

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Moore*, 2020 NSPC 3

Date: 2020-01-10

Docket: 8316016

Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

ROBERT MOORE

Restriction on Publication:

s. 486.4: Ban under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way

TRIAL DECISION

Judge: The Honourable Judge Elizabeth Buckle

Heard: November 7, 2019 (s. 276 Application), December 12 & 13, 2019, in Halifax, Nova Scotia

Decision: January 10, 2020
January 24, 2020 (Written Reasons)

Charge: Section 271, *Criminal Code*

Counsel: Constance McIsaac, for the Crown
Stanley MacDonald, Q.C. & Allan MacDonald (Articling Student) for Mr. Moore

By the Court:

Introduction

[1] Mr. Moore is charged with sexual assault of KW. Ms. W. was employed at a restaurant that was part-owned by Mr. Moore. On the night of the incident that led to the charge, she went to the restaurant as a patron. She went into an office with Mr. Moore and they kissed. That activity, which was captured on video surveillance, is the subject of the charge.

[2] There is no doubt that the kisses occurred, and the Defence does not dispute that they constitute sexual activity. The issues in the trial relate to consent. Consent in the sexual context requires voluntary agreement to engage in the sexual activity in question. Even where there is apparent consent, there are circumstances where the law says that consent is not valid.

Position of the Parties

[3] The Crown argues that Ms. W. did not consent to the kisses and, if she did, any apparent consent was not valid because it was induced by Mr. Moore's abuse of his position of power or authority toward her. The Crown is required to prove both the absence of consent and the vitiation of consent beyond a reasonable

doubt. The Defence argues that the Crown has not proven either. In the alternative, the Defence argues that if the Crown has proven the absence of valid consent, Mr. Moore honestly believed that Ms. W. communicated valid consent to the kisses.

[4] I must first decide whether the Crown has proven that Ms. W. did not consent to the kisses. If I conclude that absence of consent has not been proven, I must go on to decide whether the Crown has proven that the circumstances invalidate that consent. Finally, if I am persuaded that there was no valid consent, I must decide whether Mr. Moore can rely on the defence of honest but mistaken belief in communicated consent. Deciding these issues will require me to assess the credibility and reliability of Ms. W.'s testimony as well as the other witnesses.

General Principles

[5] There are general principles that apply to every criminal trial:

1. Mr. Moore is presumed to be innocent of these charges;
2. The Crown bears the burden of proving each and every element of the offences beyond a reasonable doubt. As I said, in a sexual assault trial, that includes the requirement to prove absence of consent;
3. Proof beyond a reasonable doubt is a high standard. It is more than suspicion of guilt or probable guilt. It is not proof to an absolute certainty

but falls much closer to absolute certainty than to proof on a balance of probabilities. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice. (*R. v. Starr*, [2000] S.C.J. No. 40; *R. v. Lifchus*, [1997] 3 S.C.R. 320.); and,

4. I am entitled to accept all, some or none of the testimony of any witness.

Evidence

[6] The Crown called 5 witnesses: Cst. Ann Giffen, the investigating officer; KW, the complainant; JD, a friend and roommate of the complainant; Mr. Andrew Flynn; and, Justin Garland, a business partner of Mr. Moore and operations manager of the restaurant. Both the public area of the restaurant and the office, where the incident took place, are under video surveillance. Three excerpts from that video surveillance were filed as exhibits at trial: the public area between 8:39 p.m. and 9:50 p.m. (Exhibit 2); the public area between 9:50 p.m. and 10:14 p.m. (Exhibit 2); and, the office from 9:03 p.m. to 9:05 p.m. (Exhibit 3). Mr. Moore did not testify.

[7] In this case, I have the benefit of the video surveillance which shows both the incident that is the subject matter of the charge and the events immediately before and after the incident. It is an objective witness to the important events. The testimony of the witnesses provides necessary context for what is in the video

and the only evidence for what was in their minds. I have to assess the evidence of the witnesses to determine if it is credible and reliable. Except for Ms. D., there was nothing about the demeanour or manner of answering questions of any witness that caused a concern. Ms. D. was very defensive during cross-examination. That is not necessarily indicative of deception but is an indication of her loyalty to Ms. W. and her animosity to the Defence. That requires me to approach her evidence with some caution.

[8] Relationships or other circumstances may motivate witnesses to lie or more subtly colour how they perceive or report events. In this case, there are circumstances that I have to take into account when assessing the evidence of various witnesses. For example, Mr. Flynn was fired by Mr. Moore and clearly felt that Mr. Moore's conduct in kissing an employee was inappropriate. Those things may cause him to have animosity toward him. Mr. Garland is a friend and business partner of Mr. Moore. That may cause him to want to protect him. The Defence alleges that after Mr. Flynn was fired, Ms. W. had a motive to allege she did not consent to the activity because of her friendship with Mr. Flynn and/or concern about her job once he was no longer able to protect her.

