PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Koge*, 2022 NSPC 37

Date: 20221110
Docket: 8537100
Registry: Sydney

Between:

Her Majesty the Queen

v.

Ekane Koge

Judge:	The Honourable Judge Shane Russell
Heard:	August 31, 2022 and September 8, 2022, in Sydney, Nova Scotia
Charge:	CC 271
Counsel:	Mark Gouthro, for the Crown Oge Egereonu, for the Defense

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By the Court:

Introduction

[1] Ekane Koge is charged that on or about October 10, 2021, at or near Sydney, Nova Scotia did commit a sexual assault on A.B contrary to section 271 of the *Criminal Code of Canada*.

[2] The following was stated by the Ontario Court of Appeal in **R. v. D. (J.J.R.)**, [2006] O.J. No. 4749 at paragraph 26:

> **26** It is one of the peculiarities of the criminal justice system that if an accused is tried by a jury, the law demands a one- or two-word verdict and forbids any explanation of that verdict. However, if the same accused is tried on the same charge by a judge alone, the same law demands a reasoned explanation for the verdict.

[3] Curiously, we continue to have a system entrenched in endorsing this long-standing ridged dichotomy. Regardless, this is a Judge alone trial. As such, the law is very clear, fair process properly demands meaningful reasons. Meaningful reasons add an additional layer of transparency and accountability. Mandated reasons create a meaningful reviewable record guarding against bias, stereotypical reasoning, errors of law, misapprehension of the evidence, and ultimately miscarriage of justice.

[4] In preparing this decision I went back and reviewed the recorded trial record. I will not recite every last detail of testimony; however, I will refer to various material portions of the testimony, evidence, and the arguments as necessary to sufficiently outline my reasons. I have considered the totality of all the trial evidence and the arguments raised by counsel even though I may not specifically reference each one.

[5] Although I will begin by reviewing and reciting various relevant portions of the evidence, I am doing this for the purpose of organization and convenience. There is no magic to the order in which I refer to portions of the evidence. However, what is important is that I have not isolated, compartmentalized, or marginalized the evidence from one source or one witness. The evidence from each source and each witness was examined, compared, linked, and contrasted in relation to the whole of the evidence.

THREE CORE PRINCIPLES

Presumption of Innocence/ Reasonable Doubt/ Burden of Proof

[6] Mr. Koge is presumed innocent. He does not have to prove his innocence. The presumption means that Mr. Koge does not have to testify, present any evidence, or prove anything. The burden rests with the Crown to prove the

charges against him beyond a reasonable doubt. This burden remains with the Crown, and it never shifts to the accused **R. v. Lifchus** [1997] 3 SCR 320.

[7] The Crown must prove all essential elements of the offence beyond a reasonable doubt. Reasonable doubt is based on reason and common sense. Reasonable doubt logically arises from the evidence or lack of evidence. Reasonable doubt is not a far-fetched, imaginary, or frivolous one. It is not one based on sympathy or prejudice.

[8] Finally, suspicion and probability fall far short of the reasonable doubt standard. If the court believes the accused is probably guilty or likely guilty, that is insufficient. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities **R. v. Starr**, 2000 SCC 40, paragraph 242. However, the Crown need not prove things to an absolute certainty to secure a conviction.

[9] There may at times be inherent frailties in the evidence put forward by the Crown. This evidence may be vague, inconsistent, improbable, unclear, or simply lack sufficient strength to constitute proof beyond a reasonable doubt. Reasonable doubt can also arise from the accused's testimony or evidence tendered by the defence from other sources.

EVIDENCE

The Events of October 7, 2021

[10] The 18-year-old complainant A.B and 30-year-old accused Ekane Koge met for the first time on October 7, 2021. Mr. Koge was a student at Cape Breton University and lived at the Alumni Hall dorm. The complainant was not a student and lived off campus. On the evening of October 7, 2021, she attended a social gathering at the dorm with her friend C.D. At the time, C.D was in a relationship with Rory, a friend of the accused. Rory also lived at the dorm. It was at this gathering the complainant was first introduced to the accused.

[11] The dorm where this and the later October 10th gathering took place consisted of 4 bedrooms and a shared common area. The common area included a kitchen, bathroom, living room, and hallway. The accused occupied one bedroom; his friend Rory had another. Two other students, Maury and Joel occupied the remaining two bedrooms.

[12] The October 7, 2021, social gathering was attended by 7 people: the accused, the complainant, her friend C.D, Rory, Joel, Maury, and Ewell. During this evening alcohol was consumed, however, the complainant stated she did not drink. She testified that she only had water. In contrast, the accused testified that the complainant had been consuming alcohol.

[13] The complainant testified that those at the gathering hung out, talked, and watched T.V over the course of approximately 3 to 4 hours. Due to the late hour, the complainant, and her friend C.D decided to stay overnight at the dorm. C.D stayed in her boyfriend's room while the accused offered his single person sized bed to the complainant. She thanked him and slept overnight in his bedroom. The accused agreed that he offered his room to the complainant. He stated he did so because the complainant was driving, they all had drinks, and that it was well past midnight. The accused spent the night sleeping on the couch in the common area. Both the complainant and the accused testified that once she went to bed, he never entered the bedroom.

[14] The complaint got up the next morning around 8am or 9am and left. She and the accused exchanged snap-chat contact information. They stayed in touch via social media over the next few days.

The Events of October 10, 2021

[15] On the evening of October 10th, 2021, the complainant, and her friend C.D returned to the dorm for a second social gathering. The complainant drove and they arrived at approximately 9pm. When they arrived, the accused was not

there. He had been playing piano in a church band and arrived sometime before 10pm.

[16] The October 10th, 2021, gathering was attended by approximately 10 or 11 people. Some of the people in attendance included the accused, his friend Daniel Okeniya, the complainant, her friend C.D, Rory, Maury, and two females from Montreal.

[17] Drinks were consumed throughout the evening. In direct, the complainant testified that she had consumed, “coolers I guess”. Upon further questioning by the Crown, she stated they were, “most likely vodka”, then “Smirnoff coolers” “if I believe correctly”. Finally, she stated, “I only had one or two drinks hours before the incident”.

[18] The accused testified that when he arrived, he got changed then joined the complainant and the others in the common area. The complainant and others had already been drinking when he joined them. The accused testified that throughout the evening he consumed 3 or 4 mixed drinks and denied any possibility that he was intoxicated.

[19] Based on the complainant’s direct evidence there was nothing inappropriate, unusual, or concerning throughout the course of the evening until they entered

the bedroom. Her direct evidence was devoid of any suggestion that the accused had physically touched her or made her feel uncomfortable in any way prior to entering the bedroom. However, her evidence on this point evolved during cross-examination. When this was put to her during cross-examination the complainant first agreed. She stated the accused was, in her words very “sweet”. However, she added that the accused had “been physical” with her prior to going to bed. She stated that the accused throughout the evening had been “near me, touching my back, having his hands on my hips”. She stated that every time this would happen, she would walk away.

