

CANADA / JUDGMENT

R. v. T.B.

2024 BCSC 2653

COURT

Supreme Court of British Columbia

DECIDED

18 October 2024

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2024 BCSC 2653 R. v. T.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. T.B.,

2024 BCSC 2653

Date: 20241018

Docket:

Registry:

Rex

v.

T.B.

Restriction on Publication: Pursuant to 278.95, 486.31(1) & 486.4(1) C.C.C.

Before: The Honourable Justice Lamb

Oral Reasons for Judgment

Counsel for the Crown:

E.K. Miller

Counsel for the Accused:

J.R. Fernandes

Place and Date of Hearing:

October 18, 2024

Place and Date of Judgment:

October 18, 2024

- [1] THE COURT: T.B. is charged with sexually assaulting G.F. from January 1, 2023, to January 13, 2023, inclusive, contrary to s. 271 of the Criminal Code, R.S.C., 1985, c. C-46 [Code].
- [2] The original indictment alleged the sexual assault occurred between January 1 and January 7, 2023. The indictment was amended at the close of the Crown's case to extend the end date to January 13, 2023.
- [3] At trial, the Crown led evidence from G.F., G.F.'s mother, and the RCMP constable who took G.F.'s original police state on April 4, 2023.
- [4] T.B. testified in his own defence. He acknowledged during his testimony that he and G.F. had sexual intercourse on January 11, 2023. T.B. also called evidence from his grandmother.
- [5] The key issues at trial are whether G.F. consented to sexual activity with T.B. on January 11, 2023, or whether the defence of honest but mistaken belief in communicated consent is made out. These issues turn on the credibility and reliability of G.F. and T.B.
- [6] Before turning to the circumstances of this case, I will outline the legal framework that applies. I will then outline the background facts before considering the parties' conflicting evidence that relates to the essential elements of the offence and making findings of fact regarding the essential elements of the offence.

Legal principles

Essential elements of the offence

- [7] T.B. is charged with one count of sexual assault. There is no dispute between the Crown and the defence about the elements of this offence.
- [8] The offence of sexual assault is established by s. 271 of the Criminal Code. As noted by the Supreme Court of Canada at para. 24 of *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 1999 CanLII 711 (SCC) [Ewanchuk], "The crime of sexual assault is only indirectly defined in the Criminal Code."
- [9] The actus reus of the offence involves proof that the accused touched the complainant without consent and that the contact was of a sexual nature. The sexual nature of the assault is determined objectively: *Ewanchuk* at para. 25. The absence of consent is determined subjectively by reference to the complainant's subjective internal state of mind towards the touching at the time it occurred: *Ewanchuk* at para. 26.
- [10] The mens rea requires proof that the accused intended to touch the complainant and that the accused knew or was wilfully blind or reckless to the victim's lack of consent: *Ewanchuk* at para. 23.

[11] As noted at the outset, the key issue is whether the Crown has met its evidentiary burden of proof.

The defence of honest but mistaken belief in communicated consent

[12] To establish this defence, the accused "must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct": *R. v. Barton*, 2019 SCC 33 [Barton] at para. 91, citing *Ewanchuk* at para. 46. The key considerations are the complainant's communicative behaviour and how it is the accused understood that behaviour to communicate consent.

[13] The availability of the defence of honest but mistaken belief in communicated consent is limited by s. 273.2 of the Code. It is not a defence that the accused believed the complainant consented to the sexual activity if the accused's belief arose from their own recklessness or wilful blindness or where the accused did not take reasonable steps to ascertain that the complainant was consenting: *Barton* at para. 101.

[14] As noted at para. 96 of *Barton*:

. . . to the extent an accused's defence of honest but mistaken belief in communicated consent rests on a mistake of law -- including "what counts as consent" from a legal perspective -- rather than a mistake of fact, the defence is of no avail . . .

[Emphasis in original.]

Presumption of innocence and proof beyond a reasonable doubt

[15] Under s. 11(d) of the Charter, T.B. is presumed to be innocent. The burden rests on the Crown to prove beyond a reasonable doubt that T.B. is guilty of the offence with which he is charged. He does not have to prove anything.

[16] Proof beyond a reasonable doubt is much closer to absolute certainty than to a balance of probabilities: *R. v. Starr*, 2000 SCC 40 at para. 242.