[9] In addition to these factors relating to demeanour and motive, when assessing credibility, I also have to consider the internal and external consistency and plausibility of the witness' evidence. In doing that, I remind myself that it is not uncommon for truthful witnesses to observe and recall different aspects of events, recall them differently or have inaccurate recollections of details. Those issues do not impact the witness' credibility but may impact the reliability of their evidence.

[10] At the time of the incident, Ms. W. had been employed at the restaurant for about 6 months. She worked as a "bar back", an assistant to the bartender. Mr. Moore was a part-owner of the restaurant. He was sometimes there but was also involved in a business in Newfoundland. I understood from the evidence that others were responsible for the day-to-day operation of the Halifax business, including, Andrew Flynn, Justin Garland and Marcus Olivier.

[11] Ms. W. testified that she understood that Mr. Moore was one of the owners of the restaurant, but he did not hire her or assign her duties. She worked closely with Mr. Flynn, who was the general manager, and Mr. Olivier who she believed was the manager of hosts. She testified that when Rob Moore was in Halifax at the restaurant, she would see him working the floor – greeting people. She agreed that

during her employment, Mr. Moore never told her how to do her job, how to dress, didn't set her pay rate, didn't offer her a raise or promotion, didn't offer to be a reference for her, didn't give her gifts, didn't give her days off, and didn't take her on drives or trips. He also never threatened to demote her, fire her, or reduce her pay or shifts and never berated her for her work.

[12] Prior to the incident, her encounters with him were quite positive.

[13] On February 1, 2019, Ms. W. went to the restaurant with her long-time friend and roommate, JD. Ms. W. was not working that night and was there as a patron. She consumed some alcohol over the course of the evening. However, the evidence does not indicate any significant consumption and neither the Crown nor Defence suggests that her consumption is a relevant factor.

[14] The surveillance footage presented in court does not show Ms. W. and her friend arriving at the restaurant. They testified that they initially took seats at the bar in an area not shown in the surveillance footage but moved because a man was bothering them. By 8:39 p.m. they can be seen on video, seated in their new seats at the bar, which they occupied until they left the restaurant at 10:14 p.m.

Witnesses agreed that the office, where the incident took place, was located near the entrance to the restaurant and that a host station was located just outside the

door to the office. The entrance to the restaurant can be seen in the video surveillance.

[15] The restaurant was relatively busy that night, there was music playing and people were talking. The video shows that from 8:39 p.m. until 9:03 p.m., Ms. W. sat at the bar with Ms. D. She was interacting with the bartender and various other people who stopped to speak with her. She testified in direct that she realized she could probably pick up her paycheque so asked “Rob” (Mr. Moore) who was the first person in charge who walked by. She testified that he said he could go get it and they went to the office. In cross-examination, when shown the video-surveillance, she agreed that before asking Mr. Moore to get her cheque, she had interacted with others who were in management and could have gotten her cheque for her, including Mr. Flynn and Mr. Olivier. She explained that it was not in her mind when she saw them. She also agreed that she did not flag down Mr. Moore to ask him to get her cheque but went to where he was standing near the host station and asked him there. She confirmed that when she is seen in the video leaving her seat and walking toward the office area at 9:03 p.m., she is going to ask about getting her cheque. Mr. Garland testified that he was standing with Mr. Moore near the host station when Ms. W. approached and asked Mr. Moore if he could get her cheque. Ms. W. could not recall him being there, but I accept his

testimony. His recollection was supported by the video-surveillance which shows him walking in that direction and not returning prior to Ms. W. going there at 9:03 p.m. His recollection is also consistent with Ms. W.'s recollection that he was outside the office when she left after the incident at about 9:05 p.m.

[16] Ms. W. testified that she entered the office first and started looking for her cheque in the drawers but couldn't find it. In cross-examination, she confirmed that in her statement to police she had also said that Mr. Moore had shut the door. While watching the video (Exhibit 3) in cross-examination, she acknowledged that while she had opened the door to the office, she had stopped to speak with someone outside the office and that Mr. Moore actually entered the office first, followed by her. She also acknowledged that Mr. Moore did not close the door, it closed on its own.

[17] The video surveillance from the office (Exhibit 3) shows the door opening at 9:03 p.m. Ms. W. can be seen standing in the entry for a short time. Then Mr. Moore passes her and enters the office, followed by Ms. W. The door then swings shut. Mr. Moore can be seen opening and closing a drawer in the desk, then Ms. W. opened and closed two other drawers.

[18] Ms. W. testified that after she looked in the drawer, she faced Mr. Moore and told him she couldn't find her cheque. Mr. Moore then leaned forward, puckered up, kissed her on the mouth and she kissed him back. She described this kiss as a "peck". She said he did not ask her if he could kiss her and when asked by the Crown if she had consented, she said "no". She testified that they both pulled away and looked at each other for a second. Then, he put his hand on the back of her head, pushed her head toward him and kissed her again. She said this second kiss involved "tongue". She said the effect of the pressure of his hand on her head brought her toward him. This made her take a step toward him and put her arm up to hold herself up or make sure she didn't fall toward him. She demonstrated this by putting her right hand up at a 90-degree angle with her palm out. She testified that he did not ask if he could touch her head or if he could kiss her the second time.