[20] The gathering wrapped up at around 3:45 am. The complainant testified that the accused, just as he did a few nights prior, offered his bed and told her that she could spend the night in his room. The complainant testified that she felt “extremely grateful” but also “felt bad” and “felt rude”. She felt this way because she had taken his bed previously and he was left to sleep on the couch. She testified that she didn’t want him to sleep on the couch again, therefore, she told him he could stay in the bed with her. She testified that she specifically told him it was “just sleep”. When asked by the Crown to clarify what she meant by those words she was very clear that it was exactly that, “just sleep”. Her full expectation was that they would only sleep and nothing

else. When asked what time the accused offered his bed she stated, “around midnight if I had to say”.

[21] The complainant was asked at what point she “felt bad” about taking his bed. She testified that it was closer to the time when they went to bed, “maybe an hour or two before”. She agreed in cross examination that the conversation about staying in his room might have been overheard by others in attendance.

[22] In contrast, the accused testified that he didn’t offer his room to the complainant on October 10th, 2021. According to him it was her who asked if she could again sleep there. Further, it was his evidence that she suggested he sleep there and that she was fine with this. He testified that he initially told her no and that he was going to sleep on the couch just as he did on the prior occasion. It was only after her reassurances that it was fine, he agreed. Further, his evidence was that there was no other discussion about the sleeping arrangements. He specifically denied that she made any comment about just sleeping.

[23] He testified that she went to bed first and that he told her he would be in a little later. He stayed in the common area cleaning for approximately 10 to 15 minutes before entering the bedroom.

[24] What happened while the complaint and the accused were in the bedroom is the subject of contention. Their views are diametrically opposed.

The Events Within the Bedroom

The Complainant's Evidence

[25] The complainant testified that she went into the bedroom first and got into bed around 3:45 am. While in bed she was wearing a hoody, sweatpants, underwear, and a crop top under her hoodie.

[26] The accused entered the bedroom approximately 15 to 20 minutes later. The complainant testified that when the accused arrived, she rolled over, said goodnight and started to fall asleep. In her words she "wasn't fully asleep" at this point.

[27] The bed was small, she was laying facing the wall. At first there was no physical contact between them. She testified that the unwanted touching began "if I had to guess, maybe 30 minutes" after the accused came into the room. It started with her feeling his hand "snake up" under the back of her shirt and around the front touching her breasts. She described the touching to her body as "skin on skin". She estimated that this touching lasted about 5 to 10 minutes before stopping.

[28] After the first incident of touching her breasts, the accused then proceeded to put his hand down her pants under her underwear for what she estimated was “a few minutes”. She then qualified it as, “no more than 5 minutes”. Several times during direct examination she was asked what body parts the accused had touched below her waist. She stated her buttocks and vagina.

[29] After the accused touched her buttocks, he moved to her front. She was asked by the Crown what she meant by front. She stated, “Just, I don’t know, just touching I guess”, “kind of touching and feeling around”. When asked what area of her body she stated, “my pubic region I guess”. When asked to clarify further she stated, “my vagina”. When asked to describe how the accused was touching her buttocks she stated, “not quite sure how to describe but he was just kind of feeling around, touching and squeezing”. She stated there was no penetration.

[30] The complainant was asked several times, in several ways, during direct examination to describe how the accused touched her vagina. She stated, “a similar thing”, “feeling is the best way to describe”, “feeling around I guess”, “I don’t know how to really explain”, “he was feeling around, just using his fingers to feel around”. It was clear by the nature of the Crown’s persistence during direct examination on this topic that they were attempting to elicit

something from the complainant's testimony. Despite a defence objection, the Crown was permitted to ask the complainant what part of her vagina was touched. The complainant testified; "all of it I guess, kind of the whole area", "It was a very short period of time", "I don't really know how to explain, it's just kind of the whole thing", "my whole vagina", "don't know how to clarify it better". Finally, when asked by the Crown if she could specify any specific part of her vagina which was touched, she responded, "No I don't think so no".

[31] She estimated that the below the waist touching occurred, "no more than 5 minutes". The accused then returned to touching her breasts for what the complainant estimated was another 5 minutes.

[32] During the three successive incidents of touching, she stated she "wasn't fully asleep" and "aware of what was going on". When asked if at any point she was sleeping between 3:45 am and 4:45 am she testified "yeah I want to say sleep but very light sleep, still aware of my surroundings".

[33] As well, she stated that during the touching she was on the side of the bed facing next to the wall. When asked by the Crown how she reacted to the unwanted touching she stated she "froze", "didn't know what to do", "felt

stuck", and felt she couldn't get out. She added that neither she nor the accused said anything during the incidents of touching. She also testified in direct that the accused didn't ask for her consent to touch her, nor did she give it.

The Accused's Evidence

[34] The accused testified that he entered the room 10 to 15 minutes after the complainant. When he entered the complainant was awake. He went on his phone for approximately 5 minutes before laying on the bed. The complainant was facing the wall and he asked her if she was comfortable. She responded yes and they both said goodnight.

[35] When the accused testified, he categorically denied all the allegations. He testified that he had a great relationship with the complainant over the brief time he had known her.

[36] He strongly rejected any such suggestion and was very specific in his denial that he ever touched her breasts, buttocks, or vagina. He testified that he is "still in shock" over the allegation.

[37] The accused was also asked about the complainant's additional allegation which was raised for the first time during cross examination. Specifically, the accused was asked about her evidence that he had been touching her throughout the evening and prior to entering the bedroom. He agreed that he did touch her. However, he stated it was a hand tap on the back saying "you are doing a good job". His evidence was that the tap on the back was in the context of them playing games and her getting "more of the scores". He stated that others were present when he tapped her on the back telling her, "Good job". His evidence went unchallenged on this point. The Crown did not ask the accused a single question about the complainant's allegation that he was touching her inappropriately during the course of the evening prior to entering the bedroom.

The Next Morning

[38] The Complainant testified that she woke the next morning at around 8:30 am or 9 am. She said good morning to the accused, grabbed her shoes, and left the dorm. She drove to McDonalds where she had breakfast. She then parked in a grocery store parking lot waiting for enough time to pass so that C.D would be awake when she returned to the dorm. She testified she returned to the dorm

around 11am or 11:30 am. She testified that she was only there for a short period of time before leaving with C.D.

[39] When she returned that morning, she recalled the following people being there; the accused, C.D, Rory, Maury, Joel, and the two females from Montreal. When asked by the Crown if she recalled having any conversation with the others she stated, “not that I recall, if there was would have been very brief”.

[40] The defence challenged the complainant on her version of events as they related to the next morning. Specifically, she was challenged on whether or not she immediately left. It was suggested to her that she did not leave right away and stayed at the dorm that morning. The complainant maintained that was not the case. She held firm in her position that she left the dorm at approximately 9 am and returned at around 11 am.

[41] Defence also suggested to her that her version of events which included leaving right away, eating breakfast at McDonalds, and waiting at the grocery store parking lot never happened. The complainant maintained that they did. When it was suggested that she ate breakfast with the others in the dorm that morning and engaged in general conversation about Texas she maintained that

she did not eat breakfast with the others. However, she did agree that it was possible that she engaged in a conversation about Texas. Her words were, “it very well could have happened yes”, “there could have been I don’t remember”, and “don’t recall conversations as it was ten months ago”. The complainant at one point lived in Texas. She also testified in cross-examination that although she didn’t eat breakfast with the others she recalls being there when the two women brought donuts and food for the others.

