
CANADA / JUDGMENT

R. v. Swain

2019 BCSC 1300

COURT

Supreme Court of British Columbia

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2019 BCSC 1300 R. v. Swain

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Swain,

2019 BCSC 1300

Date: 20190807

Docket: 101369

Registry: Kamloops

Regina

v.

Cory Richard Swain

Ban on publication pursuant to s. 486.4(2.2) of the Criminal Code,

R.S.C. 1985, c. C-46.

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Crown:

Sarah E. Firestone

Counsel for the Accused:

Don G. Campell

Place and Dates of Trial:

Kamloops, B.C.

June 3-4, 2019

Place and Date of Judgment:

Kamloops, B.C.

August 7, 2018

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INTRODUCTION and OVERVIEW

- [1] By an Indictment dated January 9, 2017, Cory Richard Swain was charged with the offences of sexual interference with and sexual assault of a person under the age of 16 years, contrary to ss. 151 and 271 respectively of the Criminal Code, R.S.C. 1985, c. C-46. The female complainant was 15 years old at the time of the alleged offences. The Indictment originally charged that the offences occurred on or about July 1, 2015, in Kamloops, British Columbia, but was amended at trial to substitute the words "on a date between July 10 - 21, 2015".
- [2] Mr. Swain pleaded not guilty to both charges.
- [3] The trial occurred before me in Kamloops on June 3 and 4, 2019. Judgment was reserved.
- [4] Testimony occupied one day. Only two witnesses testified, namely, the complainant and Mr. Swain. The only document marked as an exhibit was a five-page Facebook message exchanged between the complainant and a friend in the early morning of July 21, 2015.

- [5] Because the complainant was under the age of 16 at the relevant time, consent is not a defence to the charges (s. 150.1 of the Code). Consent is not asserted in any event. Instead, the issue is whether any sexual contact occurred. The complainant testified under oath that such contact did indeed occur and provided details. Mr. Swain flatly denies any such contact and testified to a completely different version of events.
- [6] For the reasons that follow, I find that the Crown has proved beyond any reasonable doubt each constituent element of the two offences with which he is charged and Mr. Swain is convicted accordingly.

THE COMPLAINANT'S TESTIMONY

- [7] The complainant's testimony in-chief was brief and to the point.
- [8] In July 2015 she stayed for four days at the house of her girlfriend, C.D., in the Aberdeen neighbourhood of Kamloops. It was a two-storey house with a rental suite downstairs, along with an entertainment room, one bedroom and a bathroom. The upstairs level had the master bedroom, two other bedrooms, a dining room, kitchen and living room. A wooden deck ran along the outside of the dining room, living room and kitchen. A staircase near the kitchen door provided access to the back yard below.
- [9] Also staying at C.D.'s house at the time were her sister (Phoebe) and her sister's boyfriend (Mr. Swain) and their two children, a boy and a girl, aged 5 and 2. She testified she did not regularly interact with Mr. Swain during the visit. The only conversation she can recall occurred at a nearby waterpark and related to his children.
- [10] The complainant was staying in her friend's bedroom upstairs but on the night of the alleged sexual contact she and her friend had decided it would be fun to sleep in the hammock outside in the back yard. They were sitting and talking on the patio in the back yard and "at a certain point Cory came out and joined us". He was part of the conversation but she cannot recall what the conversation was about. There was no alcohol involved.
- [11] The complainant testified that she and her friend were on the back yard patio from approximately 10:00 or 11:00 p.m. until approximately 4:00 a.m.
- [12] The complainant testified to two separate interactions of a physical/sexual nature with Mr. Swain. The first interaction occurred after the complainant got a drink in the kitchen and was on her way down the outside stairs from the kitchen to the back yard. She says Mr. Swain said, "I'm sorry, but I have to do this; don't tell anyone" and he "grabbed my butt", using one hand. She says she panicked when this occurred but, "I just said, 'okay', and kept walking."
- [13] The second interaction occurred later when she went upstairs to put her glass in the kitchen sink. She says Mr. Swain came up behind her claiming he was going to bed for the night. After putting her glass in the sink, she was standing facing away from him, on her phone, when he came up behind and started touching her.