[19] She was shown the video from the office and said that watching it made her feel sad, grossed out and disgusted. She testified that she later told her friend "I think I just kissed Rob". When asked by the Crown "did you kiss Rob?", she said "yes". When asked why she described it that way, she said "because I kissed him back because I was alone in the room". She testified that being alone in the room made her feel she didn't have any help or choice other than to go along with what

he was going to do. She was asked why she felt she didn't have any choice and responded, "because I was alone".

[20] In cross-examination, Ms. W. agreed that in her statement to police she had said that the kiss had made her feel "disgusting, uncomfortable and really scared" because she didn't know where it was going to go, she was alone, had nowhere to go, no one to run to, and no one was seeing it. She acknowledged that she knew and was on good terms with many people working in the restaurant that night.

[21] In cross-examination, Ms. W. agreed that after the first kiss, she and Mr. Moore appeared to stare at each other for a moment. She said this was when she was telling him she couldn't find the cheque. She agreed that when he leaned forward and puckered up, she also leaned in a bit and kissed him. She agreed that during the second kiss, she was actively kissing him. She agreed that she took a step toward him at the start of the second kiss but maintained that this was the result of him pulling her toward him and that she had put her hand on him to keep herself from falling. She acknowledged that he moved away from her after the second kiss and that she walked toward him and put her head against his chest.

[22] In the video (Exhibit 3), after looking for the cheque, Ms. W. and Mr. Moore can be seen standing about 1 foot apart and looking at each other for a few

seconds. Both are behind the desk with Ms. W. closer to the door. Then Mr. Moore slowly leaned toward Ms. W. with his lips puckered, she moved her head slightly toward him and they briefly kissed on the lips. After that kiss, neither moved. A second or two later, he put his left hand on the back of her head, she took a step toward him, put her right hand on his side and they kissed for about 4 seconds. This is a more significant kiss than the first, and both appear to be actively involved. When they parted, they moved away from each other; she took a step back and he moved 3 or 4 steps in the opposite direction. At this point she is closer to the door than previously and he is further into the office. She then took 3 or 4 steps toward him and leaned slightly against his chest. He put his hand on her head and kissed the side of her head. He then pointed to the door, she left the office and he remained.

[23] Mr. Garland was just outside the office door when Ms. W. left. She testified that he asked what she was doing, she told him she was trying to get her cheque and he went back in with her and found it. In cross-examination, she agreed that in her statement to police she'd said she believed that Justin Garland must have observed something in her face when she left the office because he asked why she was in there and if she was ok. She testified she couldn't remember if that is exactly what he said but confirmed that he had expressed concern. Mr. Garland

testified that he did not observe anything out of the ordinary when Ms. W. left the office and saw nothing that prompted any inquiry about her wellbeing. They spoke about the fact that she couldn't find her cheque and they went back in to get it. I accept that Mr. Garland did not observe anything in her face or express concern. However, I believe that someone observed something that caused concern and Ms. W. was simply mistaken about who. Mr. Flynn testified that he looked at the video from the office that night because of a concern raised by the guest services manager.

[24] The video (Exhibit 3) shows Ms. W. return a short time later with Mr. Garland. He found the cheque and handed it to her. She then raised her arms and wiggled her shoulders. Mr. Garland said that when he handed her the cheque, he said something to her like "make it rain" and she did a little dance. In cross-examination, Ms. W. agreed that she had done a little "shoulder dance" when she received the cheque. She denied that she appeared comfortable in the office after the incident. She said that the fact that she remained in the doorway when they went back in to get the cheque is indicative of discomfort and the "shoulder dance" doesn't show she's comfortable, just that she needed the money and was happy to receive her cheque.

[25] Ms. W. testified that when she left the office, she didn't know what to think because she was in shock that it had happened. She recalled that she went back to the bar and sat down with Ms. D. The video of the public area (Exhibit 2) shows that when she left the office, she stopped for a brief period and interacted with a woman, they hugged and then Ms. W. returned to her seat at the bar. In cross-examination, Ms. W. identified the person she spoke to as Lea and agreed that they hugged and had a brief conversation during which she again did the "shoulder dance".

[26] Ms. W. testified that when she returned to her seat, she told Ms. D. either "I think I just kissed Rob" (in direct) or "I think Rob just kissed me" (in cross) and then ordered a drink. Ms. D. testified that when Ms. W. returned to her seat, she looked uncomfortable, so Ms. D. asked her why and she said Rob had kissed her. Then they went to the bathroom.

[27] In cross-examination, it was suggested to both Ms. W. and Ms. D. that Ms. W. did not tell Ms. D. about the kiss immediately when she returned to her seat. The video (Exhibit 2) shows Ms. W. saying something to Ms. D. as she sits down. Ms. D. has her phone in her hand, is looking at it and appears to be typing as Ms. W. is speaking. They then both get up and are off-camera for about 5 minutes.