[17] A reasonable doubt is not an imaginary or frivolous doubt, but rather a doubt that is rational and arises from the evidence or the absence of evidence: *R. v. Lifchus*, [1997] 3 S.C.R. 320, 1997 CanLII 319 (SCC) at para. 36.

[18] When weighing the evidence and the conflicting testimony in this case, I must always keep in mind that the Crown bears the onus of proof beyond a reasonable doubt. As noted by Marchand J., (then a judge of this Court), at para. 39 in *R. v. Snell*, 2021 BCSC 673 [Snell]:

I must not determine guilt by simply determining which evidence I prefer. It is not a credibility contest.

[19] The Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93 (SCC) [W.(D.)], provided the following framework for weighing conflicting testimony:

- i. if I believe T.B.'s testimony, I must acquit;
- ii. if I do not believe T.B.'s testimony but it leaves me with a reasonable doubt, I must acquit; and
- iii. if T.B.'s testimony does not raise a reasonable doubt, then I must acquit if, on the whole of the evidence that I do accept, I am left with a reasonable doubt.

[20] The Supreme Court of Canada has since added a fourth consideration:

- iv. if, after careful consideration of all of the evidence, I am not able to decide whom to believe, then I must acquit: *R. v. J.H.S.*, 2008 SCC 30 at para. 12.

[21] When using the W.(D.) framework, the trial judge is not required to examine the evidence in any particular order, but must have regard to the basic principles underlying the W.(D.) instruction: *R. v. Turmel*, 2004 BCCA 555 at para. 14.

[22] In addressing the key issue of whether the Crown has proven the charges against T.B. beyond a reasonable doubt, I must necessarily consider the credibility of witnesses and the reliability of their testimony. Credibility refers to the truthfulness of the witness; reliability relates to the accuracy of their testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104.

[23] A truthful witness may give unreliable evidence if there is reason to doubt the accuracy of the witness's recollection. Accuracy engages considerations of the ability of the witness to observe, recall and recount: *Ford* at para. 104.

[24] The Court of Appeal in *R. v. J.T.*, 2019 BCCA 180 at para. 31, identified some factors that may assist the court to assess the credibility of a witness:

[31]. . . a witness's demeanor in the witness box, although it is recognized that it would be dangerous to rely wholly on demeanor to convict; internal inconsistencies in a witness's testimony at trial and/or external inconsistencies in a witness's testimony with prior testimony or out-of-court statements; any explanation by the witness for the inconsistencies; any consistent evidence or corroborating evidence to support the witness's evidence, although corroboration is not a requirement; and how a witness withstands cross-examination.

[25] Finally, when assessing the evidence in this case, I must be careful to avoid stereotypical reasoning and assumptions. I must avoid making credibility findings grounded in emotional evaluation, stereotypes, guesswork and other impermissible reasoning: *R. v. D.F.*, 2020 BCSC 2215 at para. 32.

[26] In particular, I must avoid drawing any inference about the credibility of the complainant based on how she reacted or failed to react after the alleged conduct. I must also be cautious to avoid stereotypical thinking that might improperly infringe on the presumption of innocence; for example, by assuming that G.F. would not expose herself to the rigour of trial if her evidence regarding the sexual conduct was not true: *Snell* at para. 44.

- [27] Within this legal framework, after setting out some background facts, I will begin my analysis by assessing G.F.'s evidence. I will then consider T.B.'s evidence.
- [28] Regardless of the order in which the evidence is analyzed, no conclusion can be reached until all of the evidence is considered: R. v. P.W., 2003 BCCA 542 at para. 19.
- [29] In this way, the basic principles underlying the W.(D.) instruction operate throughout the analysis.

