PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Archer*, 2021 NSPC 17

Date: 2021-03-15
Docket: 8295985
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

John Archer

Restriction on Publication: Section 486.4 & 486.5

DECISION MARCH 15, 2021

Judge: The Honourable Judge Marc C. Chisholm

Heard: March 15, 2021, in Dartmouth Nova Scotia

Charge: Section 271 of the *Criminal Code of Canada*

Counsel: Eric Taylor, for the Nova Scotia Public Prosecution Service
Jonathan Hughes, for the Defence Counsel

PUBLISHERS OF THIS CASE TAKE NOTE that sections 486.4 and 486.5 of the **Criminal Code** applies and may require editing of this Judgement or its heading before publication. Sections 486.4 and 486.5 provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280,281, 346, 347,

(ii) an offence under section 144 (rape), 145 (attempt to Commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or Subsection 246(1) (assault with intent) of the **Criminal Code**, chape C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983 or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any subparagraphs (a)(i) To (iii).

486.5(1) Unless an order is made under section 486.4, on application of the Prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

By the Court:

[1] The accused, John Archer, stands charged that he, on or about the 25th day of February, 2018, at or near Westphal, Nova Scotia, did unlawfully commit a sexual assault on K.H., contrary to section 271 of the *Criminal Code*.

[2] A fundamental principle of Canadian law is that all persons charged with a criminal offence are presumed to be innocent. This presumption of innocence remains in effect throughout the trial. The burden of proving the charge rests upon the Crown. The burden is proof beyond a reasonable doubt. A reasonable doubt may arise from any aspect of the evidence. If a reasonable doubt exists in relation to any element of the offence the accused must be acquitted. Only if the Court, based

upon all of the evidence heard at a public trial, is satisfied beyond a reasonable doubt that the accused is guilty of the offence may a conviction be entered.

Elements of the Offence

[3] Section 265 of the *Criminal Code* states, in part:

> (1) A person commits an assault, when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault."

[4] The *Criminal Code* does not define "sexual assault." In general, a sexual assault is an assault as defined in section 265(1) committed in circumstances of a sexual nature such as to violate the sexual integrity of the victim (*R. v. Chase*, [1987] 2 SCR 293). The test to be applied in determining whether the conduct had the requisite sexual nature is an objective one. The question is whether, in light of all the circumstances, the sexual nature of the assault would be clear to a reasonable observer. The body part touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant. The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. (per *R. v. Chase*, *supra*).

[5] In *R. v. Barton*, [2019] SCJ No.33, at para. 87, the Court stated:

> … A person commits the *actus reus* of sexual assault "if he touches another person in a sexual way without her consent" (*R. v J.A.*, 2011 SCC 28, [2011] 2 SCR 440, at para. 23). The *mens rea* consists of the "intention to touch and knowing of, or

> being reckless of or wilfully blind to, a lack of consent on the part of the person touched"(*R v Ewanchuk*, [1999] 1 SCR 330, at para. 42).

Summary of Events

[6] The accused met the complainant on a social media site around the first of February, 2018. Prior to that time they were unknown to each other. At the time, the complainant was 17 years old and the accused was 19 years old. The accused was aware of the complainant's age. They were in contact only briefly, initially, as the complainant had begun seeing someone else and ended their communications. About two weeks later they reconnected as the complainant was no longer seeing anyone else. For about a week they communicated on-line. On the late evening of February 24th the complainant invited the accused to meet her at a location in Forest Hills, Halifax, Nova Scotia. She had been drinking heavily, partying with friends since the early evening of that day. The accused agreed to meet her to hang out. The complainant arrived at the agreed upon location with four of her friends in the car with her. The evidence of the accused and the complainant differed as to what communications occurred between them but both stated that they did not meet face-to-face that night.

[7] The following morning the accused and the complainant had a lengthy phone conversation. She was scheduled to meet a girlfriend in Halifax at around 12:00, noon, that day to attend an event where they would try on prom dresses. The accused persuaded her to meet with him first and he would drive her to Halifax to meet her girlfriend.

[8] The accused picked her up at her home in Cole Harbour, Halifax, Nova Scotia shortly after 10 a.m. They drove to Shubie Park. It was a Sunday morning and there were lots of people at the park. The accused parked on the side of the road outside the parking area and they discussed what to do. The accused leaned over to kiss the complainant. She did not kiss him. Their respective evidence differed as to what was said at that time.

[9] The accused drove them to Spider Lake park. At that location there is no parking area. There is just a gravel path that leads up a hill to a treed area which is out of sight of the road. There was no one else around. The accused told the complainant that there was a look-off at the top of the hill. It was cold out. The complainant was wearing a dress and a sweater over her dress.

[10] The two went up the hill to the look-off area. Exactly what happened on the hilltop is a matter of dispute, but the accused admitted that he kissed the complainant, he hugged her, he lifted her off the ground, briefly, he touched her buttocks and one of her breasts. During this time the complainant acted "joyful". After approximately ten minutes she convinced the accused that she was cold and they headed back to the car. The complainant skipped and continued to act playful as they returned to the vehicle. Shortly after their return to the car the accused asked her if she wanted to touch his penis. The wording, but not the intent of his question, was a matter of dispute. How the complainant responded to his question was a matter of dispute. The accused agreed that she did not say yes nor give any affirmative indication she wanted to touch his penis. The accused agreed that he touched her hand with his fingers and that she pulled her hand away from his touch. The specifics of this contact were in dispute. The content of the conversation thereafter was also a matter of dispute. The accused did not drive the accused to Halifax. He drove her to the Mic Mac Mall in Dartmouth, Halifax, Nova Scotia, from where she took the bus to Halifax, arriving late to meet her girlfriend, C.K..

Credibility and Reliability of Evidence

[11] With each witness who testifies at a trial the presiding judge may accept all, some, or none of their evidence. The determination of what evidence to accept is based upon the court's assessment of the credibility and reliability of the witness's evidence. Credibility, or believability, takes into consideration a variety of factors, including but not limited to: the witness's demeanor; the consistency of their statements; the reasonableness of their evidence; how the witness's evidence fits with other proven facts; and any indication of bias or collusion or reason to fabricate.

[12] Even if the Court finds a witness's evidence credible the Court may reject the evidence due to its lack of reliability. Concerns regarding reliability of evidence may arise for a number of reasons including, but not limited to: the witness may demonstrate having poor observation skills; the witness's ability to observe may have been impaired, due to their vantage point or other visual impairment or physical impairment such as a state of intoxication; the witness may demonstrate a poor memory; the witness may lack the ability to clearly communicate what they observed; and a witness's recollection of the event may be tainted by the passage of time or bias.

The Evidence

[13] The Court reviewed the evidence of the two key witnesses, the accused and the complainant separately and in the context of the whole of the evidence. However, to highlight the consistencies and differences in the evidence of the complainant and the accused the Court has set out their respective evidence on each aspect of the event, chronologically, rather than separately from start to finish. But, the burden of proof beyond a reasonable doubt is not satisfied by the Court finding the evidence of the complainant is more likely true or more credible than that of the accused. A conviction may be entered only if the Court rejects the evidence of the accused, finds that it does not raise a reasonable doubt, and on the whole of the evidence, including that of the complainant, the Court is satisfied beyond a reasonable doubt that the accused committed the offence alleged.

[14] The accused testified that he and the complainant agreed to meet at the Tim Horton's in Forest Hills at noon on February 24, 2018. He said that he went there but got a call at the last minute from the complainant cancelling the meeting. The complainant testified that they did not make a plan to meet at noon on the 24th. She said that the first plan to meet was on the evening of the 24th.

[15] On the night of February 24th, the complainant was highly intoxicated. She said that she was "drunk out of her mind" and remembered "bits and pieces." She initially said she started drinking around 9:00 p.m. but later said 5:00 p.m. She arranged to meet the accused at a parking lot in Forest Hills where there was a Tim Hortons restaurant and a pizza shop. She initially said the time was 2:00 - 3:00 a.m. but later it could have been 12:00 to 12:30 a.m. She testified that when she arrived she was with four of her friends who were getting a pizza. She said that the accused became upset and wanted her to get rid of them. She stated that her friends refused to leave her alone with a man whom she'd never met before. When she told the accused that, he became upset and left. She acknowledged that she planned to go with him to his place and hang out.

[16] The accused said he was uncomfortable with the situation because he really did not know her and felt it would be unsafe for him to hang out with her with her four friends present. He mentioned hearing of cases where people were kidnapped. He decided to leave and told her so. He said she tried to entice him to stay and hang out by telling him she had alcohol in the car. When that didn't work, he testified that she offered to perform oral sex on him if he hung out with her. He did not agree,

and she became upset because she had planned to hang out at his place. He "blocked her" and left. The accused testified that he felt "baited" and agreed there were lots of red flags.