They testified they probably went to the bathroom. Ms. W. agreed in cross-examination that the video does not show a conversation at that time but maintained that this was when she told Ms. D. about the kiss. She said Ms. D. did not respond when she told her about the kiss. She said Ms. D. was very intoxicated so she didn't tell her any further details of what had happened in the office. Ms. D. agreed she was looking at her phone when Ms. W. told her, but that she could hear what Ms. W. had said.

[28] In cross-examination, Ms. W. was asked about various things she can be seen doing in the video from the public area of the restaurant (Exhibit 2) between 9:05 p.m. when she returned to her seat after the incident and when she left the restaurant at 10:14 p.m. She acknowledged that she is in the video, however, could not recall any of what it shows. Specifically, she didn't recall seeing Mr. Moore again that night, any of the interactions with Mr. Moore or others shown in the video, leaving the restaurant, whether she'd gone anywhere else after leaving the restaurant, or getting home. In direct, she was not asked why she could not remember this. In cross-examination she testified that she couldn't remember what happened after the incident because she was in a state of shock. Later in cross-examination, she agreed that her loss of memory was most likely attributable to trauma or shock.

[29] In cross-examination, she agreed that in her statement to police she had been asked what had happened after she told her roommate what happened and had responded that they “left after that . . . left the restaurant”. Then, later when she was asked again what happened after she rejoined her friend, she had said “we basically just carried on our night because we didn’t know how to react at all. Like we had no idea how to react so we just left that bar”. She acknowledged that she and Ms. D. did not leave the restaurant immediately after the incident and that, read together, these statements could suggest that she had, but denied that this was what she had meant to convey.

[30] The video shows that between the incident and when Ms. W. left the restaurant at 10:13 p.m., she continued to interact in a friendly manner with people in the restaurant, including Mr. Moore. In a pre-trial ruling, I granted the Defence request to adduce evidence of two post-incident interactions between Mr. Moore and Ms. W. Both interactions took place in the public part of the restaurant and both were captured on video surveillance. In the first, which took place about 15 minutes after the incident, Mr. Moore approached and stood behind Ms. W’s stool, she leaned back against his chest, they spoke briefly, and he kissed her on the forehead (a peck). In the second, which occurred as she was leaving the restaurant

about an hour after the incident, she waved to Mr. Moore, approached him, they hugged, and she waved again as she left.

[31] The defence was permitted to use that evidence in relation to the credibility of Ms. W's statement to police that the kiss in the office made her feel disgusted and really scared. The focus of cross-examination and submissions was not on the fact that the post-incident contact between Ms. W. and Mr. Moore included a kiss and a hug. Nor was it suggested that this contact was sexual. The evidence was used, along with other evidence, to suggest to Ms. W. and other witnesses and argue in submissions that her appearance and behaviour in the hour following the incident was not consistent with being unhappy, disgusted by Mr. Moore or scared of him. Ms. W. agreed that in the post-incident video, she appeared to be in good spirits and that her appearance and behaviour did not show that she was scared of Mr. Moore. She agreed that: she had animated and friendly interactions with Ms. D., the bartender, Mr. Flynn, Mo (an employee with whom she had a good relationship) and Mr. Moore; she did the "shoulder dance" a couple of times, including immediately after an interaction with Mr. Moore; she appeared to show Ms. D. around the restaurant; and, when leaving the restaurant she waved to Mr. Moore and walked toward him to give him a friendly "good bye" hug. She denied that she had not told the truth in her statement when she said she was scared. She

testified that she had meant she was scared while in the office and alone with Mr. Moore and that one could feel scared without looking scared.

[32] Mr. Flynn was working at the restaurant on the night of February 1st. He testified that he reviewed the security footage from the office at the request of the guest services manager. He saw the kiss and spoke with Mr. Moore. He testified he vehemently expressed that what he'd observed was a "bad idea" and was not good for the business.

[33] Both Ms. W. and Mr. Flynn testified that he called her the next morning. He said he wanted to check on her. They both agreed that he asked her about the man who had been harassing her and then asked what had happened with Rob in the office. In cross-examination, she agreed that when he first raised it with her, she was worried, and the thought crossed her mind that she might be in trouble or lose her job. However, Mr. Flynn then said that what Rob had done was wrong. Mr. Flynn testified that he didn't recall saying that to her and didn't think he would have.

[34] Ms. W. was supposed to work a shift on Sunday, February 2nd but cancelled. In cross-examination, she said she'd cancelled because she was scared of Mr. Moore. She agreed that she'd told police that she was still scared of him on

Monday but worked that day because the owners would not normally be there. She agreed that she'd told police that when she realized Mr. Moore was there on the Monday, she felt fear and anxiety and she'd avoided contact with him by rushing to the bathroom. Mr. Garland testified that he saw her on Monday. By then, he knew about the incident but didn't observe anything out of the ordinary in her demeanour that day.