- [14] The complainant testified that Mr. Swain put his hand on her red fabric pajama shorts and then slipped his hand down the back of those shorts and "put one of his fingers inside of me". He then "went to take my pants off" and also took her hand, placing it first on the outside of his pants, and then down the inside of his pants so that she was touching his penis.
- [15] Upon these things happening, the complainant says she panicked and told him that her friend would be wondering where she was. Mr. Swain then said, "Okay", whereupon he briefly kissed her in a manner that was "slightly aggressive, with tongue" and she pulled away. Nothing further was said and she went downstairs and tried to go to sleep in the hammock.
- [16] After waking up in the morning, the complainant says she waited for an opportunity "to come out into the kitchen without him being there, so [she] could call [her] mom and go home". She says she made a diary entry on her phone about the incident, which she shared with another friend a few days later.
- [17] In cross-examination counsel pointed the complainant to certain omissions, additions and variations to her version of events as narrated in her statement to the police on December 16, 2015 and as recorded in her phone diary shortly after the incidents in question.
- [18] In the police statement the complainant acknowledges that she was only there because her parents had made her come against her wishes. She told the police officer that Mr. Swain "had already grabbed my butt once earlier in the night, but I just kinda brushed [it] off". She later said in the statement that the incident occurred when she was walking down the stairs from the kitchen and that he "grabbed my butt" from behind and said, "Don't say anything."
- [19] With respect to the second incident, she initially told the police officer that Mr. Swain had put his hands on the back of her pants and then after she expressed concern about her friend wondering about her whereabouts, she turned around (to leave) and Mr. Swain caught her off guard by kissing her, whereupon she left.
- [20] A little later in her statement to the police officer she discloses that Mr. Swain had actually put his hands down the back of her pants and had "put his finger inside of me".
- [21] There are three significant details in the complainant's phone diary version of events that the complainant did not mention to the police during her statement and which she also did not mention in her examination-in-chief:
1. between the first and second incidents, "whenever I went passed him and no one was looking he would slap my ass, and I would just ignore it";
 2. at the kitchen sink, after "rubbing his hand down the left side of my body down to my ass ... he started grabbing my ass and slapping it and stuff"; and

3. after grabbing her hand and putting it first to his crotch and then down his pants, "then he pulled his dick out".
- [22] When confronted with these additional details, the complainant said that not only did she not recall these things at the time she gave her statement to the police but also that, "It's not something I recall now." In other words, re-reading the entries in the diary did not refresh any memory of events in the witness box.
- [23] Earlier on in her cross-examination, counsel for Mr. Swain had asked the complainant, "During that whole evening did [Mr. Swain] slap you?" The complainant answered "no". When confronted with the above diary entries to the contrary, the complainant stated, "I assumed you meant in a violence sense" rather than simply saying these were details that she could not now recall. She did insist, however, that everything written in the diary "was 100% accurate".
- [24] Counsel also elicited from the complainant some of her medical challenges and drug consumption habits, presumably in an effort to impugn the reliability of her recollections and of her evidence as a whole. She acknowledged she has been in the care of a psychiatrist since late 2016 and has been diagnosed with severe depression, anxiety, and post-traumatic stress disorder for which she has been prescribed anti-depressant and mood stabilizing medications. She attempted suicide in October 2018. For a two-month period last summer she consumed crystal methamphetamine and since that time has "done cocaine a few times". She "occasionally smoke(s) marijuana".
- [25] No evidence was elicited from the complainant by either the Crown or the defence respecting the cause of her mental health issues or suicide attempt. Whether there is any link to the events of mid-July 2015 is unknown to the Court.

THE ACCUSED'S TESTIMONY

- [26] Mr. Swain is employed as an industrial insulator, working mostly at gas plants in northern Alberta. In mid-July he, along with his common-law wife and their two children, aged 2 and 5, went to Kamloops to celebrate his wife's birthday with her mother and other family members in that city. They arrived during the evening of July 12, 2015 and he left on July 19 as he had to return to work in Cold Lake, Alberta.
- [27] His wife had a younger sister, C.D., who was 15 and a brother, R.D., who was 16. The two of them lived with their mother at the latter's house. C.D.'s friend, the complainant, was also staying in the house while Mr. Swain and his family were visiting.
- [28] Mr. Swain testified that he and his wife were sleeping on the pull-out couch in the downstairs family room. The two children would usually sleep upstairs and sometimes the granddaughter would sleep with her grandmother. The complainant and C.D. would often sleep outside in a hammock.