[17] When the complainant was asked if she offered alcohol, she said that her friend who drove them to the pizza shop and was to drive each of them home would not allow alcohol in his car. Nevertheless, she said it was possible. When she was asked if she offered to perform oral sex she replied that "she didn't feel that was something she would say" and pointed out that she was always in the presence of her friends.

[18] The accused testified that on the morning of February 25, 2018, he decided that he had been "too rash" in blocking the complainant and undid the block. He stated that when he did so a sexual relationship with her was not in his mind. The two had a long telephone conversation that morning. He did not indicate who called whom. He said that she told him that she had to be in Halifax by noon to go to the prom dress event with her girlfriend. He stated that they agreed to meet at 10:00 a.m. and go for a walk and then he would drive her to Halifax.

[19] The complainant testified that on the morning of the 25th the accused called her and asked her to meet him. She stated that she told him that it was not a good day. She was going to be busy. She had to meet her girlfriend in Halifax. She testified that her father had agreed to drive her but they had had an argument that morning and he had changed his mind about driving her, so she was planning to take the bus which would take about 90 minutes. She said that the accused kept begging her to meet with him and finally said, "What if I drive you to Halifax?" She testified that she agreed because of the night before when he had driven some distance to meet her and that had not happened, and because of his offer to drive her to Halifax, her expectation was that he was going to drive her directly to Halifax. She knew she would be getting there early but she was fine with that.

[20] The accused testified that during their phone conversation they agreed to go to the park for a walk and then he would drive her to Halifax. He said that he wanted to meet her in the daytime; that it was safer for him; that he did not know her; did not know a lot about her. He wanted the place where they met to be public, neutral.

[21] The accused arrived at the complainant's home sometime after 10:00 a.m. that morning, driving a black Volvo motor vehicle. He said the weather was cold.

[22] The complainant testified that she and her girlfriend had been advised to wear a dress to the prom dress event because it would make it easier to try on gowns. She said she was wearing a little dress with a heavy sweater over it and boots, no overcoat.

[23] The complainant testified that as she approached him the accused "looked her up and down" and then said, "Man, I like that dress." The complainant said that she experienced a "slightly off" feeling and "she didn't feel very comfortable."

[24] The accused testified that he was dressed in sweatpants and a sweat top. When he saw the complainant in the dress he said, "You look nice." He denied looking her up and down. He said he made the comment because he was dressed so casually compared to her. On cross-examination he stated that the statement he made was, "Nice dress."

[25] The complainant testified that once she was in the car the accused suggested that they go to the Tim Horton's or go for a walk. She testified that she didn't want to do that because she wanted to get to Halifax. She said that she did not want to appear to be ungrateful since he was to drive her to Halifax. She testified that the accused suggested going for a walk at Shubie Park and she agreed to go, but she mentioned, more than once, that she did not have much time. On cross-examination she stated that she was "certain" that the idea of going for a walk before going to Halifax was suggested by the accused after she was in his car.

[26] The accused testified that they headed to Shubie Park as planned during their earlier phone call.

[27] The accused drove them to Shubie Park. February 25, 2018 was a Sunday. Both witnesses agreed that there were lots of cars in the parking area and lots of people around. The accused drove around the parking area and then out to the street where he pulled over and stopped the car.

[28] The complainant testified that the accused said something about it being too busy. With the benefit of hindsight, she said that she should have seen that as a red flag. The accused testified that there were no good parking spots, and he didn't want to risk getting a scratch on the car.

[29] In the car outside the Shubie park the accused suggested going to another park that he knew. And the accused moved towards the complainant with his lips

puckered to kiss her. The complainant testified that his action was unexpected. She testified that she did not want to kiss him. The complainant stated that she leaned away. She stated that he said, in a sarcastic tone, "What, you can't kiss someone you don't know?" The complainant testified that she replied, "I'd prefer not to."

[30] The accused denied that the conversation occurred as the complainant alleged. He testified that he moved his body toward her and made "a kiss face", inviting her to kiss him. She did not kiss him. He testified that the complainant said to him, "I like to play hard to get." He testified that he interpreted this as her not wanting to kiss him then or there.

[31] The complainant denied making a statement, "I like to play hard to get."

[32] The accused knew of another park nearby. He stated that his plan was still just to go for a walk. He drove for about five minutes and then stopped on the side of the road. The accused testified that he took them to Spider Lake park. He was familiar with the area, having been there before on his bike. He said it was a spur of the moment decision and he thought the look-off was romantic. He agreed it was more of a walking trail than a park area. He introduced two photos which he took of the area, in November 2018, marked as Exhibits 1 and 2, of the view from the road. The top of the hill is not visible in the photos.

[33] The complainant testified that she believed that they were still in the Westphal area, but she was unfamiliar with the area. She stated that there was a path up a hill on one side of the road and houses on the other side. She said that the accused told her that there was a look-off at the top of the hill, a short walk away. They got out and walked up the hill. Neither recalled what conversation occurred on the walk up the hill. Neither mentioned any physical contact as they proceeded up the hill.

[34] The complainant testified that, almost immediately upon them getting to the top of the hill, the accused moved toward her and put both hands on her buttocks and lifted her off the ground. He kept touching her with his hands. He slid his hands up under her dress to her breasts. She thought he was trying to lift her dress off of her. She stated that she was exposed from the waist down (she was wearing panties and a bra). She said that he kissed her neck and face and on the mouth. She said that she felt numb and let the kiss on the lips happen. She testified that he said that she was not a good kisser. She said that she tried to squirm out of his grasp. She said that she was scared and in shock and did not want to do anything to make him angry. She said that she realized that she was alone with him there. She said she

thought he lifted her more than once. She continued to squirm to get away. She said he would resist her squirming and pull her to him. She did not tell him to stop. She did not say the word "no". She said her body language was screaming "no". She said that she was terrified. In addition to squirming she thought she recalled telling him that she did not want to do this, but, while she was thinking this, she was not sure she said that aloud. She said that, when out of his grasp, she tried to get away and coax him to go back down the path by acting playful and saying, "Come on, let's go, I'm cold." She said these were ruses to try to get away. She said she did not run away because she did not think she would make it and she did not know how he would react. She thought that he would catch her or she would fall. She testified that the accused said, "Come on...don't be an asshole...don't be rude...come back." She said his tone seemed sarcastic, but she felt he was serious. She continued to act playful and, eventually, got him to follow her down the hill to the car.

[35] The accused testified that once they were at the top of the hill there was a lot of chit chat. He did not clearly remember what they talked about. He gave no indication that they talked about touching each other or kissing or anything of that nature. He stated that they began hugging. He initially said that he did not remember how it started but on cross-examination he said that he initiated the hugging. He said they kissed. When asked who initiated the kissing he said that it was mutual. He testified that he told her, "She was a bad kisser because of her braces". He said that he lifted her off the ground for a brief moment. He said that he did not remember how he lifted her. He did not agree that he grabbed her buttocks nor that when he lifted her it was by holding her buttocks. He said that he did touch her buttocks. He stated that he touched one of her breasts with one of his hands. He said that all of the touching was over her clothing. He denied trying to lift her dress off. He testified that her demeanor and attitude throughout was "joyful" and "happy". He said that she did not squirm or try to pull away. He said that this continued for five to ten minutes, and then she said she was cold and he noticed that she was shivering. He testified that she also said that she had to get to her appointment. He stated that she still appeared happy and was skipping along down the hill. He believed that she was "into it" because of her body language and demeanor.

[36] On cross-examination he was asked whether he said to her, "Come back...don't be an asshole..." He replied that he did not recall saying it, but it was possible that he did, "but not in a hateful way."

[37] The complainant maintained that the first contact by the accused was not a hug but him grabbing her buttocks. She testified that he did not hold her off the ground for a long time but she thought it happened more than once. She said he squeezed her buttocks. He hugged and kissed her forcefully. She tried to "play it off." Defence counsel suggested that, in her statement to the police, she did not mention him touching her breast. She did not acknowledge saying that to the police and maintained that he slid his hand under her skirt up to and touching her breast, but mostly he touched her buttocks. She testified that he never asked to touch her and never asked why she squirmed out of his grasp. She agreed that she tried to appear upbeat throughout the time on the hill so not to upset the accused.

[38] Once the two of them were back inside the car the accused testified that he turned the heat on and they engaged in casual conversation. He did not recall what led up to it, but said that he asked the complainant if she wanted to touch his penis. He said that he did not recall the exact words. He could have said dick rather than penis. He said that he did not believe he asked her if she wanted to feel how big his penis was. He said that he asked her this because he "thought she was into it...that they liked each other." He testified that the complainant seemed confused by the question and looked at him weird. He said that he reached over and touched the back of her hand with his fingers. He said that he did so to comfort her because she looked really confused. He said that he thought that she felt it was too forward. He stated that when he touched her hand, he thought that she pulled back a bit. He testified that she responded by saying she wanted to get to know him better first. He did not say whether she made that statement before or after he touched her hand.