[42] It was suggested to her that the next morning when she and the accused woke up, she advised him that she had a headache, asked him to get her water, and was offered Advil. She testified that this interaction “never happened”, however, then qualified by saying that she did not recall him offering Advil.

[43] Finally, she was asked in cross-examination if she knew a person by the name of Daniel. She acknowledged that she did and that he was present at the dorm. The Crown redirected on various points including asking when she first met Daniel and if she recalled the names of the two women who bought donuts.

[44] Defence called evidence relating to the events of the morning after. The accused testified and so did his friend Mr. Okeniya. The accused stated he

woke up after feeling the complainant sit up in the bed. He asked her how her night was. She responded “O.K.” and advised him that she had a headache. He offered her water and Advil. He left the room, retrieved a small bottle of water, and brought it back to her.

[45] According to his narrative she did not leave right away. When she came out of the room she stayed and interacted with him and the others. It was during that conversation he learned that she had lived in Texas. As well, he was showing her songs on his phone. They discussed being fans of country music. He testified that the complainant did not leave and come back to the dorm as she stated. His evidence was that she stayed until the point where her and C.D eventually left together. She was there for breakfast, but he couldn’t recall whether or not she ate. He said he was cleaning up when she was about to leave. He was at the door when she left and was the one who closed the door behind her.

[46] Mr. Okeniya is also a student at the University. He testified that he recalled the accused coming out to get water that morning and returning to the bedroom. He also testified that he recalls the complainant spending time at the dorm that morning, being present for breakfast, socializing, and engaging in a

conversation about Texas. The Crown did not object to the evidence of Mr. Okenyia. Much of his evidence turned out to be collateral.

[47] The Crown cross-examined Mr. Okenyia extensively about his recall of the events of the next morning. The areas of cross-examination included; when he woke up, who was present at the dorm that morning, when he left the dorm that day, the breakfast, the Texas conversation. He testified that he woke at around 9 am or 10 am and left the dorm at around 12 pm or 1pm. He recalls the two women from Montreal bringing breakfast from Tim Hortons but not who was actually eating. He speculated that they "probably" brought egg McMuffins or "stuff like that". When asked if he was just assuming they brought egg McMuffins he agreed.

[48] Mr. Okenyia testified that he never participated in the breakfast and was more focused on the conversation about Texas than who was eating. He testified he didn't have a specific time as to when this conversation took place. He agreed with the Crown that the conversation could have occurred sometime between 9 am and 1 pm. He also agreed that the breakfast could have occurred sometime between 9 am and 1pm as well.

[49] The Crown specifically suggested to Mr. Okenyia that before he woke at 9 am or 10am the complainant could have left without him knowing. His reply was “I don’t know, I don’t think it’s possible because I’m not a deep sleeper”. The Crown then put to Mr. Okenyia that if she left before he was awake, he wouldn’t know. Mr. Okenyia agreed.

[50] Despite agreeing with the Crown on these points Mr. Okenyia maintained his deep-rooted position that it wasn’t possible for the complainant to have left before him that day. I listened carefully to his evidence and do not accept his entrenched position that 10 months later he is able to recall with precision that the complainant was in the dorm at all times for approximately 4 hours between the hours of 9 am and 1 pm.

[51] It is difficult to accept with confidence that Mr. Okenyia can now confidently account for the complainant’s whereabouts for the entirety of that morning. He has an unclear recall as to when the conversation about Texas occurred and when the breakfast took place. This is coupled with his eagerness to speculate on what they had for breakfast. He also maintained the exaggerated and speculative position that was impossible for her to leave without him knowing because he is not a deep sleeper. I would note as well that at the outset of cross examination he did not agree with the Crown when it

was suggested to him that his memory of what took place that morning would be better back in October 2021 than what it is today.

The Next Morning: Rebuttal & Collateral Evidence

[52] At the conclusion of the defence case the Crown applied to call rebuttal evidence. Specifically, the Crown was seeking to call evidence rebutting Mr. Okenyia's testimony relating to the events of the next morning. After holding a *voir dire,* I ruled that the Crown would be permitted to call the rebuttal evidence of the complainant's friend C.D. This was permitted despite the fact that much of Mr. Okenyia's evidence was collateral.

[53] Rather than recite the full details of the *voir dire* ruling I will attempt to provide a short overview. The collateral evidence rule seeks to preserve trial efficiency and avoid confusion and distraction by preventing the litigation of issues that have only marginal relevance. It prohibits calling evidence solely to contradict a witness on a collateral fact. In addition, the primary concern about rebuttal evidence is that in many ways it opens the door to the many dangers which can flow from allowing the Crown to split its case. It divides the Crown's case so as to sandwich the defence. The accused has the right to

remain silent and when they do choose to testify, they ought to be permitted to make such a decision in full awareness of the Crown's completed case.

[54] After having reviewed the caselaw I noted many decisions fall on the side of not permitting the Crown to call rebuttal evidence when it relates to a collateral issue **R v. Krause**, [1986] 2 S.C.R. 466, **R v. T.J.B**, [2004] N.J. No.115, **R v. Lanois**, [2003] O.J. No. 4083. However, as stated by the Ontario Court of Appeal in **R v. C.F** [2017] O.J. No. 3034 at paragraph 60:

> **60**…. The collateral fact rule is not absolute. As the Supreme Court recognized in R. v. R. (D.), [1996] 2 S.C.R. 291, evidence that undermines a witness's credibility may escape the exclusionary reach of the collateral fact rule if credibility is central to the case against an accused.

[55] Here, the defence maintained its position that any inconsistencies in the complainant's evidence with respect to the events of the next morning ought to go to her credibility and reliability. It was further argued that the Crown opened the door by calling evidence about the next morning as part of its case. In addition, there was no Crown objection when this area was explored in detail during the complainant's cross-examination. Finally, the Crown didn't object to the defence calling evidence in an effort to contradict the complainant's evidence in this area.

[56] Ultimately, there was collateral evidence before the court and the defence clearly stated in submissions at the *voir dire* that they sought to use it to undermine the complaint's credibility and reliability. Credibility and reliability are central issues to this case. As such, after considering several factors I ruled that the probative value of the rebuttal evidence outweighed its prejudicial effect.

[57] The complainant's friend C.D testified. She stated that she awoke that morning at around 9 am or 10 am but didn't leave the bedroom until about 11 am. When she went to the common area the complainant was not at the dorm. She testified that at around 12 pm she encountered the complainant at the dorm entrance, and they left.

[58] I give little weight to C. D's evidence. She was very inconsistent in her recall. At times she was unclear as to when she woke and when she actually left the bedroom that morning. She was unclear and at times provided inconsistent accounts about the number of times the complainant actually went to the dorm. Therefore, I naturally have concerns with respect to the accuracy and reliability of the details of what she now recalls about how long and when the complainant stayed at the dorm that morning.