- [29] While visiting Kamloops, everyone "did a bunch of family things together", like visiting a nearby waterpark, going to the mall, and "a lot of outside stuff".
- [30] Mr. Swain testified that he had very little interaction with the complainant or C.D. between July 13 and July 18. "They were at that age where they don't want to hang out with adults". They did come along on the first visit to the waterpark the day after Mr. Swain's family arrived but thereafter the two of them did not come along on family activities and were instead "hanging outside" together. Mr. Swain says he did not speak to the complainant during the initial visit to the waterpark. He says, "I barely even saw her the whole time we were there."
- [31] On July 18, 2015, Mr. Swain, his wife, and her parents and other brothers and sisters all went out for a birthday dinner. He estimates they got back to the house at approximately 8:00 p.m. where the family had some cake for dessert. C.D. and the complainant joined them for the cake.
- [32] Mr. Swain estimates that he went to bed at around 12:45 a.m. At about 5:00 a.m. he heard "a lot of loud talking and laughing" whereupon he went outside and found the complainant, C.D. and the 16-year-old son of the downstairs' tenant in the back yard. This was the first time he had seen the tenant's son and he asked, "Whose this?" He says he asked them, "Do you guys have to make so much noise?" and then he sat there and "had a few smokes".
- [33] Mr. Swain says he did not take part in the conversation but he did hear what they were talking about: "Well, they were talking about what guys would like to do them or what guys wanted to have threesomes with them, and that's when [the complainant] said to me, 'Were you a pervert, like us, at 15?'" Mr. Swain says he "just laughed" because "I don't know how to really respond to something like that."
- [34] After smoking three cigarettes and probably some 25 minutes after coming out of the house, Mr. Swain said he went back inside and then upstairs through the family room. He said, "I'm going to bed", and he went upstairs to get a drink of water. He did so because there is no bathroom downstairs and no sink where he could get some water.
- [35] According to Mr. Swain, when he got upstairs, "[The complainant] was in the kitchen, having a glass of chocolate milk ... she put it down on the island. And that's when she tried to pull in to kiss me, and then I pushed her away saying, 'What are you doing? You're 15!'" He then went back downstairs.
- [36] Mr. Swain says that the complainant did not actually make contact with him before he pushed her away but he knew she was trying to kiss him because she came very close to his face with her lips puckered up.
- [37] Mr. Swain says he went downstairs and went to bed. The next time he heard about this incident was some eight months later when he was in Fort McMurray and received a call from the Calgary police asking him to get in touch.

LEGAL PRINCIPLES

Elements of Offences Charged

[38] In order to convict Mr. Swain for any of the offences with which he is charged, the Crown must prove beyond a reasonable doubt and by way of properly admissible evidence each constituent element of the particular offence.

[39] For the purposes of the sexual interference charge under s. 151 of the Criminal Code, the Crown must prove:

1. Mr. Swain touched, directly or indirectly, any part of the complainant's body;
2. Mr. Swain specifically intended that the touching be for a sexual purpose; and
3. the complainant was under the age of 16 years at the time of the touching.

[40] In order to convict Mr. Swain of the sexual assault charge under s. 271 of the Criminal Code, the Crown must prove beyond a reasonable doubt each of the following:

1. Mr. Swain made physical contact with the complainant;
2. the contact was sexual in nature;
3. the contact occurred without the complainant's consent;
4. the contact was intentional on Mr. Swain's part; and
5. Mr. Swain was reckless or wilfully blind to the lack of consent.

[41] Section 150.1 of the Criminal Code provides that when, as here, an accused is charged with an offence under s. 151 or s. 271 of the Code in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject matter of the charge. That section is subject to certain exceptions, none of which apply in this case.

Reasonable Doubt and the Presumption of Innocence

[42] It is a fundamental principle of Canadian criminal law that any person charged with an offence is presumed to be innocent until proven guilty and convicted in a court of law. First articulated in the common law, this principle is also prescribed by s. 6(1) of the Criminal Code, and is now enshrined in s. 11(d) of the Canadian Charter of Rights and Freedoms.

[43] In a criminal case, the obligation is upon the Crown to prove, by way of properly admissible evidence, all elements of an offence beyond a reasonable doubt, and only then can a court convict. The burden remains on the Crown throughout. Where, based upon the evidence adduced, a reasonable doubt exists respecting any of the constituent elements of the offence charged, the accused must be acquitted of that offence.