[39] The complainant testified that once they were back in the car the accused asked her, "Do you want to feel how big my dick is?" She said that she replied, "No" or "Not really." She said that was the only time she said "no" throughout the incident. She testified that the accused then grabbed her hand/wrist and tried to get her to touch his penis. She said that she pulled her hand away. She stated that she was not pretending to be upbeat or joyful at this time.

[40] She said that the accused got angry, visibly upset, and his demeanor changed quickly. He said, "Well, then I'm not your fucking chauffeur, get out." She testified that she was scared and in shock. She was in the middle of nowhere. She asked him to take her to a bus stop. He agreed to drop her at the Mic Mac Mall bus stop. Contrary to his evidence, she said he did not offer to drive her home or to Halifax.

[41] The accused was asked on cross-examination if he told to the complainant to "get out" around the time of the discussion of her touching his penis. The accused responded, "Not that I recall." When asked whether, at that time, he told her that he was "not her fucking chauffeur," he testified that, earlier in their conversation that day, he remembered talking about driving his friends around and stated that he said that he was not someone's fucking chauffeur.

[42] The accused testified that after the complainant declined his invitation for her to touch his penis he started driving toward Halifax. He said they were talking, and she was using her phone to text. He made a comment to her about not liking people being on their phone when in a conversation with someone. He said it was a pet peeve of his. He said he may not have been particularly polite but maybe said it jokingly.

[43] He said that, as they spoke, he realized that they had very little in common. He felt that she was different than she had been on the phone or texting. He said that he told her that he was not having a good time. He said he told her that if she wanted, they could see each other again, but he just wanted to be friends. He said that her attitude immediately made a 180-degree change. She became unresponsive, giving only one-word answers.

[44] He initially said that he decided to drop her off at the Mic Mac Mall (MMM). Later, he said that, in the course of their conversation, including him saying that he was not having a good time, he asked if it was okay if he just drove her home. He said that she asked him to take her to the bus stop at the MMM, so he drove her there.

[45] The complainant testified, while in the accused's car, after the alleged sexual assault, she received a text message from her girlfriend, C.K. , whom she was to meet that day. She responded to C.K. , texting that she was in a black Volvo and she was scared. The complainant testified that the accused was upset by her using her phone and told her so, which caused her to become more afraid. C.K. confirmed receipt of the complainant's text message and recalled that the message also said that K.H. would call her. C.K. said that that was highly unusual because K.H. knew that C.K. always texted.

[46] On cross-examination the complainant was asked if the accused said to her that he wanted them to be friends with benefits. She replied, "No."

[47] The complainant testified that, when the accused parked at the MMM, the accused asked her how she felt. She said that she replied that she "felt dirty." She testified that the accused said, "Why would you say that? Now I feel like shit."

[48] The complainant said that she went into the mall to get a bus ticket. Once inside, she said that she became hysterical, bawling and crying. She said a lady, whom she did not know, tried to comfort her. The lady hugged her and even bought her a bus ticket. When she felt all right to do so she came out to wait for the bus. The accused was still there in his car. He texted her saying that he felt weird. She texted back for him to leave her alone. She said the accused responded with a message, "Wow, WTF, blocked," and he blocked her. She did not see or communicate with him again.

[49] The accused testified that when they arrived at the mall, he tried to explain his position. He said to her that he was not just into her because of her dress, meaning sexually, but he was into her emotionally because of their phone calls, *et cetera*. He said that she did not respond. She got out. He texted her saying that he felt "rattled". He stated that she replied by text, "Don't talk to me again." He replied, "Blocked," and he blocked her. He never saw or spoke to her again.

[50] The accused denied that the complainant said to him that she felt dirty and he denied saying to her, "Why would you say that? Now I feel like shit."

[51] The complainant testified that the accused did not seem apologetic. He never said, "Sorry." He seemed "pissed off."

[52] The complainant testified that she remembered getting on the bus to Halifax. She said she was in a state of shock. She said she got off outside the library in Halifax and, other than wiping away tears, she did nothing to fix her appearance before going inside to meet C.K. . C.K. testified that the complainant's eyes were red as if she had been crying and she was not herself. She said the complainant was upset but trying not to cry in that public place. She said that the complainant told her some of what happened.

[53] The complainant said she talked to C.K. and stayed so C.K. could get a dress, which she did. The complainant did not. She said she just wanted to go home and be in her bed. C.K. testified that her boyfriend was to come and drive them home, but they changed the plan because the complainant was not comfortable to be around anyone but C.K.

[54] The complainant testified that, over the ensuing days, some friends and family told her that it was her fault because she wore that dress and went with him. She said that for weeks she felt sad, scared, disgusted with herself, and felt like it was her fault. She said she was not sleeping because she could not get the incident out of her mind. She said she drank too much to try to forget it. She said she tried to commit suicide. She did not know what to do. She spoke to C.K. who encouraged her to speak to someone. She decided to come forward. She said that the accused did not get to make her feel like this. She said that other women should not have to go through what she went through. She went to the school's guidance counsellor who referred her to the school's police liaison officer who, in turn, referred her to an investigator who took a video statement from her. On cross-examination the complainant was asked if her memory of the incident was better when she gave her statement to the police than now. She said that, while it is hard to remember small details, she has a very clear recollection of what happened.

[55] It was more than six months after the incident when the police first contacted the accused.

Admissibility of Evidence Issues

[56] The evidence introduced by the Crown included the testimony of Ms. C.K.'s observations of the complainant's emotional state after the event. The defence did not object to the introduction of this evidence. Rather, the accused's testimony also suggested that she was upset, in that her demeanor changed markedly and she became uncommunicative. as an alternative explanation for her being upset.

[57] This Court finds that evidence of the complainant's post event emotional state is admissible to support the complainant's credibility. The weight to be given to the evidence is a matter for the trial judge to decide (*R v J.A.*,[2010] O.J. No. 2902 (Ont. C.A.); *R v Boss* (1988), 46 C.C.C. (3d) 523 (Ont. C.A.).

[58] The evidence introduced by the Crown also included testimony from the complainant and C.K. of a text message sent by the complainant to C.K., while the complainant was still in the accused's car, after the alleged sexual assault. The evidence was that the complainant texted that she was in a black Volvo and that she was scared (C.K. also recalled the message said that the complainant would call her). The defence did not object to the introduction of this evidence.

[59] The Crown urged the court to find that this evidence was also admissible to show the complainant's emotional state at the time.

[60] The difference between the text message and the evidence of C.K.'s observations of the complainant's emotional state is that the text message is a prior statement of the complainant. As such it is subject to further admissibility considerations.

[61] The general rule of evidence is that if the evidence is relevant then it is admissible unless it is subject to an exclusionary rule.(The Law of Evidence in Canada, Lederman, Bryant and Fuerst, 3rd edition, 2009, Butterworths.)

[62] In the present case, the Court finds that the emotional state of the complainant at the time of the text message was relevant to issues at trial, including the complainant's credibility.

[63] In *R v Stirling*, [2008] 1 S.C.R. 272, the Supreme Court confirmed that self-serving evidence such as prior consistent statements of a witness are not admissible, unless proven to fall under an exception to the rule. Part of the rationale for the rule is the risk of fabrication of evidence. If admitted the evidence may be used only to support the evidence of the witness, but not for the truth of the content of the statement. The statement would not be admissible as evidence of the cause of her emotional state.

[64] A statement may be admissible, as an exception to an exclusionary rule, to establish the witness's state of mind at the time, if it was part of the *res gestae* of the offence. For a statement to form part of the *res gestae* of the offence it must be made during or so closely connected in time as to be a part of the carrying out of the act or transaction (The Law of Evidence in Canada, *supra*.)

[65] The statement in this case, the text message, was made shortly after the alleged sexual assault ended and while the complainant was still in the accused's car. How soon after the alleged sexual assault the text message was sent was not established. Because of the uncertainty of the timing the Court cannot find that the text message formed part of the *res gestae* of the offence.

[66] In *Thomas v British Columbia (A.G.)*; *Milliken v British Columbia (A.G.)* (1973), 34 D.L.R. 521 (BCCA) the court held that a statement of a witness's state of mind made contemporaneous with the event is admissible. The timing of the

statement in relation to the event was necessary to ensure reliability and lack of time to fabricate. In *Thomas* the issue was the cause of the applicant's back injury. His statement of experiencing pain, made at the time of lifting a heavy object while at work, was ruled admissible, not as proof of the cause of the injury but to support his evidence of his emotional state at the time of the lifting incident.