[35] On Tuesday, February 4, 2019, Mr. Moore sent two text messages to Ms. W. The printout of those messages, marked as Exhibit 1, contains the following:

Monday, February 4, at 12:56

"Hi [K] it's Rob from the restaurant could you give me a call when you get a second", followed by a phone number and "thanks"

Monday, February 4, at 16:59

"Hey [K] I understand you have a meeting with Andrew on Wednesday. Just wanted to let you know I am deeply sorry for what transpired this past weekend. I obviously miss read the situation and for that I am deeply sorry and apologize for my actions. You're a great employee and asset to our team at a [...]. I hope we can put this behind us and move forward. Thanks, Rob"

[36] Mr. Garland testified that as a result of the incident in the office, Mr. Flynn planned to meet with Ms. W. on Wednesday, February 6th and he intended to be present. He said the meeting was changed to Tuesday the 5th and he wasn't notified so wasn't present. Mr. Flynn and Ms. W. confirm that they met, and Ms. W. agreed in cross-examination that the meeting was on the Tuesday. She also agreed that during the meeting, she and Mr. Flynn had come up with a "game plan"

and, after the meeting, she was in good spirits, felt he was supporting her and would help her. She didn't know at the time that his job was in jeopardy.

[37] Mr. Flynn testified in direct that he stopped being an employee at the restaurant on February 4th, but in cross-examination, he agreed that it could have been on Wednesday, February 6th. Given the evidence of Ms. W., Mr. Garland and the sequence of events described by Mr. Flynn, I believe he was dismissed on February 6th.

[38] Mr. Flynn testified that he was told he was being dismissed because he was the cause of the restaurant's financial difficulties. In cross-examination he denied that he'd been told in January that the owners were questioning his performance. He agreed that he was in regular communication with the owners about the restaurant and knew in January that it was having financial issues. However, he said he was not told that they felt he was responsible until early February. Mr. Garland testified that Mr. Flynn was fired because the restaurant was not doing well financially and the decision to fire him was made before the incident. He said the restaurant struggled in December 2018 – January 2019. The owners received “the numbers” on January 16th and saw that sales revenue was very good but the bottom line was awful. As General Manager, Mr. Flynn was directly involved in

decisions impacting costs and revenue, so the owners believed Mr. Flynn was responsible. He testified that after January 16th, Mr. Flynn was made aware that his performance was not acceptable, that there was a real question about whether he'd be kept on and that the owners were coming to Halifax and wanted to meet with him and the chef. He testified that the owners made the decision to fire him before they came to Halifax at the beginning of February and produced an email exchange, dated January 29, 2019 (Exhibit 4) indicating that the owners were seeking legal assistance concerning the dismissal. The email to counsel says we "are travelling to Halifax tomorrow we unfortunately have to part ways with our GM." and gives reasons. Mr. Garland confirmed that "part ways" meant terminate his employment. The response from counsel states that a termination letter is attached. I accept that the decision to fire Mr. Flynn was made before February 1st and was related to the finances of the business, not the incident between Ms. W. and Mr. Moore.

[39] Ms. W. agreed that she learned of Mr. Flynn's dismissal and contacted him to confirm. At that time, she was aware that there was a video of what had happened in the office but hadn't seen it. She asked him to send her a copy. He had taken a recording of that part of the surveillance video using his cell phone. It is not clear when that recording was made but Ms. W. agreed that he emailed a

copy of it to her on February 6th. She then went to the police, met with Cst. Giffen and turned over that recording (Exhibit 1).

Legal Principles and Analysis

[40] As I said at the beginning, the focus in this case is on whether the Crown has proven beyond a reasonable doubt that Ms. W. did not validly consent to the sexual activity in question, either because she did not consent at all or because any consent was vitiated.

[41] The Crown argued that the sexual activity here includes the two kisses and a touch of Ms. W.'s buttocks shortly before she left the office. I do not find that there was any touching of Ms. W.'s buttocks. Ms. W. did not testify that there was, and the video shows only that Mr. Moore touched her lower back/waist as she was leaving. That body part is not typically viewed as sexual. The nature of the contact is also not typically or unambiguously sexual. It appeared that Mr. Moore was simply guiding her in the direction of the door. I have no evidence from Ms. W. that she felt her sexual integrity was violated during that part of the interaction and, in the context, that touch is not objectively sexual. Therefore, I conclude that the post-kiss contact in the office is not sexual activity and the focus of my consent analysis will be on the two kisses.

[42] In *R. v. Hutchinson* (2014 SCC 19), Cromwell, J. said that when the court has to determine whether consent was vitiated, the issue should be analyzed in two steps. The first step is to determine whether the evidence proves the complainant did not consent. If there is a reasonable doubt about whether the complainant consented, the court must go on to the second step and determine whether there are circumstances that invalidate that consent. If the court concludes that the complainant did not consent, there is no need to go on to consider whether any of the circumstances that might invalidate that consent exist.

Issue 1 – Has the Crown Proven Beyond a Reasonable Doubt that Ms. W. Did Not Consent?