- [44] Reasonable doubt means a doubt that is based upon reason and common sense. Such doubt must be logically connected to the evidence or absence of evidence. It must not be based on sympathy or prejudice. It also must not be based on mere speculation or stereotypical reasoning unsupported by evidence.
- [45] The Crown is not required to prove all elements of an offence to an absolute certainty, as this would be an impossibly high standard. Still, the reasonable doubt standard falls much closer to absolute certainty than to the standard of proof used in civil cases, i.e., the balance of probabilities. In a criminal case if the court can only find that the accused probably committed the offence, the accused must be acquitted. Instead, the court must be sure or firmly convinced of the accused's guilt before any conviction can result.
- [46] The application of the reasonable doubt standard of proof in sexual assault cases can be difficult. In that regard I agree with the observations made by the Ontario Superior Court of Justice in *R. v. Nyznik*, 2017 ONSC 4392:

11 As I have stated, the presumption of innocence and the standard of proof beyond a reasonable doubt apply in a sexual assault case just the same as in any other criminal trial. However, there are aspects of sexual assault cases that can make the application of the standard a difficult one.

12 First of all, the very nature of the act underlying a sexual assault usually means that there are seldom any eye-witnesses apart from the complainant and the person or persons accused of the offence. Often, these cases come down to the word of one person against the other -- the classic "he said/she said" scenario. In that situation, it would be wrong for the trial judge to decide the case based on which is the more credible version of the two. To do so would be to misapply the burden of proof on the Crown to establish guilt beyond a reasonable doubt. The correct application of the burden of proof requires the judge to acquit if the evidence of the accused, when seen in the context of all of the evidence, raises a reasonable doubt as to his guilt. It is possible that the judge might not fully believe the defendant's version of the events, and might find the complainant's version to be more credible, but still be uncertain as to what actually happened. In that situation, there is a reasonable doubt, the benefit of which must go to the defendant, even where the complainant's story is more plausible or more believable than that of the defendant.

...

16 It is sometimes said that the application of these principles is unfair to complainants in sexual assault cases, that judges are improperly dubious of the testimony of complainants, and that the system is tilted in favour of the accused. In my opinion, those critics fail to understand the purpose of a sexual assault trial, which is to determine whether or not a criminal offence has been committed. It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt. In many cases, the only evidence implicating a person accused of

sexual assault will be the testimony of the complainant. There will usually be no other eye-witnesses. There will often be no physical or other corroborative evidence. For that reason, a judge is frequently required to scrutinize the testimony of a complainant to determine whether, based on that evidence alone, the guilt of an accused has been proven beyond a reasonable doubt. That is a heavy burden, and one that is hard to discharge on the word of one person. ...

17 Although the slogan "Believe the victim" has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence. That is antithetical to the fundamental principles of justice enshrined in our constitution and the values underlying our free and democratic society.

Conflicting Evidence and Credibility

[47] In most trials, including sexual assault trials where the accused elects to adduce evidence, the court is usually confronted with conflicting evidence and sometimes diametrically opposed versions of events. The role of the trial judge in such situations is not to simply select one version over another but, rather, is to weigh all of the evidence as a whole and to determine whether the critical facts of the case have been proved in accordance with the applicable standard of proof (in criminal matters, proof beyond a reasonable doubt).

[48] Accepting all or part of the testimony of any witness involves an assessment of credibility (truthfulness/honesty) and reliability (accuracy) of both the witness and the evidence. That in turn involves consideration of many different factors including:

- internal consistency of the witness's account of events;
- consistency with other evidence afforded by witnesses, documents or physical evidence;
- whether the evidence is reliably corroborated or contradicted by other evidence (although in sexual assault cases no corroboration is required for a conviction: s. 274 of the Code);
- the witness's ability/opportunity to observe or experience the events in question and to reliably recall/communicate same;
- the demeanour of the witness and whether the questions are answered in a frank and forthright fashion without evasion, speculation or exaggeration (making all appropriate allowances for the witness's experience and circumstances);
- whether the witness has any interest in the trial outcome or has any motive to fabricate;
- whether (based on properly admissible evidence) the witness has "poor character for truthfulness"; and
- the inherent plausibility of the evidence in the context of the case as a whole.