[67] In the present case the complainant's text was sent after the end of the alleged sexual assault. It was not clear on the evidence whether her text was sent before or after the accused spoke to her "not politely" or "angrily" about her being on her phone. If it were the latter there would be two possible causes of her emotional state.

[68] One portion of the statement, that the complainant would call her girlfriend, was, according to C.K., very unusual for the complainant to say. This observation of unusual behavior was consistent with the accused's testimony of the complainant demonstrating unusual conduct. Unusual conduct may reflect the complainant's emotional state at the time.

[69] The portion of the statement that she was in a black Volvo could have been in response to a question from C.K. as to where she was. If unprompted by a question, it could have been part of a message of distress, in which case it may relate to the complainant's emotional state.

[70] The statement that she was scared was clearly a statement of her emotional state at the time. The text message was consistent with the complainant's testimony.

[71] The Court finds that the timing and content of the text message may fall within the exception relating to the witness's emotional state, at the time, to permit inclusion in evidence; however, the court must always exercise its discretion to exclude evidence which is more prejudicial than probative. I find that the evidence of the text message has limited probative weight which is outweighed by the potential prejudicial effect of its admission. One possible prejudicial effect was an incorrect inference that the complainant was in the accused's vehicle against her will.

[72] The Court finds the text message inadmissible as it relates to the complainant's emotional state at the time it was sent.

Analysis

[73] The accused presented as an intelligent, confident young man. He was soft-spoken, thoughtful, and careful in answering questions. On more than one occasion, without being asked to do so, he referred back to an earlier answer and clarified his evidence. He provided a very detailed account of what happened on the day in question.

[74] The Court found inconsistencies in the accused's evidence.

[75] When the accused first saw the complainant outside her home on February 25th he testified that he told her that "She looked nice." He said he did not look her up and down and made the comment because she was dressed much nicer than he was in his casual sweatsuit. But later he changed his answer and testified that he had said, "Nice dress." And when he was dropping her off at the MMM he testified that, in trying to explain himself, he told her that he wasn't just into her because of the dress, by which he meant sexually, but because of the emotional connection they had made during their numerous texts, phone calls, *et cetera*. The Court found his evidence regarding the complainant's dress inconsistent.

[76] On the night of February 24th, 2018 and the morning of the 25th, the accused testified that he wanted to meet the complainant during the day, in a public place, which would be safer for him, because he really didn't know her. Then, he chose to take her to an isolated hilltop, because he thought that the look-off there was romantic. Then, after engaging in hugging and kissing the complainant, touching her breast and buttocks and inviting her to touch his penis, he, within minutes, said that he told her that he wasn't having a good time, that he realized that they had little in common, and that she was different than she had been when they had talked/texted before. Yet he stated that he offered to see her again, but only as friends. And, he testified that, at the MMM, he tried to explain his position, that he was not just into her because of the dress, meaning sexually, but was into her emotionally because of their long conversations over the past days. He also said that you can get to know a person pretty well by talking, texting, *et cetera*. The Court found his evidence about whether he viewed the complainant as a stranger or someone he knew pretty well inconsistent.

[77] The accused's decision to take the complainant to an isolated location because it was romantic was completely inconsistent with his earlier evidence that he wanted to be with her in a public place for his safety, and seemed inconsistent with his statement that he had no sexual thoughts when deciding to take her there.

[78] The accused's evidence of how the complainant reacted to his invitation for her to touch his penis appeared inconsistent. The accused stated that the complainant seemed confused and gave him a weird look, so he touched her hand to comfort her. Yet the accused also testified that the complainant responded by saying that she wanted to get to know him better first. There did not appear to the Court to be any confusion in that alleged response. Unless her statement occurred after her initial confusion and weird expression the two pieces of the accused's evidence appeared inconsistent.

[79] The accused initially said that after the complainant declined his offer for her to touch his penis he started driving to Halifax but then he decided to take her to the MMM. Later in his evidence he stated that after telling her that he wasn't having a good time, *et cetera*, as he was heading to Halifax, he asked her if it would be okay if he just drove her home. He said she asked him to take her to the bus stop at the MMM.

[80] The Court found aspects of the accused's evidence were not credible.

[81] The accused, while being cross-examined about what he said to the complainant after she did not respond positively to his question about touching his penis, testified that he did not remember telling the complainant to get out of the car. The Court found it impossible to believe that statement. The accused provided very detailed evidence of the events on the hilltop and back in the car. He related the complainant's response to his question. They were on the side of a highway on a cold day in February and the complainant was wearing a dress and a sweater but no coat. This was the first, and only time, he was with her. I cannot believe that he would not recall telling her to "get out" in those circumstances. The accused was very thoughtful and careful in answering questions. The choice of language he chose to use to respond to this question was considered. I found his answer was not credible.

[82] The accused denied saying to the complainant, after she declined his offer to touch his penis, that he was not her fucking chauffeur. Yet he testified that he made such a statement, using almost those exact words, earlier in their conversation in the context of talking about him driving all of his friends around. He testified that he said he was not someone's fucking chauffeur. The accused's evidence was that he used virtually the exact words alleged by the complainant but in a different time and context during their time together. The accused's evidence on this point would have the Court believe, or at least be left in doubt, that the complainant, in giving her

evidence, transferred his earlier statement about not being someone's fucking chauffeur into the context of his response to her declining his invitation for her to touch his penis. This degree of concoction and deviousness was completely inconsistent with the Court's assessment of the complainant's evidence. The Court did not find the accused's statement credible.

[83] The accused testified that the complainant's demeanor remained upbeat and happy until the point in time when he told her that he would prefer to just be friends. He said she, then, changed 180 degrees and she became incommunicative. He testified that when they got to the MMM he was still unsure if she wanted to get together again, as friends.

[84] The Court found two aspects of the accused's evidence on this point problematic. First, on the accused's evidence, his decision to abandon any sexual interest in the complainant came after engaging in kissing and fondling her on the hilltop, and then him asking her if she wanted to touch his penis. On his evidence her response was not a "no" but rather not until she knew him better. Yet he would have the Court believe that he abandoned any sexual interest in her. Second, the evidence of the accused would have the Court believe, or a least be left in doubt, that the accused's partial rejection of the complainant so affected her that she became upset and incommunicative. The rejection was partial because he offered to see her again but only as friends, this partial rejection occurring on the first day the two met and within a couple of hours of doing so. Even before considering the complainant's evidence the accused's evidence of such a stark reaction by the complainant in those circumstances seemed unlikely.

[85] The evidence of the accused regarding the events on the hilltop was very specific. He initiated physical contact with a hug. He did not recall the "chit chat" leading up to the hug. He did not suggest that the conversation contributed to his belief that the complainant wanted to engage in hugging. He did not ask her if she wanted to be hugged or kissed or fondled before he did so.

[86] The accused stated that he hugged the complainant. He stated that he kissed her. He did not specify where, if anywhere other than on her lips, he kissed her. He said that the kissing was mutual. He said that he touched her buttocks. He did not say that he grasped her buttocks. He did not say that he squeezed her buttocks. He did not say that he was holding her buttocks when he lifted her off the ground. He said he did not recall how he lifted her. He said that she did not squirm. He said that she was joyful and appeared happy throughout.

[87] He said that he noticed that she was shivering and that prompted them going back to the car. He recalled her saying she was cold and recalled her saying she had to go. He also said that he did not recall saying to her, "Come back...don't be an asshole," but it was possible he said it and, if he did, it would not have been in a hateful way.

[88] The accused's description of what happened on the hilltop was not unreasonable. The event could reasonably have happened as he testified. The Court found the accused's evidence of what took place between him and the complainant after they returned to the car lacking in credibility. The Court's assessment of that aspect of the accused's evidence negatively affected the Court's assessment of his evidence of what happened on the hilltop. Further, the accused's evidence about why he took her to the hilltop caused the Court to doubt his evidence of what occurred on the hilltop.

[89] It appeared to the Court that the accused attempted to address virtually all of the details of the complainant's allegation, often with a slight change of the words or context. Examples of this included: (1) the accused's evidence that he made a statement about not being a fucking chauffeur, but in a different context and at an earlier time; (2) the accused's evidence that he told the complainant that she was a poor kisser but added that he said "because of your braces"; (3) that he may have told her not to be an asshole while on the hilltop, but not in a hateful way; (4) that after she declined his invitation for her to touch his penis he did touch her hand as she alleged but only to lightly touch the back of her hand to comfort her as she seemed very confused; and (5) that he may have been less than polite in talking to her about being on her phone while in his company in the car.