[59] As well, she agreed during cross-examination that she told police she was witness to the conversation between the complainant and the accused where he offered her his room. She told the police that she was present and heard the complainant tell the accused that nothing was going to happen between them. However, during her testimony at trial she stated that she wasn't actually a witness to this conversation and that she only subsequently received this information from the complainant. When caught in the inconsistency she was reluctant at first to agree with counsel's suggestion that she "lied" to the police. She first attributed it to poor memory recall. However, when it was put to her a second time that she in fact "lied" she stated, "I didn't mean", "I guess yeah sure". I'm not prepared to, nor do I have to, definitively conclude that C.D "lied" to the police. However, for obvious reasons I can't attach a great deal of weight to her evidence.

Disclosure & Hospital Examination

[60] After the complainant left the dorm on October 11, 2021, she didn't speak to anyone about what had happened until two days later. She stated that the morning after the sexual assault her friend C.D was upset about having had just broken up with Rory. That morning she was focused on comforting her

friend. As well, she testified that she was in shock about her own circumstances and still trying to process what had taken place.

[61] The complainant went to the police and the hospital 2 days later on October 13, 2021. While at the hospital she had met with sexual assault nurse examiner Karen Kennedy. Ms. Kennedy completed a sexual assault examination. Ms. Kennedy testified that the examination took close to three hours. The assessment involved several intrusive things such as the examination and taking of swabs from various portions of the complainant's body including her vagina.

[62] The complainant testified that on the day she attended the hospital she waited nervously for approximately an hour and a half prior to being seen by Ms. Kennedy. She estimated the examination was between three to four hours in duration. When asked how she felt about the examination she stated it wasn't a comfortable experience considering what had happened to her.

[63] As part of the examination the complainant was examined for injury. Swabs were taken from various locations of her body. The sexual assault examination report was marked and tendered as Exhibit #1. Ultimately, the examination failed to yield any evidence supporting a sexual assault or anything which

would link such an assault to the accused. Again, I am aware of the pitfalls of stereotypical reasoning in the context of equating absence of injury with absence of sexual assault. I will turn to this later.

Position of the Parties

The Crown Position

[64] The Crown argues that the totality of the evidence points to Mr. Koge's guilt. They state that the complainant is both credible and reliable.

[65] In the Crown's view the complainant had a clear recount of the sexual assault and other material aspects of the particular evening. The Crown concedes that the complainant's evidence at times had to be frequently "flushed out" through repeated direct examination. This was particularly apparent in relation to the finer details of how the accused was touching her. However, it is argued that this should not be viewed as a concern and to some degree ought to be expected. This was a significant traumatic event for her. In the Crown's words, the complainant is a nervous young woman speaking about a sensitive topic in a room full of strangers; perfection should not be the standard. This is a very fair and reasonable point.

[66] The Crown also urges the Court to resolve the various inconsistencies within the complainant's evidence such as her testimony with respect to how much alcohol she consumed.

[67] The Crown insists that the complainant had "no motive to fabricate". As well, there was "no evidence of animosity" towards the accused. The Crown points to her post-event demeanour and conduct. She subjected herself to an intrusive sexual assault examination days later. This, they argue, can be used as circumstantial evidence to corroborate the complainant's version of events.

[68] The Crown acknowledges that the accused was not at all moved, shaken, or inconsistent during both direct and cross examination. However, his repeated denial, standing alone, should not be enough to leave the Court in doubt. The Crown reminds the Court that the trial judge, based on the totality of the evidence, is entitled to believe the complainant, and reject the denial of the accused.

The Defence Position

[69] Mr. Egereonu, for the Defence, disagrees with the Crown's assertions and submits that the Crown has not proven Mr. Koge's guilt beyond a reasonable doubt.

[70] Mr. Koge's primary position is an outright denial of the allegations made by the complainant. It is argued that the sexual contact simply did not happen.

[71] Over and above the primary position it is argued that the sexual assault is not made out on the totality of the Crown's evidence. Reasonable doubt exists not only in the totality of the evidence but is apparent when particular examination and scrutiny is given to the complainant's evidence.

[72] The Defence takes a very different view of the Crown's characterization of the complainant's evidence. They point to serious issues and concerns with respect to the reliability of her evidence. It is argued that there are number of places where her evidence is contradicted in material ways. They argue that the complainant is simply too unreliable for the court to accept guilt beyond a reasonable doubt.

[73] Mr. Egereonu characterized the complaint's evidence as being inconsistent and uncertain. He contrasts this with the testimony of his client who was not evasive, and forthright in his answers. It is the defence position that Mr. Koge's testimony should properly be considered in conjunction with the totality of the evidence. It is argued that reasonable doubt is also reinforced when his evidence is considered in the context of Mr. Okeniya's testimony.

These three things, the accused's testimony, the frailties within the complainant's evidence, and the supporting evidence of Mr. Okeniya ought to collectively raise a reasonable doubt.

Analysis: Evidence of the Next Morning

[74] Simply put, much of the evidence relating to the next morning is collateral. In essence, both Crown and Defence took a side journey through the weeds. Naturally, within a busy and demanding trial this sometime happens. As a result, some legal untangling was required. All of this leads me to conclude that nothing in this decision turns on the evidence relating to the next morning.

[75] First, as stated much of it is collateral. Second, even if I accept the defence position that this otherwise collateral evidence can be used to make findings of credibility and reliability against the complainant the evidence does not support such a conclusion. I am unable to accept the defence position that the complainant is unreliable or even inconsistent on her evidence relating to the next morning. She openly acknowledged that she may have taken part in the conversation about Texas and did speak to others that morning. She even recalled the two women from Montreal picking up breakfast.

[76] It is still quite reasonable to accept that she did leave and return as she testified. As well, and I will outline later, I am consciously aware of how a great deal of this "next morning" evidence brushes dangerously with the pitfalls of stereotypical reasoning. I will turn to this later.

Analysis: Hospital Examination and Post-Event Demeanor

[77] The Crown has argued that the Court should give consideration and weight to the fact that the complainant willingly subjected herself to an intrusive sexual assault examination days later. In support of their argument, they draw the Court's attention to two cases, **R. v. Mugabo**, 2017 ONCA 323 and **R. v. Percy**, 2020 NSSC 138.

[78] The Nova Scotia Supreme Court in **R. v. Percy**, *supra* cited **R. v. Mugabo**, *supra* at paragraph 113:

> **113** This use of post-event demeanour evidence was approved in *R. v. Mugabo*, 2017 ONCA 323, where Gillese J.A. stated, for the court:
>
> …….
>
> 25 It is well-established that this court owes deference to a trial judge's findings of fact, including credibility findings. In the present case, the trial judge's credibility assessment of the complainant was informed by a number of factors,

> including the complainant's observed physical injuries by a trained sexual assault nurse which corroborated the complainant's version of events, the complainant's willingness to undergo the invasive sexual assault examination, and the complainant's demeanour immediately after the assault (crying "hysterically" and shouting that the appellant had had sex with her without her consent). It has long been held that post-event demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events ... [Citations omitted.]