- [49] In assessing the inherent plausibility of evidence or, indeed, in making any determination of fact, the court is expected to apply "common sense" derived from life experience. At the same time, however, the court must recognize that "myths and stereotypes do indeed pervade perceptions of sexual assault" (R. v. Find, 2001 SCC 32 at para. 68) and that "the use of a common-sense approach to credibility assessment is fraught with danger for it can mask reliance on stereotypical assumptions" (R. v. Cepic, 2019 ONCA 541 at para. 13). It is critical that unsupported stereotypical reasoning and speculation regarding human behaviour not affect a trial judge's assessment of the evidence (R. v. Kodwat, 2017 YKCA 11 at paras. 36-37).
- [50] Historically, the law of sexual assault in Canada failed to recognize let alone protect complainants from misogynistic myths and stereotypical reasoning that undermined her credibility generally and improperly emphasized a propensity to consent in particular. For the longest time neither the Criminal Code nor the common law imposed meaningful limits on the admissibility of evidence designed to impugn a complainant's character and thus promote "reasonable" doubt respecting consent to the sexual activity in question. This history has raised serious questions respecting the ability of the criminal justice system to effectively and fairly try sexual misconduct crimes (R. v. Barton, 2019 SCC 33 at para. 55ff).
- [51] Over the past 40 years the Criminal Code has gradually been amended and the common law re sexual assault has been adjusted to abrogate stereotypical or misogynistic assumptions or generalizations lacking an evidentiary foundation. Among other things, the Criminal Code has eliminated corroboration as requirement for conviction (s. 274), abolished the doctrine of "recent complaint" (s. 275), and declared inadmissible sexual activity or reputation evidence to challenge a complainant's credibility or proclivity to consent (ss. 276, 277). Any notions of assumed or implied consent have been replaced by an affirmative standard requiring communicated consent by words or conduct. And trial judges are now directed by the Supreme Court of Canada to expressly instruct juries (and indeed themselves) respecting impermissible myths, prejudices and stereotypes whether in respect of the standard of proof, any application of "common sense", or otherwise determining the inherent plausibility of the evidence (see Barton).
- [52] It is also important to realize stereotypical assumptions and generalizations lacking an evidentiary foundation are capable of operating against an accused:

14 It is an error of law to rely on pre-conceived views about how sexual assault victims would behave. ... These are the "myths" of appropriate behaviour that the law seeks to eradicate. Historically, these myths have operated to undermine a complainant's testimony. But they may also operate in the reverse, to artificially bolster a complainant's credibility on the basis that "no young woman would consensually engage in the alleged behaviour. ...

15 Here the trial judge used assumptions about female behaviour as the basis for accepting the complainant's testimony. The corollary is that the assumptions about what a woman would or would not do were also used to undermine the appellant's credibility. [Internal citations omitted.]

Cepic, *supra*.

[53] In Cepic the trial judge used assumptions about female behaviour as the basis for finding the accused's exculpatory evidence "completely implausible and nonsensical". The Court of Appeal held that the trial judge's repeated use of words like "implausible" and "nonsensical" to characterize various aspects of the appellant's testimony was "untethered to an evidentiary base" and "reflects a conclusion based almost entirely on an assumption about what a young woman would do in this context" (para. 23). The conviction was reversed and a new trial was ordered.

[54] Much the same occurred in Kodwat where the Court held:

41 While it may have been open to the trial judge to draw the inference that the complainant did not consent to sexual intercourse from all of the surrounding circumstances established by the evidence, the conclusion that it was "inconceivable" that any 17-year-old woman in these circumstances would have engaged in consensual sex with an unfamiliar man of the appellant's age was a stereotypical assumption or generalization lacking an evidentiary foundation. In my view, there is a danger that assumption resulted in a conviction that was not founded upon the evidence.

Credibility, the Burden of Proof, and the R. v. W.(D.) instruction

[55] The accused's final arguments in this case were entirely based upon the "formatted analysis" said to be required by R. v. W.(D.), [1991] 1 S.C.R. 742. Some observations respecting the so-called "W.(D.) instruction" are therefore warranted.