[90] The foregoing observations arose from the Court's assessment of the accused's evidence alone. His evidence must be assessed in the context of the whole of the evidence.

The Complainant

[91] The complainant acknowledged being very drunk on the evening of February 24, 2018 and said that she remembered bits and pieces of what happened. She acknowledged that her original statement as to the time she went to the parking lot to meet the accused could be wrong. She acknowledged that she planned to go with the accused to hang out but her friends would not let her do so. She said it was a

stupid idea on her part. She did not recall telling the accused that she had alcohol in the car. She said the person driving would not allow alcohol in his car. Nevertheless, she said that she could have made that statement. Similarly, she testified that she did not believe she offered to perform oral sex on the accused. She said that she was always in the presence of her friends. Nevertheless, she acknowledged it was possible that she said it. Where her memory was unclear, she was amenable to reasonable suggestions.

[92] The complainant's evidence was firm and consistent that, during the phone call with the accused on the morning of February 25, 2018, she did not agree to go for a walk with him. She stated that he was to drive her to Halifax. The complainant testified that, after she was in the accused's car, he suggested they go for a walk before he took her to Halifax. Her evidence was that she expressed reluctance to do so because she needed to get to Halifax to meet her girlfriend, but agreed to do so because she did not want to appear ungrateful since he was driving her to Halifax.

[93] The complainant's choice to wear a dress on February 25th was explained by her to be in response to a recommendation by the organizers of the prom dress event. Her evidence, on that point, was corroborated by her girlfriend, C.K.. The style of the dress she chose was presented in Exhibit #3. C.K. stated that the dress was not too short, with a hemline just above the knee. The complainant took only a sweater, not a coat, to wear over her dress. The weather that day was cold. The complainant's decision not to wear a jacket that morning appeared to the Court to be consistent with her evidence that she was not anticipating going for a walk.

[94] The complainant testified that there were lots of cars and people, many with their dogs, at Shubie Park. She testified that the accused said that it was too busy. Outside the parking area she testified that he leaned over to kiss her and she pulled back. She testified that in response to his inquiry as to why she wouldn't kiss him, she said she told him not until she knew him better. She firmly denied that she said that she liked to play hard to get. The Court's view was that her stated answer would reflect a reasonable, practical response to an unexpected attempt to be kissed by a virtual stranger. The answer suggested by defence counsel, if she made it, it would appear flirtatious. There was no other point in the evidence where it was suggested that the complainant acted or spoke in a flirtatious manner.

[95] When leaving Shubie Park the complainant testified that she agreed to go to another park where there was a look-off. She stated that she continued to express concern about needing to get to Halifax.

[96] She testified that at the second park she willingly got out of the car and proceeded up the path to the top of the hill to the look-off. She testified that soon after getting to the hilltop the accused grabbed her buttocks and lifted her off the ground. She testified that he hugged her and kissed her on the neck and lips. She believed that he lifted her off the ground more than once. She testified that she squirmed to get away but did not verbalize that she was not consenting to his behaviour. She testified that he hugged and kissed her firmly but she was able to get free of his grasp. She did not run away. She said that she tried to appear upbeat and playful and coax him to leave the hill and return to the car. She testified that she said she was cold and that she needed to go to get to Halifax to persuade (?). She stated that he told her to come back, not to be an asshole, and not to be rude. She said his tone of voice sounded sarcastic but she was fearful. She was questioned at length about these events. The Court found her answers highly consistent. Defence counsel suggested that her evidence was implausible because the accused could not have touched her breast with his hand while holding her off the ground. The Court found the evidence of the complainant entirely plausible. She did not suggest that she was off the ground the entire time she was being touched by the accused and indeed she said that she believed that she was lifted up more than once during the time on the hilltop. Furthermore, the complainant's evidence about how she was feeling and what she was thinking during that time period was entirely consistent with her version of the events.

[97] The complainant agreed that she acted happy and upbeat and that she skipped down the hill, coaxing the accused to follow her.

[98] The complainant testified that once they were back in the accused's car he asked her if she wanted to feel how big his dick was. She said that at that time for the first and only time that day she verbalized her lack of consent. She testified that she said "No" or "Not really." She said that the accused reached over and grabbed her hand or wrist and tried to pull it towards him. She said her hand went as far as the gear shift before she was able to pull it from his grasp. She testified that she was not trying to appear upbeat at that point. She said the accused's demeanor changed quickly and he said to her, "Well, I'm not your fucking chauffeur, get out." The complainant said she was afraid and in shock. She realized that she was in the middle of nowhere. She asked him to take her to the bus stop. He agreed. Around that time she got a text message from her girlfriend whom she was to meet in Halifax and she responded that she was in a black Volvo, she was scared, and she would call her later. The evidence of this text message was confirmed by C.K.. C.K. testified that

the reference to a phone call was very unusual as the complainant knew C.K. virtually always communicated by text. Throughout a lengthy, detailed cross-examination the complainant's testimony regarding these events remained highly consistent.

[99] At the mall the complainant testified that the accused asked her how she felt and said that she replied, "Dirty." She said that he responded by saying, "Why would you say that? Now I feel shitty." She testified that the accused never apologized for his actions. She said that he seemed "pissed off."

[100] She testified that once inside the mall building she broke down. She said that she began sobbing and a woman came to her assistance. Once the complainant was into the mall with other people present was the first moment she was away from the accused. Her emotional reaction at that time appeared to the Court to be consistent with her evidence of having been afraid while in the accused's presence but holding herself together until she was away from him.

[101] People from the mall did not testify at the trial, nor did anyone who may have seen the complainant en route to Halifax.

[102] C.K. testified that the complainant was very late getting to Halifax. Her eyes were red as if she had been crying and she was not herself. This was evidence of the complainant's emotional state within a couple of hours of the event.

[103] The Court found the complainant's evidence to have been consistent with each telling and re-telling of it. Other than the one suggested inconsistency with her police statement about whether the accused touched her breast, which she explained, no other inconsistencies with any earlier statement were identified. Where the complainant's memory was unclear she was amenable to reasonable suggestions made to her by defence counsel. Her evidence demonstrated a clear recollection of the events of February 25, 2018. Her evidence was straightforward and compelling. The Court found her evidence credible.

[104] Defence counsel suggested that the complainant has been "ruminating" on this incident for thee years and may be recalling the details of the event incorrectly, either intentionally or inadvertently. With respect, the Court observed no evidence of that being the case during the complainant's testimony. Her testimony was clear, reasonable, and changed very little even through detailed and extensive cross-

examination. Her statements regarding the events and her emotional state at the time of the events, and her explanations for her actions were logical and reasonable.

[105] The Court found the evidence of C.K. credible and reliable. The Court accepted C.K.'s evidence of the complainant's emotional state just hours after the event. Further, the Court accepted C.K.'s evidence of the content of the message she received from the complainant while she was still in the accused's car. The Court accepts C.K.'s evidence that the complainant's statement that she would call her was very unusual. The Court ruled the evidence of the text message inadmissible.

[106] On the whole of the evidence the Court found the evidence of the complainant compelling, credible, and reliable. The Court found the evidence of the accused was not credible. The Court rejects the evidence of the accused on all significant points.

Findings of Fact

[107] The Court finds that the events of February 25, 2018, and the communications between the accused and the complainant happened as testified to by the complainant, with two exceptions: (1) the Court was left with a reasonable doubt as to whether the first contact made by the accused on the hilltop was of the complainant's buttocks. The Court finds that the first contact could have been by the accused putting his arms around her to hug her and then sliding them down onto her buttocks; and (2) the Court finds that, at the mall, the accused may have made reference to not just liking the complainant because of her dress, meaning sexually, but because of their emotional connection.

[108] The Court finds that the accused's comments about the complainant's dress when he first saw her and as he dropped her off at the mall reflected his sexual attraction to her in that dress. The Court finds that when the accused first saw the complainant at her home he looked her up and down and said he liked her dress, which made her feel uncomfortable.

[109] The Court finds that the accused rejected the Shubie Park location and took the complainant to the Spider Lake park for the specific purpose of getting her somewhere away from other people to facilitate his sexual advances.

[110] The Court finds that there was no evidence that the accused took any steps to ascertain whether the complainant was willing to kiss him before he attempted to kiss her when they were in his car. There was no evidence that he and the complainant were verbally or physically flirting or discussing kissing or anything of the sort prior to his attempt to kiss her. In response to that attempt he received a verbal and physical indication that the complainant did not consent to being kissed by him at that time. The Court rejects the accused's evidence that the complainant said that she liked to play hard to get.

[111] The Court finds that there was no evidence that, prior to initiating sexual contact with the complainant on the hilltop, he took any steps to ascertain whether she was consenting to sexual contact.