Background

- [30] G.F. and T.B. first met in either February or March 2021. They started dating in April 2022. T.B. broke up with G.F. on January 13, 2013.
- [31] As of January 2023, G.F. was 20 years old. She was attending post-secondary school and lived in a house with her parents.
- [32] As of January 2023, T.B. was 27 years old. He worked as a youth leader. He lived in a house with his grandmother. His sister and her boyfriend lived in the basement. He had parenting time with his four-year-old daughter on weekends and on other days during the week.
- [33] G.F. and T.B. saw each other on December 31, 2022, at T.B.'s home to get ready for a party that evening. They travelled to the party separately. They exchanged affectionate text messages wishing each other a happy new year shortly after midnight on January 1, 2023.
- [34] T.B. and G.F. did not see each other in person on January 1, 2, or 3.
- [35] On the morning of Wednesday, January 4, 2023, T.B. was at home alone playing videogames before he went to work.
- [36] On Wednesday, January 4, 2023, G.F. visited T.B. at his home around 6:00 p.m. after he finished work.
- [37] T.B. and G.F. did not see each other in person or text each other on January 5, 2023.
- [38] On January 6, 2023, after 9:15 p.m., T.B. texted G.F. to explain that he had been feeling antisocial lately and that he felt badly that they were not spending time together. T.B., in reference to their time together on January 4, 2023, said he worried that he had done harm. G.F. responded, suggesting that they take a break from talking for a few days and check back on Monday or Tuesday. T.B. agreed. They exchanged "I love you" messages.
- [39] On Sunday, January 8, 2023, G.F. and T.B. exchanged text messages making plans to get together on the morning of Wednesday, January 11, 2023.
- [40] On the morning of Wednesday, January 11, 2023, T.B. visited G.F. at her home. He was scheduled to work that afternoon.
- [41] On Friday, January 13, 2023, T.B. went to G.F.'s home and broke up with her. He told her that he no longer enjoyed spending time with her.

G.F.'s evidence

- [42] G.F. was adamant that the non-consensual sexual intercourse with T.B. happened on a Wednesday morning at her house. In direct examination, G.F. testified that the incident happened on Wednesday, January 4, 2023, but in re-re-examination, she said she believed that she got the date wrong earlier. After seeing the messages put to her on cross-examination, she now believed the non-consensual sexual intercourse took place on Wednesday, January 11, 2023.
- [43] G.F. said T.B. arrived at her home at approximately 10:00 a.m. on the day of the incident. She was making breakfast in the kitchen. He played the guitar, while she continued making eggs. G.F.'s mother passed through the kitchen and exchanged a few words with T.B. before she went downstairs. G.F.'s father was not at home.
- [44] G.F. and T.B. went to her bedroom, and she played a movie on her laptop while they sat on her bed. Initially, they were laying on their backs before moving into a cuddling position on their sides with T.B. positioned behind her.
- [45] G.F. and T.B. started kissing. G.F. broke off the kiss and told T.B. that, given their conversation the last time, she wanted to be very clear with him and told him that she did not want to have sex that day. He responded, "Okay."
- [46] After cuddling and movie watching for another 10 to 20 minutes, T.B. kissed her again and she kissed him back. T.B. then kissed her more forcefully and she kissed him back. He was touching her arms, her breasts over her shirt, and her thighs over her clothes. T.B. then got on top of G.F. and pulled her pants and underwear down to her knees. He pulled her body to the edge of the bed and stood at the end of the bed facing her. T.B. unbuttoned his pants and pulled out his penis. He put two fingers inside her vagina twice, and then put his penis inside her vagina. He continued having sex with G.F. until he ejaculated inside her. He withdrew his penis. He pulled up his pants and buttoned them. He looked at the clock and said he had to go.
- [47] From the beginning of the second round of kissing to the zipping of his pants, five minutes elapsed. While the penetrative sex was happening, G.F. just lay there looking at T.B.. She remembers thinking, "Was I clear enough? Did he understand me when I told him I did not want to have sex today?" She concluded that she had been clear, and he had responded with, "Okay." She realized that T.B. decided to proceed with having sex even though he knew what she did and did not want. G.F. wanted it to be over as quickly and painlessly as possible, so she just lay there. She was afraid that if she said no again, then things could escalate.
- [48] G.F. testified that she did not consent to penetrative sex. T.B. did not ask her if she wanted to have sex.
- [49] G.F. testified that she and T.B. had had a clear conversation about consent the most recent time she had seen him before the incident. They were in his bedroom at his house. On that occasion, they were kissing, and G.F. had placed her hand on his crotch above and below his

pants. G.F. noticed he looked a little off. She asked if he was okay and if what she was doing was okay. T.B. said he was not really feeling it that day. G.F. immediately pulled her hand away. G.F. said to T.B. that she did not want him to feel they have to have sex or be intimate if he did not want to. G.F. told T.B. that she hoped he could always feel safe to tell her. G.F. said she just wanted both of them to have a good time and if that did not involve sex, that was okay with her. T.B. agreed to that. He told G.F. that there were times in the past when he did not want to have sex but did it anyway. G.F. said she was sorry, that she did not know that. G.F. said it was important to talk about what consent means, because they had grown up in different generations and may not have the same idea regarding consent. For her, consent is two partners enthusiastically consenting. G.F. said that there should not be a question, and it should always be clear. T.B. agreed. G.F. said it was important to be very transparent about consent.