[56] The W.(D.) instruction was developed by the Supreme Court of Canada as a way of illustrating to a jury the relationship between the assessment of credibility and the Crown's ultimate burden to prove the guilt of the accused to the criminal standard. The relevant passage of W.(D.) is found at pp. 757-58 where Cory J. explained:

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[57] Shortly after the W.(D.) decision was issued, Wood J.A. of the British Columbia Court of Appeal suggested a further component should be added to the framework:

- [24] I would add one more instruction in such cases, which logically ought to be second in the order, namely: if, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.
- (R. v. C.W.H., [1991] B.C.J. 2753.)
- [58] The Supreme Court of Canada has since acknowledged that the precise formulation of the W.(D.) questions might require refinement. In R. v. J.H.S., 2008 SCC 30, the unanimous judgment of the Court pointed out that the instruction is designed to help juries understand what is the meaning of "reasonable doubt" in the context of conflicting testimonial accounts and that it was designed to emphasize that mere disbelief of an accused's evidence does not satisfy the Crown's burden of proof:
- [10] The precise formulation of the W.(D.) questions has been criticized. As to the first question, the jury may believe inculpatory elements of the statements of an accused but reject the exculpatory explanation The principle that a jury may believe some, none, or all of the testimony of any witness, including that of an accused, suggests to some critics that the first W.(D.) question is something of an oversimplification.
- [11] As to the second question, some jurors may wonder how, if they believe none of the evidence of the accused, such rejected evidence may nevertheless of itself raise a reasonable doubt. Of course, some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.
- [12] The third question, again, is taken by some critics as failing to contemplate a jury's acceptance of inculpatory bits of the evidence of an accused but not the exculpatory elements. In light of these possible sources of difficulty, Wood J.A. in H. (C.W.) suggested an additional instruction [see above] ...
- [13] In short the W.(D.) questions should not have attributed to them a level of sanctity or immutable perfection that their author never claimed for them. W.(D.)'s message, that it must be made crystal clear to the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt, is of fundamental importance but its application should not result in a triumph of form over substance. the W. (D.) instructions need not be given "word for word as some magic incantation" in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt. [Internal references omitted.]

[59] The Alberta Court of Appeal has recently weighed in with its own extensive critique of the W. (D.) instruction and has held that: "Reciting and relying solely on the wording of W.(D.), without elaboration, will not usually be sufficient in a jury trial": *R. v. Ryon*, 2019 ABCA 36 at para. 54. The Court suggested an "improved version" should impart the following information:

(i) The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown. (Subject to the caveat that this does not apply to defences, such as that found in s 16 of the Criminal Code, where the onus rests with the proponent of the defence.)

(ii) In that context, if the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if they are not confident they can accept the Crown's version of events, they must acquit. (Subject to defences with additional elements such as an objective component discussed at para 31).

(iii) While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit.

(iv) Even if the jury completely rejects the accused's evidence (or where applicable, other exculpatory evidence), they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.

[60] In my view, the Alberta Court of Appeal's reformulation of the instruction has much to commend it, whether for juries or for trial judges. It remains to be seen whether it will gain traction outside that province.

SUBMISSIONS OF THE PARTIES

[61] The Crown acknowledges that this case turns on the credibility and reliability of the complainant and the accused. It suggests the complainant was "honest to a fault" and frankly admitted when she did not have a specific recall about a point and readily acknowledged where her present memory diverged from that of her prior statements. She made "reasonable admissions" when she was not certain about some matters, for example, whether or not a conversation about sexual activity and threesomes may have occurred in Mr. Swain's presence in the back yard.

- [62] By contrast, the Crown says Mr. Swain was unrealistically rigid and precise in his purported recall of events, matters that would have been minor details by the time he had reason to recollect them eight months later, e.g., waking at 4:55 a.m. and going outside at 5:00 a.m., smoking precisely three cigarettes, purported recollection of exact statements ("Do you have to make so much noise?", "Who is this?"). This certainty of memory is claimed by the Crown to "defy common experience", Mr. Swain is simply not telling the truth and his version of events should not be believed.
- [63] The defence submits that Mr. Swain emerged completely unscathed by cross-examination and that his version of events remained intact in every way and should be accepted by the Court. He was not successfully challenged or contradicted on any of the material aspects of his evidence, other than the testimony of the complainant whose memory of events was faulty and whose testimony was generally unreliable.
- [64] The defence points to the complainant's admission that her memory is "fuzzy about certain details" and relies on the three significant discrepancies referred to above in para. [21] of these Reasons for Judgment to suggest the complainant in her evidence-in-chief was "sanitizing her version of events and excising portions she realized were implausible".
- [65] In summary, the defence submits the reliability of the complainant's testimony was significantly impeached, Mr. Swain's version of events was in no way contradicted by other reliable evidence and that, on the whole of the evidence, the Crown has simply not proven its case beyond a reasonable doubt.