[112] The Court finds that, on the hilltop, once the accused began touching the complainant in a sexual manner she did not verbally tell him to stop and continued to act in a happy, joyful manner, but, she did squirm to get out of his grasp. The Court finds that her physical movements, combined with her earlier refusal to kiss him, gave the accused good reason to believe that the complainant may not be consenting to engage in sexual contact. At best, her behavior was equivocal. Neither her body language nor her demeanor was a clear indication of consent to sexual contact. The accused ignored or misinterpreted her squirming.

[113] The Court rejected the accused's evidence that the complainant told him that she liked to play hard to get. The Court did not accept the accused's evidence that he believed that she was playing hard to get but otherwise consenting. If he had held such a belief it could not have been based on anything other than her choice of clothing, her going with him to the hilltop, her happy demeanor, her not saying no or stop, and his perception of her squirming.

[114] Once the accused and the complainant were back in his vehicle, the Court finds that the words he uttered were whether she wanted to feel how big his penis was and they were intended to be an invitation for her to touch his penis. The Court finds that the complainant clearly stated that she did not want to touch his penis. The Court finds that the accused ignored her refusal and took hold of her hand/wrist with the specific intent of putting her hand on his penis. When she pulled her hand away he did not attempt to use any greater physical force to have her touch his penis, but her refusal angered him. He said he wasn't her fucking chauffeur and ordered her to get out of the car, but he relented and agreed to drop her at the bus stop at the mall.

[115] The Court finds that the complainant was able to hold her emotions in check until she was inside the mall, away from the accused, and then she broke down and began sobbing.

Admissions

[116] In this case, the accused admitted all elements of the offence charged except the element of *mens rea*.

The Defence Argument

[117] The accused argued that he, at the time of the alleged offence, held an honest, albeit mistaken, belief in the communicated consent of the complainant. Defence argued that there was an air of reality to this defence and submitted that the Crown had failed to prove beyond a reasonable doubt that the accused did not have an honest, albeit mistaken, belief in communicated consent of the complainant.

The *Criminal Code* Provisions Relating to Consent

[118] Section 265:

> (1) A person commits an assault when
>
> > (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (3) For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> > (a) the application of force to the complainant or to a person other than the complainant;
> >
> > (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
> >
> > (c) fraud; or
> >
> > (d) the exercise of authority.
>
> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is

sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[119] Section.273:

(1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272, and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

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

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

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

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

(a.1) the complainant is unconscious;

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

(c) the accuse induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2 **Where belief in consent not a defence --**It is not a defence to a charge under section 271, 272, or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from

(i) the accused's self-induced intoxication;

(ii) the accused's recklessness or wilful blindness;

(iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct."

[120] *R. v. Barton*, [2019] SCJ No, 33, at paragraphs 86 to 113 and 121 to 123:

86 One of the ways in which an accused my respond to a charge of sexual assault is to rely on the defence of honest but mistaken belief in communicated consent. To lay the foundation for the analysis that follows, it will first be useful to briefly review several key principles relating to this defence, namely: (a) the role consent plays in the sexual assault analysis, (b) the necessity of having a belief in *communicated* consent in order to raise the relevant defence, (c) mistakes of law, and (d) the reasonable steps requirement. I will address these four points in turn.

(a) *The Role of consent in the Sexual Assault Analysis*

87 A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the *actus reus* and had the necessary *mens rea.* A person commits the *actus reus* of sexual assault "if he touches another person in a sexual way without her consent" (*R. v J.A.*, 2011 SCC 28, [2011] 2 SCR 440, at para. 23). The *mens rea* consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched"(*R v Ewanchuk*, [1999] 1 SCR 330, at para. 42).

88 "Consent" is defined in s. 273.1(1) of the *Code* as "the voluntary agreement of the complainant to engage in every sexual act in a particular encounter" (*J.A.* at para. 31), and it must be freely given (see *Ewanchuk*, at para. 26). This consent must exist at the time the sexual activity in question occurs (*J.A.*, at para. 34, citing *Ewanchuck,* at para. 26), and it can be revoked at any time (see *Code*, s. 273.1(2)(e); *J.A.*, at paras. 40 and 43). Further, as s. 273.1(1) makes clear, "consent" is not considered in the abstract. Rather, it must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and "the identity of the partner", though it does not include "conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" (*R. v. Hutchinson*, 2014 SCC 19, [2014} 1 S.C.R. 346, at paras 55 and 57 (emphasis deleted).

89 Consent is treated differently at each stage of the analysis. For the purposes of the *actus reus*, "consent" means "that the complainant in her mind wanted the sexual touching to take place" (*Ewanchuk*, at para. 48). Thus, at this stage, the focus

is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent – plain and simple (see *Ewanchuk*, at para. 31). At this point, the *actus reus* is complete. The complainant need not *express* her lack of consent, or revocation of consent, for the *actus reus* to be established (see *J.A.*, at para. 37).

90 For purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused" (*Ewanchuk*, at para. 49). Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" (*ibid.*, at para. 47).

(b) *The Necessity of Having an Honest Belief in Communicated Consent*

91 This Court has consistently referred to the relevant defence as being premised on an "honest but mistaken belief in consent" (See e.g., *R. v. Esau*, [1997} 2 S.C.R. 777, at para. 1; *Ewanchuk*, at para. 43; *Darrach*, at para. 51; *R. v. Cinous*, 2002 SCC 29, [2002] S.C.R. 3, at para. 57; *R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627, at para. 32; *J.A.*, at para. 24), and the *Code* itself refers to the accused's "belief in consent" (s. 273.2(b) (heading)). However, this Court's jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually *communicated* consent, whether by words or conduct (see *Park*, [1995] 2 S.C.R. 836, at paras. 39 and 43-44 (per L'Heureux-Dubé J.); *Ewanchuk*, at para. 46; *J.A.*, at paras. 37, 42 and 48). As L'Heureux-Dubé J. stated in *Park*, "[a]s a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary" (para. 44 (emphasis in original).

92 Therefore, in my view, it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in *communicated* consent". This refinement is intended to focus all justice system participants on the crucial question of *communication* of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.

93 Focusing on the accused's honest but mistaken belief in the *communication* of consent as practical consequences. Most significantly, in seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she *communicated* consent to the sexual activity in question at the time it occurred (see S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed.

Loose-leaf), at s. 16:20.50.30).). For example, in some cases, prior sexual activities may establish legitimate expectations about how consent is communicated between the parties, thereby shaping the accused's perception of communicated consent to the sexual activity in question at the time it occurred. American scholar Michelle Anderson puts it this way: "prior negotiations between the complainant and the defendant regarding the specific acts at issue or customs and practices about those acts should be admissible. These negotiations, customs, and practices between the parties reveal their legitimate expectations on the incident in question" (M. J. Anderson, "Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armour" (2004), 19:2 *Crim. Just.* 14, at p. 19, cited in Hill, Tanovich and Strezos, at s. 16:20.50.30). These "negotiations" would not, however, include an agreement involving broad advance consent to any and all manner of sexual activity. As I will explain, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.

94 However, great care must be taken not to slip into impermissible propensity reasoning (see *Seaboye*r, at p.615). The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the "twin myths", which is prohibited under s. 276(1)(a) of the *Code*.

(c) *Mistakes of Law*

95 A mistake of fact defence operates where the accused mistakenly perceived facts that negate, or raise a reasonable doubt about, the fault element of the offence (see *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 148, per Dickson J. (dissenting, but not on this point). Honest but mistaken belief in communicated consent falls within this category of defences (see *Ewanchuk*, at paras. 42-43; *J.A.*, at para. 48).

96 But the law draws a distinction between mistakes of fact and mistakes of law. As a general rule, the latter offer no excuse (see *Code*, s. 19*; R. v. Forster*, [1992] 1 S.C.R. 339, at p. 346; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 58). As the Court of Appeal in this case put it, "[n]o one in this country is entitled to their own law" (para. 245). Therefore, 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 (see Stewart, at s. 3:600.30.10).

97 For present purposes, three consent-related mistakes of law are particularly relevant: implied consent, broad advance consent, and propensity to consent. I will address these concepts in turn.

(i) Implied Consent (*Ewanchuk*)

98 The "specious" defence of implied consent "rests on the assumption that unless a woman protests or resists, she should be 'deemed' to consent" (*Ewanchuk*, at para.

103. per McLachlin J. (as she then was)). *Ewanchuk* makes clear that this concept has no place in Canadian law. As Major J. stated for the majority, "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence" (para. 51, citing *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; see also J. Benedet, "Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution" (2014), 52 Alta. L. Rev. 127), It is also a mistake of law to infer that "the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant" (*J.A.*, at para. 47). In short, it is an error of law -- not fact -- to assume that unless and until a woman says "no", she has implicitly given her consent to any and all sexual activity.