- [50] This prior conversation ran through G.F.'s head as the non-consensual sexual intercourse was happening in her bedroom. She knew that there was no misunderstanding, but instead T.B. understood what she had said and proceeded regardless.
- [51] In direct examination, G.F. said that she spoke to T.B. about the incident two or three days later when he called her on his way home from work. When he asked how she was doing, G.F. replied, "Not good." When T.B. asked why, G.F. replied, "I told you I did not want to have sex, and you did it to me anyway." T.B. was quiet for 20 or 30 seconds before he started breathing heavily. T.B. then asked her how she could say that. He said she thought he was a bad person, but he has a daughter, a mother, a grandmother, he supports women, how could she say he was a bad person? G.F. said she did not think he was a bad person. The conversation devolved into her reassuring him and calming him down. At one point, he said, "I wouldn't have done it if I knew you would act like this." The conversation ended after G.F. had reassured T.B. enough. He said he was tired, and he hung up.
- [52] In cross-examination, when she was shown the text messages from January 6, 2023, G.F. said that the first text message from T.B. prompted the post-incident phone call just described, and a second text from him came after the phone call. Under further cross-examination, G.F. acknowledged subsequent text messages that day did not have an angry tone. G.F. could not confirm the post-incident phone call happened on Friday, January 6 for certain.
- [53] T.B. ended their relationship on January 13, 2023. He sent a message on Snapchat asking her to meet at the mall or go somewhere else. G.F. invited him to come to her house. T.B. came over. They spoke for about 40 minutes. T.B. told G.F. that he would like to end their relationship because he did not enjoy spending time with her anymore.
- [54] In direct, G.F. testified that aside from the incident itself, the conversation about consent, the confrontation on the phone and the breakup, G.F. and T.B. saw each other one other time in person during this period. She conceded in cross-examination that she was not certain about this one other date.

T.B.'s evidence

- [55] When he spent time with G.F. after work on the evening of January 4, 2023, T.B. was feeling tired. To a degree, he was not feeling chatty or social, but he tried. T.B. said that G.F. wanted to hang out and chat and cuddle. T.B. tried to cuddle for a little bit, but then he told her he was not feeling cuddly. She was being affectionate, but he was not in the mood. In cross-examination, T.B. denied telling G.F. that sometimes he cuddles or does other things when he was not in the mood. In cross-examination, T.B. disagreed that they discussed consent or how they would communicate consent going forward.
- [56] In direct examination, T.B. confirmed that he saw G.F. at her house on Wednesday, January 11, 2023. When asked what he did with her that day, T.B. said he remembered hanging out, watching movies, and having an honest conversation about how they had been feeling and his grumpiness. He denied sexually assaulting G.F. that day. T.B. did not mention in his direct testimony that he and G.F. had sexual intercourse on January 11, 2023.
- [57] T.B. was cross-examined in detail about the events of Wednesday, January 11, 2023. Based on his text messages that morning, T.B. believes he arrived at G.F.'s house at 8:45 a.m. He did not remember specifically what G.F. was doing when he arrived, though he agreed it was possible she was making breakfast. T.B. does not recall interacting with G.F.'s mother that day. He believes G.F.'s father was not at home. T.B. plays guitar, but he does not recall whether he played the guitar at G.F.'s house on January 11, 2023.
- [58] In cross-examination, T.B. recalled he and G.F. ended up in G.F.'s bedroom on January 11, 2023. He said they discussed his need to have less communication, so that he would have time to recharge, which was a continuation of a conversation they had been having for a few weeks. T.B. believes he was sitting on the ground near the end of G.F.'s bed during this conversation, which happened closer to the time he was leaving. T.B. could not remember where G.F. was during this conversation.
- [59] In cross-examination, T.B. acknowledged it was possible he and G.F. were lying on the bed at some point on January 11, 2023. When asked whether they were cuddling at all or kissing at all on January 11, T.B. responded, "I believe so." He acknowledged touching her on her body. When asked whether he and G.F. had sex on January 11, T.B. responded, "To my memory, yes."
- [60] When asked what steps he took to confirm G.F. consented to having sex on January 11, 2023, T.B. said mutual kissing, mutual touching, and no verbal expression that she did not want to have sex. T.B. also said there was mutual excitement.
- [61] When asked whether he pulled down G.F.'s pants or whether she pulled down her own pants, T.B. said it was mutual. When asked to clarify what this meant in terms of pulling down her pants, T.B. responded as follows: "I just feel that term encompasses the situation, the exact order of which -- I just feel the term 'mutual' describes the situation to the best I remember."