ANALYSIS and DETERMINATION

- [66] As a matter of law, Mr. Swain is presumed to be innocent and must be acquitted unless the Crown has established his guilt beyond a reasonable doubt. Mr. Swain is not required to prove his innocence or to disprove any of the evidence led by the Crown. However, Mr. Swain has testified in his defence and the Court is thus required to assess the credibility of his exculpatory testimony.
- [67] None of Mr. Swain's evidence was corroborated by other reliable evidence. It was, of course, completely contradicted by the evidence of the complainant and the credibility of that testimony will be assessed below. For his part, Mr. Swain appeared as a confident witness and his testimony contained no internal inconsistencies. I agree with his counsel that Mr. Swain essentially emerged unscathed by his cross-examination. If Mr. Swain was lying, he did so skillfully.
- [68] Obviously, if Mr. Swain engaged in the conduct of which he is accused, he would have a clear motive to fabricate evidence in order to avoid any conviction. That, however, is true of every accused and to dismiss an accused's evidence on that basis runs afoul of his constitutionally protected presumption of innocence. I cannot and do not diminish the weight of his evidence by any motive to fabricate.

- [69] Having said all of the above, I do not believe Mr. Swain's version of events because it is inherently implausible. My finding of implausibility is not based on stereotypical generalities respecting the behaviour of a 15-year-old girl but, rather, is founded on the background facts established beyond any reasonable doubt.
- [70] The complainant had just turned 15 years of age. She was staying at her girlfriend's house for a few days, generally sleeping upstairs but on the night in question, she intended to sleep outside in the back yard in a hammock. She and her girlfriend stayed up very late talking in the back yard.
- [71] The complainant's visit overlapped that of Mr. Swain, his wife and two children. This was the first time the complainant and Mr. Swain made each other's acquaintance. They were strangers to each other. Apart from a group visit to the waterpark the day following the arrival of Mr. Swain and his family, the complainant and Mr. Swain spent no time together, barely saw each other and barely spoke.
- [72] In such factual circumstances, while it is not impossible such a thing might occur, it is highly unlikely that the 15-year-old complainant would engage in a sexualized conversation with other minors in front of Mr. Swain, a mature adult many years her senior, whom she did not know and with whom she had not previously spent any meaningful time or had any meaningful conversations.
- [73] Similarly, while it is not necessarily impossible that such a thing might occur, it is highly unlikely that such a complainant would have unilaterally attempted to kiss Mr. Swain when he later encountered her by coincidence in the kitchen upstairs. Both parties agree some interaction occurred in the kitchen. I find however, that Mr. Swain's version of that interaction is implausible.
- [74] I also agree with the Crown that Mr. Swain's certainty of memory is improbable and not worthy of belief. If his version of events were true, when contacted by the police over six months later he would have had little cause to remember with such precision small details about when he awoke (4:55 a.m.), when he went outside (5:00 a.m.) and how many cigarettes he smoked while outside (3). Such a feat of memory is not impossible, but common experience generates scepticism in that regard.
- [75] Another conclusion mandated by Mr. Swain's version of events is that, even though the brief encounter in the kitchen was witnessed by no one else, the complainant thereafter fabricated in her phone diary a detailed version of events involving multiple incidents of sexual interference and sexual assault at the hands of Mr. Swain. Mr. Swain offers no explanation why the complainant might do such a thing and, of course, he is under no obligation to do so. Nonetheless, the absence of evidence offering some rationale or motivation for the complainant's conduct in that regard reinforces its improbability.