[43] Consent at this stage is defined in s. 273.1(1) as the voluntary agreement to engage in the sexual activity in question. Mere acquiescence or failure to specifically object to sexual activity does not mean there was consent. Consent is not defined by the absence of “no”, it is defined by the presence of “yes”. That “yes” has to be communicated. It can be communicated verbally or by action but there is no such thing as implied consent.

[44] The absence of consent is subjective and determined solely by reference to the complainant’s “subjective internal state of mind towards the touching, at the time it occurred” (*R. v. Ewanchuk*, [199] 1 S.C.R. 330, at para. 26). Absence of

consent is proven if I am convinced beyond a reasonable doubt that Ms. W., in her own mind, did not want to engage in the kisses.

[45] Ms. W.'s testimony is the only direct evidence of her state of mind. She testified that she did not consent. However, that is not the end of the matter. I have to assess the credibility and the reliability of that assertion in the context of all the evidence. Evidence is only relevant to that assessment if it makes it more or less likely that her claim about her state of mind is true or accurate. I have to be careful not to rely on myths or stereotypes about sexual interactions. I also have to be careful about applying what I believe to be common sense to human behaviour. In this case, because I admitted evidence relating to interactions between Ms. W. and Mr. Moore after the event, I have to ensure that I don't use that evidence for any improper purpose. For example, the fact that Ms. W. had consensual physical contact with Mr. Moore after the incident, does not mean that she is more likely to have consented to the contact that constitutes the alleged offence.

[46] The evidence establishes that there was no verbal communication of consent to either kiss. Mr. Moore did not ask permission to kiss Ms. W. and Ms. W. did not verbally communicate consent to be kissed.

[47] The Crown argues that absence of consent has been proven because Ms. W's testimony is credible and reliable, she did not verbally communicate consent prior to either of the kisses and I should not find communicated consent in Ms. W.'s actions. The Crown submits that Ms. W. acquiesced to the sexual activity because she felt she had no other choice and that is not voluntary consent as required by s. 273.1 of the *Code*.

[48] The Defence argues that Ms. W. clearly communicated consent through her actions, and I should reject her assertion that she did not voluntarily consent because it is not credible or reliable.

[49] I have considered Ms. W.'s testimony carefully and have significant concerns with its credibility and reliability.

[50] In my view, her assertion that she did not consent but simply acquiesced is inconsistent with her actions as seen in the video. When Mr. Moore leaned in to kiss her the first time, she moved her head toward him and kissed him. That is not mere passive acquiescence; it is active and indicative of voluntary consent. When he put his hand on the back of her head, she took a step toward him and they kissed. The video shows that she kissed him back and she agreed that she did. Again, that is not mere passive acquiescence and is indicative of voluntary consent.

She testified that she had no one to turn to, nowhere to go and went along with it because she didn't know what else to do. Even if the first kiss caught her by surprise, she had time before the second kiss to take a step back or turn away. Instead, when he put his hand on her head, she stepped toward him and put her hand on his waist. I will discuss this in more detail below, but the video does not support her assertion that this action was involuntary. After the second kiss, Mr. Moore moved away from her. At that time, the kisses were over, and she could easily have left the room. Instead she walked toward him and leaned into him. Again, this is not passive acquiescence but a voluntary act.

[51] Her testimony in many other respects is contradicted by the video. Her testimony that she stopped Mr. Moore and asked him to get her cheque because he was the first person she saw who was in management is contradicted by the video and the testimony of Mr. Garland. She interacted with many other people in management, including Mr. Flynn who was her supervisor, before she asked Mr. Moore to get her cheque and she did not grab him as he passed by, she went to where he was standing and asked him to get it for her. Contrary to her statement to police, Mr. Moore did not follow her into the office and close the door. He went in first and the door closed on its own. Her testimony that she moved toward him and put her hand out because the pressure of his hand on her head was causing her to

fall or stumble is not supported by the video. The video, in my view, shows no indication of loss of balance. Based on my review of the video, I believe that Ms. W.'s step toward Mr. Moore during the second kiss was voluntary and not because she was falling due to the force of his hand on her head. Her action in putting her hand on his waist does not appear to be to steady herself or prevent herself from falling against him. Her hand is not up in front of her with the palm facing away from her as she demonstrated in court; rather, her hand is at his waist with the palm against his side.

[52] Her testimony that the incident caused her to feel disgusted and really scared, presumably of Mr. Moore, is also not supported by the video. There is no sign of fear or disgust in her demeanour or behaviour during the hour that she is seen on video after the incident. In fact, in some instances her actions contradict her testimony that she was scared. After the second kiss when Mr. Moore moved away from her, instead of leaving, she walked to him and leaned against him, she appeared happy and excited when Mr. Garland gave her the cheque, she stayed in the restaurant where Mr. Moore was for more than an hour, she appeared to be happy, including when interacting with Mr. Moore, and she chose to be physically close to him by leaning against his chest while they chatted at the bar and hugging him when she left. I accept that fear is not always visible in one's face or

behaviour, that people react differently to situations, that there may be a desire to try to normalize things after an upsetting or uncomfortable event, that many people would not want to make a scene in their workplace and that this might be even more important when one is interacting with one's manager, employer or the owners of the business where you work. However, Ms. W.'s actions went beyond what would be necessary in the situation to simply normalize it or prevent a scene. She explained that when she said she was scared, she meant that she was really scared when she was in the office, not when she was with people in the public area of the restaurant. However, even her behaviour while still alone with him in the office, moving toward him and leaning against him, is not consistent with being scared of him. That explanation is also not consistent with her testimony that she didn't work Sunday because she was afraid of him and was still afraid on Monday. It just doesn't make sense that she would be afraid in the office on Saturday night and afraid on Sunday and Monday but not afraid immediately after the incident.