[79] The Ontario Court of Appeal at paragraph 25 in **R. v. Mugabo,** *supra* endorsed the position that post-event demeanour of a sexual assault complainant can serve as circumstantial evidence to corroborate the complainant's testimony. As well, In **R. v. Mugabo**, *supra*, the Ontario Court of Appeal held that the trial judge could take into account the fact that the victim went through a very onerous sexual assault examination.

[80] In this case, it is clear A.B went to the hospital. The examination was physically intrusive. It was also mentally and emotionally intrusive as testified to by the complainant. She stated she was nervous, and it was not a comfortable experience in light of what she alleges happened to her. I do not question the immense trauma such an examination must inflict upon a complainant. However, I wish to be clear. The fact that a complainant pursues a complaint does not lockstep equate it to the guilt of an accused. This would effectively shift the onus of proof from the Crown to the accused.

[81] The reality that A.B ultimately agreed to participate in what was described as a physically invasive and emotionally intrusive sexual assault examination may be supportive of credibility. However, it is certainly not determinative. There is a danger in assigning it undue weight so as to effectively jump to a conclusion that the complainant must therefore be telling the truth. It is one consideration amongst many. As such, I will give it limited weight in the context of the whole of the evidence. It will be added into the global mix when it comes time to consider the many other aspects of complainant's credibility and reliability.

Myths and Stereotypes

[82] It is important that I take a moment and outline a few things regarding myths and stereotypes. I will do so in the context of my examination of the trial evidence and to some extent in response to counsel's submissions.

The Complainant's Consumption of Alcohol

[83] Both Crown and Defence asked several questions about what and how much alcohol the complainant consumed on the evening of the alleged sexual assault and on the prior occasion. I will later turn to various inconsistencies in her evidence with respect to this. However, I do not use those inconsistences or

the evidence of her drinking underage for any impermissible purpose. Her consumption of alcohol, regardless of her age or amount, does not make her a person of bad character, less worthy of belief, or more likely to have consented.

Sharing the Bedroom, Attending the Gatherings, and Exchanging Contacts

[84] I'll be clear, regardless of whether it was the accused who offered his bed to the complainant or her who made the request, this is of no material relevance when it comes to assessing credibility. As well, it is of no consequence that she stayed in the bedroom on a previous occasion. It is not evidence upon which consent to any sexual activity can be made. Equally it is not a permissible basis upon which to engage in speculative stereotypical inferences about the complainant's credibility.

[85] To some degree this is so obvious that it need not be stated. However, this point of evidence appears to have crept into closing submissions in as far as defence counsel's reference to him treating her like a "gentleman". Defence also placed emphasis on the accused's testimony that it was the complainant who insisted, over his initial reluctance, that they share a bed that evening. I do not accept, nor will I engage in any speculation that she somehow invited him

into the bedroom as a way of setting him up for a later fabrication. There is no evidence before the Court to support this. Likewise, socializing with the accused, exchanging snap chat contacts, and keeping in touch after the first encounter is not evidence upon which consent to sexual activity can be made. Equally, no impermissible inferences of credibility against the complainant will or ought to be drawn by virtue of those facts. Simply put, there is nothing to see here.

The Complainant's Post Assault Conduct

Staying The Night with The Accused and Interacting the Next Morning

[86] After the alleged sexual assault, the complainant stayed the night with the accused, interacted with him the next morning and at one point may have returned to the dorm after leaving the first time. This is often referred to in the case law as post-contact avoidant behaviour. The lack of avoidant behavior on part of the complainant tells the court nothing and that's how I've treated it here. See **R v. ARD**, 2017 ABCA 237 affirmed on appeal 2018 SCC 6, at paras 39-42, 44 :

> **What can lack of avoidant behaviour tell a trier of fact?**
>
> **39** The more important question is what, if anything, can evidence of a lack of avoidant behaviour by a complainant

tell a trier of fact about a sexual assault allegation? The answer is simple--nothing.

40 There was no explanation provided by the trial judge for the relevance of his conclusion that there was no evidence of avoidant behaviour by the complainant, other than in the context of an *expectation* that post-assault a victim generally, or this particular complainant, would avoid the perpetrator. Where that expectation was deemed to be unmet, it led to a direct finding against the complainant's credibility--that her behaviour was not "consistent with [the] abuse" alleged.

41 First, there is a troubling circularity about the sought for avoidant behaviour, in that "avoidance" defines an interactional aspect of this particular interpersonal relationship which could be equally attributable to both the respondent and the complainant, or to neither of them. Its presence or absence signifies nothing in particular in relation to the credibility of the complainant about the alleged sexual assaults.

42 Second, it has long been recognized that there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave": ***R v D(D)*** at para 65. Just like the failure to make a timely complaint, a failure to demonstrate avoidant behaviour or a change in behaviour "must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse" [emphasis in original]: ***R v D(D)*** at para 63.

44 Stereo typicality is never a legitimate anchor on which to tie crucial credibility assessments in the context of sexual assaults. And counter-stereo typicality must never translate to less credibility.

[87] Defence has not established a basis of relevance for the fact that the complainant spent the night with the accused after the alleged sexual assault. I do not see any nexus of relevance to an issue before this court. As well, I wish to be clear that the complainant's credibility is not impacted in any way by the fact that she spent the night with the accused after having allegedly experienced a sexual assault.

Removing herself from the situation

[88] The Crown and Defence asked the complainant questions about how she reacted to being touched by the accused. She stated she "froze", "felt stuck", felt "fear", "powerless", "didn't know what to do". The Supreme Court of Canada has repeatedly stated that a complainant is not expected to take preventative action or act in a certain way. It is wrong to expect that a complainant will resist, scream, fight back, or remove herself from the situation. Any lack of resistance or passivity cannot be equated with consent or lack of credibility. Finally, the complainant was not required to express her lack of consent for the actus reus to be established. See **R v. Seaboyer**, [1991] 2 SCR 577 at paras 147-148, **R v. Ewanchuk**, [1999] 1 SCR 330 at paras 51-52, and **R v. JA**, 2011 SCC 28 at para 4, **R v. DD**, 2000 SCC 43 at para 65, **R v. JR**, 2016 ABQB 414 at paras 25-26.

Delayed Reporting

[89] Simply because the complainant did not disclose or report the events until days later does not mean that her testimony or evidence is in any way less credible. There is no logical connection between the genuineness of her complaint and the promptness with which she made her disclosure. Despite being asked during direct examination why she didn't tell her friend C.D the next morning, such an explanation was not necessary. The case law is clear, a delay in disclosure alone will never give rise to an adverse inference against the complainant's credibility. See **R v. DD**, 2000 SCC 43 at paras 63 and 65.

Corroboration: The Sexual Assault Nurse Examination

[90] Section 274 of the *Criminal Code* is very clear; corroboration is not required for a conviction in sexual assault cases. A complainant's evidence does not require corroboration nor is it permissible for a court to expect such evidence. Sexual violence does not always leave physical evidence such as marks or DNA. See **R v. JA**, 2011 SCC 28 paragraph 61.