- [76] Mere rejection of Mr. Swain's exculpatory evidence cannot and must not be taken as proof of his guilt. The question that now arises is whether the Crown has proved beyond a reasonable doubt Mr. Swain's guilt based on the other evidence adduced at trial, namely the complainant's testimony and the content of her phone diary entry made shortly after the alleged assault and passed on to a close friend a few days later.
- [77] I turn now to an assessment of the complainant's evidence.
- [78] There certainly exists some basis for challenging the complainant's ability to accurately recall the events in question. In para. [21] of these Reasons for Judgment I outline three significant details in the complainant's phone diary version of events that the complainant did not mention to the police during her interview and which she also did not mention in her examination-in-chief. They are details that might well be expected to be memorable and which, when the diary entry was re-read at trial, would result in her memory being "refreshed". This did not occur and the complainant's failure to recall such matters is, at a minimum, an oddity in the Crown's case.
- [79] For sure, memory is not infallible with respect to the experience of traumatic events, and perhaps particularly so in situations of sexual assault. A very recent example is *R. v. R.V.*, 2019 SCC 41, where a 15-year-old girl was sexually assaulted in the early morning hours of a family camping trip. The complainant testified to the details leading to the assault but her memory of actual penetration and the moments following was blank. That case, as here, involved two diametrically opposed versions of events, where the accused testified that he went to bed much earlier that evening and he denied any further interaction with the complainant, sexual or otherwise.
- [80] Obviously, *R. v. R.V.* involved a completely different factual scenario but it is an example of how a sexual assault complainant can indeed have a "blank memory" regarding some aspects of the event in question and how frailty of a complainant's memory is not necessarily fatal to the prosecution.
- [81] I do not consider the complainant's evidence respecting slapping to be internally inconsistent. Cross-examination produced the following exchange:

Q: Did he hit you?

A: No.

Q: During that whole evening did he hit you?

A: No.

Q: Did he slap you?

A: No.

- [82] As noted above, when confronted with her diary entries respecting "slapping [her] ass", the complainant said that with respect to the earlier questioning, "I assumed you meant in a violence sense." Given that the initial question respecting slapping had been preceded by two questions about Mr. Swain hitting her, it was reasonable for the complainant to have interpreted the question in the sense of more violent physical contact.
- [83] The complainant's evidence respecting the assaults is not corroborated by other reliable evidence. This, of course, is not unusual in sexual assault cases since the only eye witnesses are often just the complainant and the accused. Of course, no corroboration is required for a conviction in sexual assault cases (s. 274 of the Code), however there are direct conflicts in the parties' evidence that were capable of being determined by independent evidence, which, if provided, might well have undermined their respective credibility. I refer here to such things as the layout of the house (whether there was a bathroom downstairs), the existence of any tenants' son and his presence in the back yard on the evening in question, the timing and duration of the accused's presence in the back yard, and the like.
- [84] The Crown explained in final argument that it only learned the accused's version of events for the first time when he testified at trial and hence no evidence on these matters had been briefed. In any event, the absence of independent corroboration or contradiction of these matters is simply a neutral factor, although it admittedly makes more difficult any assessment of credibility.
- [85] Notwithstanding all of the above, however, I found the complainant to be a generally credible witness and I accept her testimony respecting the key events in question. She testified in a frank and forthright fashion and without evasion. She readily acknowledged that her "memory is fuzzy about certain details but not others". She also readily acknowledged she was reluctant to report the event to others, including the police in particular.
- [86] The complainant was consistent about the core events in her various statements in her diary, to the police and to the court, i.e. Mr. Swain groping her buttocks on the deck stairs and, in the kitchen, engaging in further non-consensual groping including putting his hand down her pants and inserting his finger into her vagina. Her inability to presently recall certain other aspects of the assault does not cause me to doubt her testimony that the core events occurred. She firmly and convincingly denied all of the defence "Browne v. Dunn" challenges respecting the accused's version of events. I believe her.
- [87] In summary:
- I do not believe the accused's evidence denying the assaults and I am not left with any reasonable doubt by that evidence;
 - while there are some frailties in the complainant's testimony at trial, I believe and accept her evidence respecting the incidents of assault occurring on the deck stairs and in the kitchen; and

· weighing all of the evidence as a whole, I am satisfied that the Crown has nonetheless proved beyond any reasonable doubt each of the constituent elements of the two offences with which Mr. Swain is charged

[88] I find Mr. Swain guilty on both counts in the Indictment, namely sexual interference and sexual assault of a person under the age of 16 years, contrary to ss. 151 and 271 respectively of the Criminal Code.

"KENT J."

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