(ii) Broad Advance Consent (*J.A.*)

99 "Broad advance consent" refers to the legally erroneous notion that the complainant agreed to future sexual activity of an undefined scope (see *J.A.*, at paras. 44-48). As summarized in *J.A.*, the definition of "consent" under s. 273.1(1) "suggests that the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind" and "this Court has also interpreted this provision as requiring the complainant to consent to the activity 'at the time it occur[s]'" (para. 34, citing *Ewanchuk*, at para. 26). Thus, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.

(iii) Propensity to Consent (*Seabover*)

100 The law prohibits the inference that the complainant's prior sexual activities, by reason of their sexual nature, make it more likely that she consented to the sexual activity in question (see *Code*, s. 276(1)(a); *Seaboyer*). This is the first of the "twin myths". Accordingly, an accused's belief that the complainant's prior sexual activities, by reason of their sexual nature, made it more likely that she was consenting to the sexual activity in question is a mistake of law.

(d) *The Reasonable Steps Requirement*

101 Finally, the availability of the defence of honest but mistaken belief in communicated consent is not unlimited. Section 273.2 of the *Code*, which formed part of the 1992 reforms to Canada's sexual assault laws, places important limits on the defence. That section reads:

> Where belief in consent not a defence
>
> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from the accused's
>
> (i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

102 As is apparent, s. 273.2 applies in respect of various sexual assault offences: sexual assault under s. 271; sexual assault with a weapon, involving threats to a third party, or causing bodily harm under s. 272; and aggravated sexual assault under s. 273.

103 The jurisprudence on the reasonable steps requirement under s. 273.2(b) remains underdeveloped, and academic commentators have highlighted the need for greater clarity (see e.g., E. A. Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women", in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (2012); L. Vandervort, "The Prejudicial Effects of 'Reasonable Steps' in Analysis of *Mens Rea* and Sexual Consent: Two Solutions" (2018), 55 Alta. L. Rev. 933). With that in mind, although the trial judge's limited instructions on reasonable steps were not raised by the Crown as a ground of appeal from Mr. Barton's acquittal, a few comments and observations are warranted to promote greater clarity in the law and provide guidance for future cases -- including the new trial on unlawful act manslaughter that, for reasons I will explain, is required in this case.

(i) *The Reasonable Steps Requirement as a Precondition with Objective and Subjective Dimensions*

104 Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent -- no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time (see *R. v. Cornejo* (2003), 68 0.R. (3d) 117 (C.A.), at para. 22, leave to appeal refused, [2004] S.C.C.A. No. 32, [2004] 3 S.C.R. vii, citing K. Roach, *Criminal Law* (2nd ed. 2000), at p. 157; see also Sheehy, at pp. 492-93). Notably, however, s. 273.2(b) does not require the accused to take "all" reasonable steps, unlike the analogous restriction on the defence of mistaken belief in legal age imposed under s. 150.1(4) of the *Code*[7] (see *R. v. Darrach* (1998), 38 0.R. (3d) 1 (C.A.), at p. 24, aff'd 2000 SCC 46, [2000] 2 S.C.R, 443 (without comment on this point)).

(ii) The Purpose of the Reasonable Steps Requirement

105 The purpose of the reasonable steps requirement has been expressed in different ways. The authors of *Manning, Mewett & Sankoff: Criminal Law* state that s. 273.2(b) of the *Code* seeks "to protect the security of the person and equality of women who comprise the huge majority of sexual assault victims by ensuring as much as possible that there is clarity on the part of both participants to a sexual act" (M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 1094 (footnote omitted)). Abella J.A. (as she then was) wrote in *Cornejo*

that the reasonable steps requirement "replaces the assumptions traditionally -- and inappropriately -- associated with passivity and silence" (para, 21). Professor Elizabeth Sheehy puts it this way: "Bill C-49's‘reasonable steps’ requirement was intended to criminalize sexual assaults committed by men who claim mistake without any effort to ascertain the woman's consent or whose belief in consent relies on self-serving misogynist beliefs" (p. 492). The common thread running through each of these descriptions is this: the reasonable steps requirement rejects the outmoded idea that women can be taken to be consenting unless they say "no".

(iii) What Can and Cannot Constitute Reasonable Steps

106 Keeping in mind that "consent" is defined under s. 273.1(1) of the Code as "the voluntary agreement of the complainant to engage in the sexual activity in question", what can constitute reasonable steps to ascertain consent? In my view, the reasonable steps inquiry is highly fact-specific, and it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps or obscure the words of the statute by supplementing or replacing them with different language.

107 That said, it is possible to identify certain things that clearly are not reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law (see *Ewanchuk* at para. 51, citing *M. (M.L.)*). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see Sheehy, at p. 518). Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants (see Sheehy at p. 537).

108 It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.

109 Overall, in approaching the reasonable steps analysis, trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Moreover, trial judges and juries should be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Finally, if the reasonable steps requirement

is to have any meaningful impact, it must be applied with care -- mere lip service will not do.

(iv) The Distinction Between Reasonable Steps and Reasonable Grounds

110 Finally, the concept of reasonable steps to ascertain consent under s. 273.2(b) of the *Code* must be distinguished from the concept of reasonable grounds to support an honest belief in consent under s. 265(4). The latter section provides that in the context of an alleged assault, whether sexual or otherwise (see s. 265(2)), where the accused claims he believed the complainant consented to the conduct in question and the trial judge is "satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence the trial judge "shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief". This provision rests on the idea that as the accused's asserted belief in consent becomes less reasonable, it becomes increasingly doubtful that the asserted belief was honestly held (see *Pappajohn*, at pp. 155-56, per Dickson J. (dissenting, but not on this point)).

111 In other words, where the accused is charged with some form of assault, the presence or absence of *reasonable grounds* is simply a factor to be considered in assessing the honesty of the accused's asserted belief in consent in accordance with s. 265(4). By contrast, where the accused is charged with a sexual offence under ss. 271, 272, or 273, a failure to take reasonable steps is fatal to the defence of honest but mistaken belief in communicated consent by virtue of s. 273.2(b).

112 With this in mind, in the context of a charge under ss. 271, 272, or 273 where the accused asserts an honest but mistaken belief in communicated consent, if either (1) there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent or (2) the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain consent, then there would be no reason to consider the presence or absence of reasonable grounds to support an honest belief in consent under s. 265(4), since the accused would be legally barred from raising the defence due to the operation of s. 273.2(b).

113 Finally, while the conceptual distinction between reasonable steps under s. 273.2(b) and reasonable grounds under s. 265(4) remains valid, as a practical matter it is hard to conceive of a situation in which reasonable steps would not also constitute reasonable grounds for the purpose of assessing the honesty of the accused's asserted belief.

…

121 An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to the defence. This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused

honestly believed the complainant communicated consent. This Court recently confirmed that where there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, the defence of honest but mistaken belief in communicated consent must not be left with the jury (see *R. v. Gagnon*, 2018 SCC 41). A number of provincial appellate decisions, including the Court of Appeal's decision in this case, have reached the same conclusion (see e.g., *Cornejo*, at para. 19; *R. v. Despins*, 2007 SKCA 119, 228 C.C.C. (3d) 475, at paras. 6 and 11-12; *R. v. Dippel*, 2011 ABCA 129, 281 C.C.C. (3d) 33, at paras. 22-23 and 28; *R. v. Flaviano*, 2013 ABCA 219, 368 D.L.R. (4th) 393, at paras. 41 and 50, affd 2014 SCC 14, [20141 1 S.C.R. 270; C.A. reasons (2017), at para. 250).

122 Accordingly, if there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, then the defence of honest but mistaken belief in communicated consent has no air of reality and must not be left with the jury. This threshold analysis serves an important purpose: it keeps from the jury defences that lack a sufficient evidentiary foundation, thereby avoiding the risk that the jury might improperly give effect to a defective defence. As such, contrary to what occurred at trial in this case, [8] the air of reality test should not be ignored.

123 By contrast, if there is an air of reality to the defence of honest but mistaken belief in communicated consent, including the reasonable steps requirement, then the defence should be left with the jury. The onus would then shift to the Crown to negative the defence, which could be achieved by proving beyond a reasonable doubt that the accused failed to take reasonable steps. The trial judge should instruct the jury as such, making it clear that the reasonable steps requirement is a precondition to the defence. In addition, the trial judge should explain, as a matter of law, the type of evidence that can and cannot constitute reasonable steps, making sure any steps that are grounded in mistakes of law are relegated to the latter category. Where the Crown does not prove beyond a reasonable doubt that the accused failed to take reasonable steps, that does not lead automatically to an acquittal. In those circumstances, the trial judge should instruct the jury that they are required, as a matter of law, to go on to consider whether the Crown has nonetheless proven beyond a reasonable doubt that the accused did not have an honest but mistaken belief in communicated consent. This requirement flows from the fact that the defence is ultimately one of an "honest but mistaken belief in communicated consent", not one of "reasonable steps". Ultimately, if the Crown fails to disprove the defence beyond a reasonable doubt, then the accused would be entitled to an acquittal.