Legal Framework for Analysis

Credibility

[91] The following principal was clearly and concisely articulated by Judge Jamie Campbell, as he then was, in **R v. E.M.W**, 2009 NSPC 33

(reversed 2010 NSCA 73; appeal allowed and conviction restored, 2011 SCC 31) at paragraph 4:

> **4** The criminal trial process is not about determining "what happened". When there are two diametrically opposed versions there is a natural inclination to resolve that issue by picking a side. Following that natural inclination deprives the accused person of the fundamental right to be presumed innocent unless his or her guilt has been proven beyond a reasonable doubt.

[92] This case will require consideration of the credibility of witnesses, including the complainant. There was conflicting evidence provided at trial between the complainant and the accused. The accused testified. Therefore, the Court must examine the standard of proof beyond a reasonable doubt in accordance with the framework as set out by The Supreme Court Canada in **R v. W. (D).**, [1991] 1 SCR 742:

> 1. If I believe the testimony of the accused, I must find him not guilty.
>
> 2. If I do not believe the accused's evidence, but the evidence leaves me with a reasonable doubt, I must find him not guilty.
>
> 3. Even if the accused's evidence does not leave me with a reasonable doubt, I must ask myself whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt of the guilt of the accused.

[93] Finally, if I am left in a position where I do not know who or what to believe, this is doubt. In such a scenario the accused is entitled to the benefit of that doubt.

Assessing Credibility: The Difficult Task

[94] In **R. v. G.F**., 2021 SCC 20, the Supreme Court of Canada stated at paragraphs 81 and 82 :

> **81**…. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence, and articulating reasons for findings of credibility can be more challenging. Mindful of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the accused is found not to be credible, or why the evidence does not raise a reasonable doubt. But, as this Court stated in *Gagnon*, at para. 20:
>
> > Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.
>
> **82** Credibility findings must also be assessed in light of the presumption of the correct application of the law, particularly regarding the relationship between reliability and credibility. ...

Assessing Credibility: The Accused's Evidence

[95] In **R. v. Lake**, [2005] N.S.J. No. 506, the Nova Scotia Court of Appeal noted the following with respect to **R. v. W.(D.)** at paragraph 22:

> **22** The analysis of both the accused's testimony and the Crown's evidence is done with full knowledge of all the evidence that has been adduced at the trial. The first W. (D.) question does not vacuum seal the accused's testimony for analysis. In W.(D.), p. 757, Justice Cory cited R. v. Morin, [1988] 2 S.C.R. 345 which, at pp. 354-55, 357-58, rejected the piecemeal analysis of individual segments of evidence for reasonable doubt. The point of W. (D.)'s first question is not to isolate the accused's testimony for assessment, but to ensure that the trier of fact actually assesses the accused's credibility, instead of marginalizing it as a lockstep effect of believing Crown witnesses.

[96] I also take guidance from what the court stated in **R v. E.M.W**, *supra* at paragraphs 29 and 30:

> **29** In a case comment on **R. v. C.L.Y.** (supra), Professor Janine Bennett points out that the process of assessing credibility is not a simple weighing of evidence.
>
> > But the evidence should be assessed in light of any contradictory (or confirmatory) evidence led by the accused. This is not necessarily because of concerns about the burden of proof, since it is possible to believe the complainant without the next step of making a finding of guilt, but because the credibility of the complainant cannot be assessed solely on the basis of whether her evidence is internally convincing and consistent. The task of the trial judge is to synthesize

> the evidence from various sources on each element of the offence so as to make finding of fact on the whole of the evidence. The concurring justices warn that to do otherwise increases the risk that the trial judge may approach the accused's evidence looking for reasons to discount it. Unfortunately, the court did not see the case as an opportunity to consider the shortcomings of W. (D.) in sexual assault trials, in particular the principle that the evidence of the accused may raise a reasonable doubt even if disbelieved. Annotation, R. v. Y.(C.L.), 53 C.R. (6th) 207.
>
> **30** Professor Ronalda Murphy in "S. (J.H.): A New and Improved W.(D.)", (2008), 57 C.R. (6th) 89, refers to the efforts of the Supreme Court of Canada as a "serious attempt to put a brake on the runaway train of W.(D.)" and return to the main point that lack of credibility of the accused does not equate to proof of his guilt.

Assessing Credibility: The Complainant's Evidence

[97] In **R. v. Jaura**, [2006] O.J. No. 4157 the Ontario Court of Justice concisely outlined how a complainant's evidence ought to be considered in the context of the totality of the trial evidence:

> **20** In summary, it is my view that the case law establishes that, in a "she said/he said" case, the Rule is that a trial judge can reject the evidence of an accused and convict solely on the basis of his acceptance of the evidence of the complainant, provided that he also gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding his acceptance of the complainant's evidence.

> **21** Quite apart from case authority, there is ample reason to conclude that this must be the Rule. If it were, otherwise, there would effectively be a legal corroboration requirement imposed in these cases and the undoing of years of reform in this area. Alternatively, the issue of guilt would turn on whether the trial judge could identify and articulate that little something extra over and above the complainant's evidence - that flaw in the accused's evidence or its presentation - that would become the additional crumb on which a conviction could be supported. Reasons for judgment would become an exercise in highly subjective nit picking of the accused's evidence, disingenuously disguising the real reason for its rejection. ...

[98] I should add, a criminal trial is not a contest in who can call the most witnesses. One very credible and reliable crown witness can, after an assessment of the totality of the evidence, lead a court to convict. This can even be so in the face of testimony from numerous defence witnesses.

Assessing Credibility: Not a Credibility Contest

[99] This is not a "credibility contest". Where credibility is important the issue is not merely a choice between two versions of events **R v. J.H.S**, 2008 SCC 30. Even if I were to prefer the complainant's narrative to the one offered by the accused, it does not resolve whether I have a reasonable doubt about the accused's guilt. There are other options requiring acquittal, including "the legitimate possibility" that I am unable to resolve the conflicting evidence and am accordingly left in a reasonable doubt.

[100] The overriding consideration is whether the evidence as a whole leaves the trier of fact with any reasonable doubt about the guilt of the accused. The evidence favourable to the accused must be assessed and considered with the conflicting evidence offered by the Crown as a whole, not in isolation. I can accept all, some, or none of a witness's evidence.

[101] In R. **v. D.F.M.**,2008 NSSC 312, Murphy J. stated at paragraph 9:

> **9** Assessing evidence is not a credibility contest. It is not a matter of which witness is believed, and who is disbelieved. The Court is able to accept some or all of a witness' evidence. Those principles are highlighted by the Supreme Court of Canada in R. v. S. (J.H.), 2008 SCC 30 (S.C.C.). I also refer to R. v. F. (S.), 2007 PESCAD 17 (P.E.I.C.A.) and in particular, para. 31 where the Court said as follows with respect to the credibility issue:
>
> > A conviction can only come about if the Crown evidence is so reliable, so consistent and so believable that it proves beyond a reasonable doubt the guilt of the accused. There must be no other reasonable conclusion from the evidence. If there is any reasonable doubt remaining after you hear the evidence of the Crown, either because of inconsistencies, unreliability, a lack of credibility or anything else, the Court must acquit -- no matter what you thought of the accused's evidence.