- [62] After a long pause, T.B. confirmed that he undid his own pants. He reiterated that he maintained his "situation" that it was mutual.
- [63] When asked whether G.F. expressed through words that she wanted to have sex, T.B. responded that he did not remember. The Crown asked T.B. if he asked her verbally if she wanted to have sexual intercourse. T.B. responded, "Not to my recollection."
- [64] T.B. confirmed that G.F. was kissing him back. He could not identify where on G.F.'s body he was touching her because it "just feels too specific". When asked to clarify, T.B. said, "I guess I just maintained that it was consensual."
- [65] T.B. confirmed that he inserted his penis in G.F.'s vagina. He did not recall inserting his fingers in her vagina prior to that. He did not specifically remember whether he ejaculated inside her. T.B. does not remember how long the sex lasted, but he did not believe too long.
- [66] When asked what steps he took to confirm that G.F. was consenting during this time, T.B. reiterated that "everything was mutual". When asked what he saw that made him believe that, T.B. said she kissed him back and touched him back.
- [67] After they finished having penetrative sex, T.B. pulled up his pants at some point. He and G.F. continued to hang out for a little while. They continued their conversation about how he was feeling. T.B. acknowledged there was some awkwardness at that time. When he left, G.F. was in her room and clothed to some extent, though maybe not fully clothed and perhaps with her pants still pulled down.
- [68] T.B. was scheduled to work at 3:00 p.m. on January 11, 2023. He does not recall having an issue with his car that needed to be fixed during that period of time.
- [69] T.B. denies that G.F. told him on January 11, 2023, that she did not want to have sex.
- [70] In cross-examination, T.B. acknowledged it was possible he spoke to G.F. by phone on January 12, 2023, on his way home from work, but he did not believe that he talked to her then. T.B. denies that G.F. confronted T.B. about what happened on January 11, 2023.
- [71] In re-examination, when asked where G.F. had touched him during the mutual touching on January 11, 2023, T.B. said that G.F. touched his penis above and under his clothes. He could not say how soon after she placed her hand on his penis they started having sexual intercourse. When asked to approximate when, T.B. said it was during kissing, but he conceded he was still unsure exactly.

Credibility and reliability

- [72] As noted at the outset, the key issues I must decide are whether G.F. consented to sexual intercourse on January 11, 2023, and, if she did not, whether T.B. had an honest but mistaken belief in communicated consent. This is not a credibility contest between G.F. and T.B.. The key is whether the Crown has proven each element of the offence beyond a reasonable doubt. In order to decide whether the Crown has met that onus, I must assess the credibility of G.F. and T.B. and the reliability of their evidence.
- [73] Overall, I found G.F. to be credible. She was a careful witness who did her best to be accurate. For example, she acknowledged telling the RCMP that the incident happened at 10:45 a.m., and that T.B. left at 11:15 a.m., but she can now only say the incident happened around 11:00 a.m., because she could no longer remember the exact time.
- [74] G.F. provided detailed evidence about the events leading up to and including the alleged sexual assault. Other than the actual date of the incident, her account did not change on cross-examination.
- [75] On the other hand, I found T.B. offered fewer details and was more evasive when giving evidence, particularly about the events of January 11. T.B. said he could not recall what happened before they ended up in G.F.'s bedroom on January 11. He was reluctant to admit they were on her bed together. When asked how he removed her pants, rather than answering the question directly, he said he recalled it being mutual. He repeated that phrase a number of times when asked about details of the interaction in G.F.'s bedroom on January 11. His unwillingness to answer questions directly undermines his credibility. Although he was given numerous opportunities by the Crown in cross-examination to explain why he believed G.F. was consenting to sexual activity through her actions, T.B.'s first mention of her touching his penis was in re-examination. Even when he offered this new detail, he was vague as to timing and conceded he was unsure when he suggested she had touched his penis when they were kissing. To the extent it is relevant, T.B.'s evidence that G.F. touched his penis is unreliable, given how vague it was and the fact it arose for the first time in re-examination.
- [76] The most significant change in G.F.'s evidence under cross-examination was the exact date of the incident. She volunteered in re-re-examination that, after reviewing the text messages, she had been mistaken when she said the incident happened on Wednesday, January 4. She now believed the incident occurred on Wednesday, January 11, 2023. Although he did not confirm all of the details recounted by G.F. about the incident, T.B. confirmed he and G.F. were together at her house on the morning of Wednesday, January 11, 2023, and they engaged in penetrative sexual intercourse on that day. The text messages corroborated the parties' meeting on the morning of Wednesday, January 11, 2023.