[53] Her testimony about her loss of memory is also troubling. Ms. W. testified that her last recollection from the evening was of returning to her seat, telling Ms. D. what happened and ordering a drink. She appeared to have a complete memory of events up to that point, then nothing until the next morning when she again appeared to again have a complete memory. However, the video surveillance

(Exhibit 2) doesn't corroborate her last recollection. It shows that she returned to her seat at approximately 9:06 p.m. but does not show her order a drink then or at any time before she left the restaurant. The video shows that not long before she went to the office, she was brought a glass of wine (at 8:55 p.m.) and a glass of water (at around 9:00 p.m.). When she returned to her seat after the incident both her wine glass and water glass were almost full. After that, she continued to sip on the same glass of wine until she finished it when she stood to leave the restaurant at 10:12 p.m. Being mistaken about ordering a drink would not normally be significant. Here it is because it is the last clear memory Ms. W. purports to have from the evening, it relates to events within minutes of the incident, and it is not accurate. Even if I accept that her testimony about memory loss is credible, this suggests that there may not be a bright line between memory and absence of memory. If her memory of what happened at 9:06 p.m. is not reliable, her memory of how she felt in the office at 9:03 p.m. may also not be reliable. She testified that she believes her memory loss is probably due to shock or trauma. In the absence of expert evidence, I cannot assess whether that is credible. Loss of memory of events following a traumatic incident but not of the traumatic incident is not something that is within my experience as a trial judge or previously as a criminal lawyer. Even if it is credible, as I said, it causes me concern about the reliability of

her recollections. Given that her last recollection is inaccurate and in the absence of expert evidence, it is difficult for me to assess whether there was a sudden onset of amnesia or a more gradual degradation of memory.

[54] After reviewing all the evidence, I am left with a reasonable doubt as to whether Ms. W., in her own mind, voluntarily agreed to kiss Mr. Moore. I say that because of concerns with the credibility and reliability of Ms. W.'s evidence. As a such, absence of consent has not been proven and I have to go on to determine whether consent was vitiated.

Issue 2 – Vitiating of consent

[55] Sections 265(3) and 273.1(2) list circumstances where consent is not valid.

In this case, the Crown is relying on s. 273.1(2)(c) which says that:

- s. 273.1(2) . . . no consent is obtained where:
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.

[56] For convenience I will also reproduce s. 265(3) because s. 273.1(2)(c) is often interpreted with reference to that provision. Section 265(3) says that no consent is obtained where the complainant submits or does not resist by reason of “the exercise of authority”.

[57] The first step in the analysis under s. 273.1(2)(c) is to determine whether Mr. Moore was in “a position of trust, power or authority” in relation to Ms. W. A position of authority has been defined as “one that places an individual in a position of "power", "obedience", "respect" and "trust". “A person who stands in a position of authority can demand certain conduct by another” (*R. v. M.R.* 2015 ONSC 7825, at para. 113; and, *R. v. Audet* ([1996] 2 S.C.R. 171, para. 34). Position of “power” is viewed as being broader than that (*R. v. Hogg*, 148 C.C.C. (3d) 86, at para. 16). Applying these definitions, I am satisfied that as part owner of the restaurant where Ms. W. was employed, Mr. Moore was in a position of power and authority toward her.

[58] However, to vitiate consent under s. 273.1(2)(c), it is not sufficient for the Crown to prove that he was in that position (*R. v. Snelgrove*, 2019 SCC 16; and, *R. v. Snelgrove*, 2018 NLCA 59, at para. 15). A person can give valid consent to engage in sexual activity with someone who is in a position of power or authority toward them (*Snelgrove*, NLCA, at para. 18). To vitiate consent, there must be evidence that the complainant was induced to consent by the accused’s abuse of his position of power or authority. That evidence can come directly from the complainant or be inferred from the surrounding circumstances (*Snelgrove*, SCC, at para. 4; *Snelgrove*, NLCA, at paras. 23 - 28; *R. v. Alsadi*, 2012 BCCA 183; *R. v.*

Lutoslawski, 2010 ONCA 207, appeal dismissed (2010 SCC 49; *R. v. Makayak*, 2004 NUCJ 5; and, *R. v. Thompson*, 2017 SKCA 33).