[102] The Court must consider all the evidence and even where the Court finds the complainant credible the onus never shifts to the accused. This was concisely articulated by the Court in **R v. E.M.W**, *supra* at paragraph 47:

> **47** The concepts of "accepting" and "rejecting" evidence are a convenient judicial shorthand. For a trial judge they may not always accurately reflect that more complicated relationship between doubt and belief. In some cases, the evidence of the complainant may be found to be more reliable, believable, or credible. The evidence of the accused may be much less reliable, believable, or credible. That does not mean that his evidence may not be just reliable, believable, or credible enough to raise a reasonable doubt in light of the remaining scope of doubt left by the complainant's evidence. It is not only appropriate, but necessary for judges to consider all the sources of reasonable doubt. The sources may include the doubt left by the complainant's evidence, the doubt created by the evidence of the accused, the doubt found in any other evidence or the doubt arising from the combination of those sources.

Assessing Credibility: The Relationship Between Credibility and Reliability

[103] There are two parts to the credibility equation. In **R v. Baxter**, [2019] N.S.J. No.400 Justice Hunt stated at paragraphs 13-15:

> **13** On the issue of assessing the evidence of witnesses the Court is aware of the many cases governing the analysis of witness testimony. What we sometimes refer to as the "credibility" of a witness really is comprised of two distinct components of creditworthiness:
>
> 1. Honesty of recollection.
>
> 2. Reliability of recollection.
>
> **14** Honesty speaks to the sincerity and candour of a witness's evidence while reliability relates more to such factors as the witness's individual perception, memory and

> clarity. Both sides of the equation -- honesty and reliability -- impact the credit that can be afforded to testimony. A judge may consider all, none or some of a witness's evidence depending on the findings. A judge may apply different weight to different portions of the evidence which is accepted.
>
> **15** A foundation for reasonable doubt can be found in any witnesses' testimony. So too, a finding of guilt may be safely grounded on the evidence of a single witness if, of course, it is found sufficiently credible and persuasive to meet the exacting burden of proof. In assessing the credibility of testimony, I am aware of the factors which have been pointed to by courts as helpful to this process. On this point I have found ***R. v. Farrar***, 2019 NSSC 46 to be instructive.

[104] Credibility and reliability are interwoven but not the same. There is a tight co-existing relationship between credibility and reliability. I take guidance from the Nova Scotia Supreme Court in **R v. J.J.C.** [2014] NSJ No.164 at paragraphs 30-33 and 35:

> **30** In historical sexual offence cases, the distinction between credibility and reliability is essential in the analysis of the witness's evidence.
>
> **31** Credibility has to do with a witness's veracity. Reliability deals with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and

recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. However, a credible witness can be honestly mistaken (Justice Michelle Fuerst, Mona Duckett, Q.C. and Judge Frank Hoskins, **The Trial of Sexual Offence Cases** (Toronto: Carswell, 2010) 58, **R. v. C. (H.)**, [2009] O.J. No. 214 (Ont. C.A.) and **R. v. Morrissey** (1995), 1995 CarswellOnt 18 (Ont. C.A.).

32 Justice P. Rosinski in **R. v. C.R.H.**, 2012 NSSC 101 commented on the relationship between credibility and reliability at para 35:

> [35] ... a witness's credibility is a mixture of their reliability (are they now recalling matters they had a proper opportunity to observe and commit to memory in the past?) and impartiality or honesty (are they disinterested in the outcome of the case and do not favour any party over another?).

33 At page 30-2 of the text **McWilliams, Canadian Criminal Evidence** (Toronto: Canada Law Book, 2013), the authors express the relationship this way:

> What do we mean by credibility? In order to answer this question, it is necessary to separate the truthfulness of the witness ... from the factual accuracy of his or her evidence. With respect to the credit prong of credibility, we ask whether the witness is worthy of belief? In other words, are we confident that the witness is trying to be truthful and not deceiving us. Having satisfied ourselves of this, we move on to the second inquiry. Is the factual content of the witness's evidence trustworthy or reliable? For example, are we confident that the witness has accurately recalled or observed whatever he or she is testifying about. Once we are satisfied that the witness is trying to be truthful and that his or her account is reliable, we can safely conclude that the evidence is credible.

Assessing Credibility: Helpful Guidelines

[105] There is certainly no set formula or standardized checklist for trial judges to use when assessing credibility. However, I do again take guidance from the Nova Scotia Supreme Court in **R v. J.J.C.**, *supra* at paragraph 35:

> **35** While it is true that no formal rules for the assessment of credibility can be enunciated, a general framework often cited is found in the reasons of Justice Mossip in **R. v.**

Filion [2003] O.J. No. 3419 (S.C.J.) which provides the following questions:

> 1.Does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable?
>
> 2.Does the witness have any interest in the outcome of the case, or any reason to give evidence that is more favorable to one side than to the other?
>
> 3.Does the witness seem to have a good memory? Does any inability or difficulty that the witness has in remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions?
>
> 4.Does the witness's testimony seem reasonable and consistent as he/she gives it?
>
> 5.Do any inconsistencies in the witness's evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because he or she failed to mention something? Is there any explanation for it? Does it make sense?
>
> 6.The manner in which a witness testifies may be a factor, and it may not, depending on other variables with respect to a particular witness.

[106] The following factors were identified in **R v. Farrar**, *supra* as helpful in assessing credibility.

a) honesty;

b) interest in the proceeding (but not their status as a party);

c) accuracy and completeness of observations;

d) circumstances of the observations;

e) memory;

f) availability of other sources of information;

g) inherent reasonableness of the testimony;

h) internal consistency, including consistency with other evidence; and,

i) demeanour, but with caution, as guided by caselaw

[107] Similarly, the Court in **R. v. DLC** [2001] N.S.J. No. 554 is of great assistance. In particular, the Court stated at paragraph 8:

> And I certainly keep in mind in this case, as well, that the task of finding the facts ... involves the weighing of the evidence but it is certainly not an exercise in preferring one witness' evidence over that of another. And of course, that's because the doctrine of reasonable doubt applies to the issue of credibility ...
>
> I'm going to indicate some aspects of a witness's testimony that I find helpful, and this determination is as follows. They are in no particular order:
>
> The attitude and demeanor of the witness. I ask whether the witness is evasive, belligerent, or inappropriate in response to questions and I keep in mind the existence of prior inconsistent statements or previous occasions where the witness wasn't truthful. Those are useful to me.

> I consider the external consistency of the evidence. And by that, I mean, is the testimony of the witness consistent with independent witnesses which is accepted by me, the trier of fact; and
>
> I consider the internal consistency of the testimony. By that I mean, does the witness' testimony or evidence change while on the stand.
>
> I concern myself with whether the witness has a motive to lie or mislead the Court. I consider the ability of the witness to originally observe the event, to record it in memory and recall the event; and

[108] This first point takes me to the role of demeanour in assessing credibility. From my review of the authorities, I must be very cautious with demeanour. It is often of little value and can actually distort the credibility analysis.

