intercourse. This inconsistency is also material to context, opportunity, and corroboration.
 - e) Evidence adopted for the first time at trial: C.T. described accepting the accused's invitation for a drink in the basement, sitting in his armchair, becoming unconscious, and waking in Mr. Smith's bed for the first time at trial. She acknowledged that this sequence was not in her recorded police statement, that her memory is poor, and that she may have fallen asleep rather than become unconscious from alcohol consumption. The late emergence of this

account raises the concern that it is a reconstruction rather than a reliable memory of that night.

- f) Memory loss attributed to different causes: At trial, C.T. said her memory loss was due to heavy drinking, while in her police statement, she suggested she may have been drugged.
- g) Differing accounts of post-incident conduct: C.T. testified that after the sexual intercourse, she went upstairs without pants and slept on the couch. However, elsewhere she said she resumed drinking with Joseph and later with the accused before going to sleep.
- [92] These inconsistencies, taken together with her acknowledged alcoholism, high tolerance for alcohol, and history of blackouts, undermine the reliability of C.T.'s recollection on the material points of the allegation.
- [93] The defence argued C.T. had a motive to remove Mr. Smith from the residence. C.T. acknowledged wanting him out of the house. While this raises a potential motive to exaggerate or fabricate, the evidence is ultimately inconclusive. It is one modest factor among many in my reliability assessment.
- [94] C.T. conceded on cross-examination that she has difficulty with dates and times. She initially told police that the incident occurred on Friday, August 2, but later said it happened on Sunday, August 4, and ultimately acknowledged that she was unsure of the exact date.
- [95] The defence pointed to Thursday, August 1, 2024 as the date of the alleged offence. They argue that this is consistent with Noah working Friday and Mr. Smith's curfew on Saturday. However, on this record, the timing of the intercourse cannot be fixed with certainty. That uncertainty alone does not decide the case, but it adds to the overall doubt and bears directly on the surrounding circumstances that the Crown must prove.
- [96] The location of the intercourse also remains unresolved. C.T. testified that she was in the basement, unconscious, and awoke on "all fours" with Mr. Smith having sexual intercourse with her. Mr. Smith admitted to a sexual encounter but maintained that it occurred on the upstairs couch on the first evening, after the group had finished the first "flat" of beer. On cross-examination, C.T. asserted primarily that the incident took place late at night on Mr. Smith's bed in the basement, while also conceding that it was possible it occurred on the upstairs couch.
- [97] C.T. testified that she has a high tolerance for alcohol and that it would take more than a whole "flat" of beer to render her intoxicated. She acknowledged sharing the flat with Joseph, Mr. Smith, and Noah, and maintained that when Joseph and Noah left to purchase more beer, she was not intoxicated. However, she also stated that after they left, Mr. Smith invited her downstairs for a drink, where she sat in his chair and described herself as "pretty drunk" before falling asleep or becoming unconscious. Her testimony on her level of intoxication at this point was therefore internally inconsistent.

- [98] Beyond timing and place, C.T. was also inconsistent on the number of episodes, the positions involved, and whether specific statements (such as being told to "shut up" or music being turned up) were made. These inconsistencies concern core matters of the sexual assault and weaken the reliability of her recollection.
- [99] C.T. admitted she has been an alcoholic since age 19 and has developed a high tolerance for alcohol. She acknowledged that excessive drinking causes blackouts, impairs perception, and prevents accurate memory. On the night in question, she consumed beer, vodka, and gin. She further admitted that her drinking had previously led to hospital visits, injuries, and episodes where she wet herself, removing her pants and underwear without recalling undressing. This history, combined with her intoxication that evening, raises serious concerns about her ability to perceive and accurately recall events.
- [100] Under cross-examination, when asked how she was certain she had slept for 15 minutes in between sexual assaults, C.T. attempted to anchor her account by stating that she was sure of this because she had looked at a wall clock. This detail was raised for the first time in cross-examination; it did not appear in her prior statement or testimony. Furthermore, no photograph in the record was identified showing a wall clock. When pressed, C.T. could not recall the exact time she saw on the clock. Given her description of being "pretty drunk," sometimes becoming unconscious, and generally not being able to remember dates, times, or other events, I find it doubtful she could accurately measure such an interval on the evening in question. While corroboration is not required, this detail cannot reliably anchor the sequence and, in my view, it diminishes her credibility.
- [101] Crown counsel correctly noted that inconsistencies are typical in sexual assault trials and do not, by themselves, render a complainant unreliable. Minor discrepancies on peripheral matters are expected where events are recalled under stress, intoxication, or after the passage of time.
- [102] I have reviewed the authorities cited by the Crown, including cases where complainants were intoxicated or had memory difficulties. In those cases, however, the complainants remained consistent on the essential details of the assaults. I accept that C.T. was doing her best to tell the truth as she remembers it. However, on the material issues, her account shifted in meaningful ways. The inconsistencies in her testimony are not confined to peripheral matters but go directly to the core of the allegation. C.T.'s description of the sexual assault shifted between her police statement, her direct testimony, and her concessions under cross-examination. These contradictions strike at the heart of the allegation.
- [103] When examined on these central points, C.T. provided answers that varied according to the form of the questions. At times, she accepted possibilities that diverged materially from her primary account, only to retreat from them later. This inability to provide a stable and coherent narrative on the nature of the assaults, frequency and manner, location, and the presence of others undermines the reliability of her evidence.

- [104] The evidence presents two irreconcilable narratives about where, how, and in what circumstances sexual activity occurred. Both Mr. Smith and C.T. agree they remained in the house together after Joseph and Noah left to buy more alcohol and that they were seated on the upstairs couch at that time. Mr. Smith says consensual intercourse then occurred on the couch. By contrast, C.T. says Mr. Smith invited her downstairs for a drink and that the assaults happened in the basement. For the reasons already set out, I am not satisfied that the basement assaults occurred in the manner C.T. described.
- [105] That leaves the upstairs-couch scenario. Although C.T. acknowledged she was not intoxicated at that point, she could not provide a coherent account of what, if anything, occurred while she and Mr. Smith were seated on the couch, ultimately conceding that intercourse may have taken place there. Even accepting that the actus reus of intercourse is established beyond a reasonable doubt, the evidentiary uncertainties as to what was said, where it happened, and who was present preclude a finding that Mr. Smith knew of, was reckless toward, or was wilfully blind to a lack of consent.
- [106] In light of that conclusion, it is unnecessary to determine whether the Crown also proved incapacity under G.F. The dispositive point is the failure to prove subjective non-consent and the accompanying mens rea beyond a reasonable doubt.

VII. CONCLUSION

- [107] This is not a credibility contest. Applying W.(D.), although I do not accept all of Mr. Smith's testimony and it does not itself raise a reasonable doubt, the Crown must still prove every essential element beyond a reasonable doubt. It has not done so.
- [108] I am satisfied that Mr. Smith intentionally engaged in sexual activity with C.T. However, the Crown has not established beyond a reasonable doubt that C.T. did not consent, nor that Mr. Smith knew of, was reckless toward, or was wilfully blind to a lack of consent.
- [109] Ultimately, both witnesses were unreliable on material points. While I accept that C.T. attempted to be truthful, her account is not sufficiently reliable to establish non-consent beyond a reasonable doubt.

VIII. DISPOSITION

- [110] Mr. Smith, please stand.
- [111] On the one count of sexual assault, contrary to s. 271 of the Criminal Code, before the Court, I find you not guilty.
- [112] You are free to go.

"Sukstorf J."

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