[59] It is clear from the caselaw that s. 273.1(2)(c) deals with a more subtle form of pressure or inducement than that covered by s. 265(3)(d). It does not require evidence of coercion or overt pressure. As such it requires a more nuanced assessment of both the power dynamic between the individuals and its impact on the complainant's decision to engage in the sexual activity (*Snelgrove*, SCC, at para. 3; *Snelgrove*, NLCA, at paras. 23 – 28).

[60] In *R. v. Snelgrove* (SCC, para. 3), Moldaver, J., writing for the Court, said this about the distinction between s. 273.1(2)(c) and s. 265(3)(d):

Section 273.1(2)(c) has as its aim '[t]he protection of the vulnerable and the weak and the preservation of the right to freely choose to consent to sexual activity' (*R. v. Hogg* (2000), 148 C.C.C. (3d) 86 (Ont. C.A.), at para. 17). Inducing consent by abusing the relationships set out in s. 273.1(2)(c) does not imply the same kind of coercion contemplated by s. 265(3)(d) of the *Criminal Code*, which speaks to consent obtained where the complainant submits or does not resist by reason of the "exercise of authority". Rather, as Justice Doherty observed in *R. v. Lutoslawski*, 2010 ONCA 207, 258 C.C.C. (3d) 1 (Ont. C.A.): 'An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity' (para. 12).

[61] In *R. v. Lutoslawski*, (2010 ONCA 207, at paras. 12 – 13, aff'd [2010] 3 S.C.R. 60; and adopted by the Newfoundland Court of Appeal in *Snelgrove*), the Court said:

I agree with Crown counsel's submissions that s. 273.1(2)(c) is broader than s. 265(3)(d). Section 273.1(2) (c) speaks not only to the abuse of a position of authority but also to the misuse of a position of power or trust. The section addresses the kinds of relationships in which an apparent consent to sexual activity is rendered illusory by the dynamics of the relationship between the accused and the complainant, and by the misuse of the influence vested in the accused by virtue of that relationship. The term "exercise of authority" in s. 265(3)(d) suggests a coercive use of authority to overcome resistance to a consent. Inducing consent by abusing the relationships set out in s. 273.1(2)(c) does not imply the same kind of coercion. An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity.

The distinction between s. 273.1(2)(c) and s. 265(3) (d) was also addressed in *R. v. Makayak*, 2004 NUCJ 5 (Nun. C.J.) at para. 70:

Section 273.1(2)(c) broadened the scope of criminal conduct to include breach of trust and power. However, the section also added the words 'induces the complainant ... by abusing a position of trust, power, or authority'. Does this mean there has to be some form of coercion? In my view, these words remove the need for coercion that may be present for section 265(3) (d). It is clear from *Matheson* [Citation omitted.] that it is the exploitation of the imbalance that is the key consideration. Section 273.1(2)(c) was passed a number of years after the courts had struggled with section 265(3) (d). Parliament had the opportunity to consider the case law that had developed up to that point. The use of the word "induces" introduces a more subtle form of pressure that can be inferred from the circumstances of the exercise of the power or authority.

[62] In the case before me, I have no direct evidence that Ms. W. was induced to kiss Mr. Moore because of any abuse of his position of power or authority over her. She testified that she “kissed him back” because she was “alone in the room”. She testified that being alone in the room made her feel she didn’t have any help or choice other than to go along with what he was going to do. She was asked why she felt she didn’t have any choice and responded, “because I was alone”. She

made no link between her perception that she had no choice but to kiss him and his position as her employer.

[63] However, vitiation of consent can be proven based on inferences from the surrounding circumstances; direct evidence is not required. I accept that there was an apparent power imbalance between Mr. Moore and Ms. W. by virtue of their employment relationship. Because of that, I have to look carefully at the circumstances to determine whether there is evidence that Mr. Moore abused his position of power and authority and whether I should infer that Ms. W. was induced to kiss him because of even subtle pressure.

[64] Mr. Moore was not directly involved in Ms. W.'s employment in any way; he didn't hire her, didn't assign her duties, and had never given her any direction at work. There is no evidence that he ever offered her any benefit or threatened any consequence during her employment. Their interactions before the incident had always been positive. He did not ask her to go to the office with him, did not follow her in and there is no evidence of any previous efforts to get her alone with him. He said nothing to her about her employment while they were in the office.

[65] I accept that the link between authority and induced consent can be nuanced and subtle. However, in this case, after reviewing all the evidence, I am not

persuaded beyond a reasonable doubt that Mr. Moore abused his position of power or authority with respect to Ms. W. to induce her to kiss him. I am also not convinced that she was induced to kiss him because of any subtle pressure. I understand that I am entitled to infer that from the circumstances even in the absence of direct evidence. In this case, I do not believe that would be a reasonable inference, let alone the only reasonable inference.

Conclusion

[66] Given my conclusion that the Crown has not proven absence of voluntary consent or that the consent was vitiated, I do not need to consider the alternative defence argument of honest but mistaken belief in communicated consent. I find Mr. Moore not guilty of the charge of sexual assault.

Elizabeth Buckle, JPC.