- [77] I accept that G.F. realized her mistake regarding the exact date only after reading the text messages that were put to her in cross-examination. She had not read the text messages since they were sent, because her phone automatically deleted them after a month.
- [78] I accept G.F.'s evidence that she and T.B. had a conversation about consent prior to the incident. However, I find she was mistaken when she testified the conversation took place three days before the incident. She conceded in cross-examination that she could have been wrong about the date, and that she did not remember when the conversation happened, but she maintained that it happened in person at his house. I find it is more likely the consent conversation happened a week before the alleged sexual assault on Wednesday, January 4, 2023, consistent with her evidence that the consent conversation occurred in T.B.'s bedroom the last time they were together before the incident. T.B. confirmed he and G.F. were in his bedroom on January 4, and that G.F. wanted to cuddle but he was not feeling cuddly that day. When it was put to him that they had discussed consent on that day, T.B. said, "To my recollection, I'm going to disagree." When it was put to him that they talked about how they would communicate consent going forward, T.B. said, "I don't remember that. I believe that that did not happen." I prefer G.F.'s evidence on that point. She provided details of the consent conversation that made sense in the context of his lack of interest in intimate contact that she described, a context T.B. generally corroborated. She said she had touched his crotch when he did not want to continue, whereas T.B. testified that she wanted to cuddle but he did not feel cuddly that day. Significantly, G.F. was not cross-examined on the content of the conversation about consent, only the timing and whether it actually occurred. T.B.'s denial that the conversation about consent occurred was couched in not having a memory of the discussion.
- [79] I find that G.F. was also inaccurate about how long after the incident the parties had a conversation about the incident. It could not have occurred two or three days after the incident on January 11, but it could have been the night of January 12. Again, G.F. expressed some uncertainty about the timing of that conversation, but no doubt about the content. G.F. was not cross-examined on the content of that telephone conversation, only the timing and whether it actually occurred.
- [80] The defence argued that G.F.'s evidence as a whole is unreliable because of the change in date from January 4 to January 11, and because her evidence regarding the timing of the other conversations was not possible, given the text messages and the breakup on January 13. However, G.F. recognized and volunteered that she was mistaken about the actual date of the incident. Her evidence about the other details concerning the incident were unchallenged or unshaken, and T.B. corroborated they had sexual intercourse in her bedroom on the morning of January 11, a Wednesday. Her evidence about timing is a collateral point that does not undermine the substance of her testimony regarding what the parties discussed and what happened.

[81] The conversation before and after the incident are collateral events that give context to the incident on January 11 and the breakup on January 13. However, the key question I must resolve is whether the Crown has proven each element of the offence of sexual assault beyond a reasonable doubt.