The Air of Reality Assessment

[121] In *R. v. Park,* [1995] 2 SCR 836, the Supreme court held that where the complainant and the accused give similar versions of the facts, and the only material contradiction is in the interpretation of what happened, the defence of honest but mistaken belief in consent should, generally, be put to the jury, except in cases where the accused's conduct demonstrates recklessness or wilful blindness to the absence of consent.

[122] In *R v Barton, supra,* at paragraph 121, the Supreme Court stated:

> … This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused honestly believed the complainant communicated consent.

[123] The wording of the test to be considered by the trial judge, as stated in *R v Barton, i.e.*, "the trier of fact...could find," bears similarity to the test for committal to stand trial after a preliminary inquiry. In applying the test for committal to stand trial the judge must assume that the trier of fact may accept the evidence presented. Therefore, I conclude that, in determining whether there is an air of reality to the defence of honest but mistaken belief in communicated consent, the analysis must be conducted with the perspective of whether there is any evidence, which, if believed, would meet the requirements of the air of reality test.

[124] In this case, if the Court accepted the evidence of the accused, there would be no evidence of a sexual assault after the accused and the complainant returned from the hilltop to the car. On his evidence the activity involved merely a question of whether the complainant wanted to touch his penis, the only physical contact being a slight touch of her hand to comfort her. The evidence of the attempted kiss in the car, prior to the hilltop, on the accused's evidence, did not proceed beyond a physical invitation to kiss, which stops when the complainant declined the invitation.

[125] In relation to the events on the hilltop, the accused's version of events was that the complainant did not resist his sexual contact with her, which he initiated with a hug, and she did not squirm or try to get away. She did not express a lack of consent verbally or by her conduct. His touching proceeded from a hug, to kisses, to touching her breast and her buttocks, and lifting her off the ground. Each of the activities proceeded because of her lack of objection, happy attitude and demeanor which caused him to believe that she was consenting to the activity. The accused

stated that he believed that the complainant communicated her consent by her attitude and demeanor.

[126] What evidence was there, which if believed by a trier of fact, could establish that the accused took reasonable steps to ascertain that the complainant was consenting to the sexual contact which occurred on the hilltop? The accused stated that he did not ask the complainant before he hugged her or, thereafter, kissed her, touched her buttocks, or touched her breast. There was no evidence that the "chit chat" he said occurred before he touched her involved any indication that she wanted to engage in such physical contact. The Court is conscious of the fact that the accused was nineteen years of age at the time of the incident and the complainant seventeen. On his evidence the first contact was a hug. A hug would appear to have been the least clearly sexual contact which occurred. On the accused's evidence he proceeded to escalate the manner of sexual activity based upon his perception that the complainant, by her attitude and demeanor, had consented to the earlier conduct and was consenting to the further activity.

[127] The standard to be applied by the Court in relation to the air of reality is whether a trier of fact "could", acting judicially, accept the defence of honest but mistaken belief in communicated consent. On the accused's version of events I conclude that a finder of fact could so find and could conclude that the accused was neither reckless nor wilfully blind.

Precondition to Honest But Mistaken Belief Defence

[128] Section 273.2 imposes a precondition to the defence of honest but mistaken belief in communicated consent; that is, if no reasonable steps to ascertain that the complainant was communicating consent, then there may be no defence of honest but mistaken belief in communicated consent. And, if the accused acted recklessly or with wilful blindness to whether the complainant was consenting there can be no defence of honest but mistaken belief in consent.

[129] The burden of proof rests upon the Crown to prove every element of the offence charged including that the accused knew of, or was reckless to, or wilfully blind to the lack of consent of the complainant to the sexual activity.

The "Attempted" Kiss in the Car

[130] On the whole of the evidence the Court was uncertain how far the accused moved toward the complainant with his lips puckered. The Court accepted the evidence of the complainant that it was clear to her that he wanted to kiss her and she moved away from him, but her evidence did not make clear whether that was necessary to avoid his contact or was preemptive, to communicate her lack of consent to being kissed. If it were the latter, and seeing her reaction he abandoned his effort, did his action constitute an assault?

[131] There was no actual physical contact. Section 265(1)(b) proves

> (1) A person commits an assault when
>
> …
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose.

[132] On the evidence the Court has no doubt that the accused, by his act of puckering his lips and leaning toward her, caused the complainant to believe, on reasonable grounds, that he had the present ability to kiss her. Did his action amount to a threat or attempt? There is no basis upon which to consider the accused's action a threat as there was no evidence it was intended to intimidate her. Whether the accused's action was an attempt, in the Court's view, depends on how far he proceeded. On that point, while it is probable that his action amounted to an attempt, the Court is not satisfied beyond a reasonable doubt.

The Activities on the Hilltop

[133] Prior to arriving at the hilltop, the accused's movement to kiss the complainant had been rejected by her.

[134] There was no evidence that before or on the hilltop the complainant had expressed a desire to engage in sexual activity with the accused. She had worn a dress that made her look attractive to the accused, she had agreed to go for a walk with the accused, and she agreed to go up the path to the look-off with the accused. Her demeanor had been light and happy. None of that conduct communicated a willingness to engage in sexual contact.

[135] The accused did not ask her if she wanted to have any physical contact with him. He touched her, perhaps initially as a hug, and then continued to sexually touch parts of her body without asking her permission before doing so. He denied that she squirmed to get free. The Court rejected his evidence on that point. He either ignored her squirming or, perhaps, viewed it as playfulness. He moved from one type of touching of the complainant to another, assuming her consent for him to do so, based upon her demeanor and attitude, and lack of verbal objection to the previous touch.

[136] In the Court's view the accused failed to take reasonable steps to ascertain whether the complainant was consenting to the sexual activities. As the incident on the hilltop progressed the complainant's conduct was, at best, ambiguous, squirming to get away while remaining happy and upbeat.

[137] In *R v Barton, supra*, at paragraph 107, the Court stated:

> That said, it is possible to identify certain things that clearly are not reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law (see *Ewanchuk*, at para. 51, citing *M. (M.L.)*). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see Sheehy, at p.518). Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step.

[138] It is the Court's view, on the proven facts in this case, this passage from *Barton* describes what the accused did. Before any contact on the hilltop he had knowledge, based upon the complainant's rejection of his earlier attempt to kiss her, that the complainant may not consent to being sexually touched by him. He did so anyway without taking any reasonable steps to determine whether she consented to his touching her. And as she did not say, "Stop," he ignored or misinterpreted her squirming, and went further with his sexual contact with her.

[139] In addition to the accused having failed to take reasonable steps to ascertain whether the complainant was consenting to sexual contact, the Court finds the accused was reckless or wilfully blind. Given the complainant's actions, before and on the hilltop, either the accused recognized the risk that the complainant was not

consenting to sexual contact with him and proceeded nonetheless or he was wilfully blind to the risk.

[140] The Court finds that the accused failed to satisfy the requirements of section 273.2 of the *Criminal Code* in relation to his conduct on the hilltop, and therefore, even if he held an honest but mistaken belief in the consent of the complainant, it is not a defence. The Court finds that the accused's sexual contact with the complainant on the hilltop has been proven beyond a reasonable doubt to have been a sexual assault.

The Invitation to Touch the Accused's Penis

[141] On the evidence which the Court accepted the complainant verbally rejected the accused's invitation to touch his penis. Nevertheless, the accused took hold of her hand/wrist for the purpose of touching his penis with her hand. The accused's evidence regarding what happened in the car was rejected.

[142] On the facts which the Court accepts there was no basis for an argument of honest but mistaken belief in consent with regard to what transpired in the car. The accused knew of or was reckless to or wilfully blind as to whether the complainant was consenting.

[143] The Court finds that the touching of the complainant's hand/wrist and pulling it towards him for the purpose of having her touch his penis, in the whole of the circumstances then and what had transpired previously that day, constituted a sexual assault.

[144] The Court finds that it has been proven beyond a reasonable doubt that the accused knew that the complainant did not consent to touching his penis. The Court is satisfied beyond a reasonable doubt that the accused did not have an honest belief that the complainant was consenting to such contact.

[145] The Court is satisfied beyond a reasonable doubt that the accused's contact with the complainant in his car after they returned from the hilltop constituted a sexual assault.

Conclusion

[146] The Court finds the accused guilty as charged.

Marc Chisholm, JPC