Findings of fact regarding the incident on January 11, 2023

- [82] I am satisfied, based on the whole of the evidence, that T.B. and G.F. had penetrative sexual intercourse on the morning of Wednesday, January 11, 2023, in G.F.'s bedroom. G.F. testified they had sexual intercourse in her bedroom on a Wednesday morning, and she clarified on re-re-examination that she now believes the incident occurred on January 11, 2023. T.B. confirmed that he and G.F. had penile/vaginal intercourse in her bedroom on the morning of January 11, 2023. Penetrative sexual intercourse is clearly contact of a sexual nature.
- [83] I find that G.F. did not consent to the penetrative sexual intercourse on the morning of Wednesday, January 11, 2023. I accept her evidence that she did not subjectively consent to penetrative sex on that day. The defence has failed to raise a reasonable doubt about G.F.'s lack of subjective consent to penetrative sexual intercourse. G.F. said T.B. did not ask her if she wanted to have sex, and T.B. testified he did not remember her expressing in words that she consented.
- [84] The defence argued that I should reject G.F.'s testimony as unreliable because she erred regarding the date of the alleged sexual assault and the timing of the two significant conversations. For the reasons I have already outlined, I am satisfied G.F.'s mistakes on these points do not raise a reasonable doubt about her lack of consent to the penetrative sexual intercourse on January 11, 2023.
- [85] G.F.'s consent to other sexual activity on January 11 does not mean that she consented to penetrative sexual intercourse. G.F. consented to kissing on that day. She did not testify to a lack of consent to T.B.'s touching her. However, G.F. was clear and consistent that she did not consent to penetrative sexual intercourse. Consent must be linked to the specific physical sexual act. T.B.'s reliance on mutual kissing, mutual touching, and her touching his penis, even if it did occur, does not raise a reasonable doubt about the absence of her subjective consent to penetrative sexual intercourse.
- [86] I find the actus reus of sexual assault is proven beyond a reasonable doubt.
- [87] In terms of mens rea, I am satisfied beyond a reasonable doubt that T.B. intended to touch G.F. with his penis when he engaged in sexual intercourse with her.
- [88] The only remaining issue is whether T.B. knew or was wilfully blind or reckless to G.F.'s lack of consent. T.B. says he believed the sexual intercourse was consensual. As noted at para. 90 of Barton:

... the question becomes whether the accused honestly believed "the complainant ... said 'yes' through her words and/or actions". . .

[89] As outlined in Barton at para. 91, when considering whether the accused had an honest but mistaken belief in communicated consent, the relevant considerations are limited to:

- a) G.F.'s actual communicative behaviour, either words or conduct; and
- b) the totality of the admissible and relevant evidence explaining how T.B. perceived the behaviour to communicate consent.

[90] In this case, T.B. does not suggest G.F. communicated consent through words. He did not remember her expressing in words that she consented to sexual intercourse, and he did not remember asking for consent to penetrative sexual intercourse.

[91] When asked in cross-examination what made him believe G.F. was consenting, T.B. said she kissed him back and touched him back. He later added in re-examination that she touched his penis over and under his clothes. This conduct, even if I accepted it occurred as recounted by T.B., does not justify a perception on his part that G.F. consented to penetrative penile/vaginal intercourse. As Barton makes clear, consent is linked to the specific physical sexual act. Consent to kissing and touching does not amount to consent to penetrative sexual intercourse.

[92] According to T.B., the other thing that led him to believe G.F. was consenting was her failure to express that she did not want to have sexual intercourse. However, at law, a person's failure to protest to sexual contact does not amount to deemed consent: Barton at para. 98. In any event, for the reasons already articulated, I prefer G.F.'s evidence on this point, and I accept she did tell T.B. that she did not want to have sexual intercourse on January 11, 2023. Even though G.F. expressed her lack of consent, T.B. had penetrative sexual intercourse with her anyway.

[93] Finally, T.B. is not entitled to rely on the defence of honest but mistaken belief in communicated consent where he did not take reasonable steps to ascertain that the complainant was consenting; s. 273.2(b) of the Code. In this case, T.B. provided no evidence of taking steps to determine whether G.F. consented to sexual intercourse. When asked on cross-examination what steps he took to confirm that G.F. was consenting, T.B. simply reiterated that "everything was mutual". The precondition prescribed by s. 273.2(b) is not met.

[94] In summary, I find the Crown has proven the requisite mens rea beyond a reasonable doubt. At a minimum, T.B. was reckless or wilfully blind regarding G.F.'s consent to penetrative sexual intercourse on January 11, 2023.

Conclusion

[95] T.B., please stand. For the reasons outlined, I am satisfied that Count 1 of the indictment has been proven beyond a reasonable doubt. I find T.B. guilty of sexually assaulting G.F. on or about January 11, 2023, contrary to s. 271 of the Code.

"Lamb J."

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Prepared on 25 October 2026 · Esheria