Assessing Credibility: The Role of Demeanor

[109] The Nova Scotia Court of Appeal has provided trial Judges with direction and guidance on the use of demeanour evidence generally in assessing witness credibility. Justice Beveridge in **R. v. W.J.M.**, 2018 NSCA 54 wrote at paragraph 45:

> **45** First of all, courts have long recognized that reliance on demeanor must be approached with caution. It is not infallible and should not be used as the sole determinant of

credibility. This was succinctly summarized by Epstein J.A., writing for the Court in R. v. Hemsworth, 2016 ONCA 85:

> [44] This court has repeatedly cautioned against giving undue weight to demeanour evidence because of its fallibility as a predictor of the accuracy of a witness's testimony: Law Society of Upper Canada v. Neinstein, 2010 ONCA 193, 99 O.R. (3d) 1, at para. 66; R. v. Rhayel, 2015 ONCA 377, , 324 C.C.C. (3d) 362. As I indicated in Rhayel, at para. 85, "[i]t is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom."
>
> [45] Although the law is well settled that a trial judge is entitled to consider demeanour in assessing the credibility of witnesses, reliance on demeanour must be approached cautiously: see R. v. S. (N.), 2012 SCC 72, [2012] 3 S.C.R. 726, , at paras. 18 and 26. Of significance in this case is the further principle that a witness's demeanour cannot become the exclusive determinant of his or her credibility or of the reliability of his or her evidence: R. v. A. (A.), 2015 ONCA 558, 327 C.C.C (3d) 377, at para. 131; R. v. Norman (1993), 16 O.R. (3d) 295 (C.A.), at pp. 313-14.

Summary: The Legal Framework

[110] Finally, and most recently, the Nova Scotia Court of Appeal in **R v. Gerrard**, [2021] N.S.J. No. 313 (Affirmed: Supreme Court of Canada [2022] S.C.J. No. 13) stated at paragraph 36:

> **36** The dangers *W.(D.)* addresses are the potential for simply comparing stories (picking a side) and for shifting the onus to the accused, *R. v. Vuradin*, 2013 SCC 38, para. 26.

[111] In assessing the evidence, I repeat, I must never lose sight of the following four things as outlined by the Nova Scotia Court of Appeal in **R v. Gerrard**, *supra* at paragraph 38:

> **38** The judge's lengthy recitation of the law in her reasons indicates she properly instructed herself on proof beyond a reasonable doubt, the presumption of innocence, the necessity to consider the evidence of each witness in the context of the evidence as a whole and the prohibition against a credibility contest.

Elements of the offense: Sexual Assault

[112] As per the Supreme Court of Canada in **R. v. Ewanchuk** [1999] 1 S.C.R. 330, in order to secure a conviction for sexual assault the Crown must prove the following elements of the offence beyond a reasonable doubt:

> i) Touched the victim;
>
> ii) in a manner such that he has violated the sexual integrity of the victim [all the circumstances surrounding the relevant conduct must be examined in an objective fashion to determine whether the conduct was of a sexual nature and violated the victim's sexual integrity];
>
> iii) in the absence of consent to do so from the complainant [the absence of consent is subjective. It is determined by

> reference to the victim's internal state of mind towards the touching when the touching takes place]; and that
>
> iv)the accused intended to touch the victim, and
>
> v) that the accused had knowledge of, or was reckless, or willfully blind regarding the victim's lack of consent

Analysis

[113] I listened carefully to the accused. He never tried to force his evidence. He didn't attempt to force fine specifics for things which were otherwise peripheral to past events. For example, he was asked about consuming alcohol. He was forthright in that he couldn't recall exactly what he was drinking on October 7th other than to say it was a mixed drink in a cup. He was asked in cross examination if he could recall what others were drinking or how much they had consumed. He stated he couldn't remember other than to say that they were drinking and that he recalls seeing vodka cans, vodka bottles, and a bottle of Martini. Similarly, he stated he couldn't recall exactly what alcohol the complainant was drinking on October 10th.

[114] The accused didn't attempt to deflect questions specific to his conduct towards the complainant or others. He didn't deflect when the focus was on him, what he did, how he acted, or what his intentions were. He met questions head on and never avoided giving a reflective answer. He was asked in cross

examination what time the complainant and C.D left the dorm the next day. He stated, “midday-ish”. When pressed by the Crown to be specific on the time he said his best estimate would be between 11:30 am and 1pm. He was clear he couldn’t give a specific time. The court would naturally have concerns if he had been able to recall uneventful details with precision so long after the fact.

[115] The accused was pressed hard in cross examination about the possibility that he was intoxicated on October 10th. He answered, “I don’t think I was”. It was suggested to him that given his words of “I don’t think I was”, it was possible he was intoxicated. Rather than simply repeat his position or avoid answering he was very candid. He took the time to articulate for the Crown why he didn’t believe he was intoxicated. He said he recalled doing various things just before entering the bedroom that night which included cleaning up the common area and having a conversation with his roommate. He said his memory was clear the next morning. His answer was reasonable and rational.

[116] Essentially, there were no material inconsistencies to be found in his testimony. Mr. Koge was not caught up in any lie, glaring contradiction, or in any internal contradictions. I watched to see if the accused’s testimony

contained any sudden strategic lapses in memory suggestive of an effort to avoid conceding things put to him. None were present.

[117] As well, there was no difference in the nature of how the accused answered questions posed to him by either his own lawyer or the Crown. His answers were never such that they were suggestive of warding off a question or to pivot the topic in another direction.

[118] During cross examination the Crown pursued the theory that the accused may have been using his friend Mr. Okenyia as a way of bolstering his narrative relating to the events of October 10th. He was asked by the Crown where he was from. He stated Cameroon. He was asked if he had many friends, he stated no. He was asked if Mr. Okenyia was a close friend, he said yes. He agreed that Mr. Okenyia was someone he could count on if he needed help. The accused didn't battle with the Crown, interrupt, or pre-empt what was an otherwise obvious attempt at exploring the idea that the accused was simply trying to create a self-serving narrative bolstered by his friend.

[119] The Crown pressed the accused on the allegations as they related to the events within the bedroom. It was suggested to him that he touched her breasts, buttocks, and vagina without her consent while they were in the

bedroom. He was unwavering in his evidence that this did not happen. There were no inconsistencies, contradictions, or aspects of unreliability when it came to his recollection.

[120] I am not prepared to conclude that I outright believe the accused or accept his evidence at face value solely based on his repeated denials. However, his evidence didn't have hallmarks of a scripted studied narrative. He was prepared to acknowledge when he may have been mistaken on certain innocuous points and was essentially unmoved in his evidence. Notably, the Crown readily acknowledged during closing submissions that the accused was unmoved in his evidence.

[121] I also listened carefully to the testimony of the complainant and her responses to various types of questions. A.B was at times emotional when she gave her evidence. She consistently maintained throughout both her direct and cross examination that she was sexually assaulted by the accused.

[122] Although the complainant cried at certain points while giving her evidence, I approached this cautiously when it came to my analysis in this case. At the end of the day the most reliable and objective way for me to

assess her credibility was to examine her evidence and how that evidence interfaced with the totality of the evidence.

[123] In assessing A.B's evidence, I keep in perspective the comments of the Ontario Court of Appeal, in **R. v. HPS**, 2012 ONCA 117. It is more than simply being satisfied as to the sincerity, and believability of the witness. This alone is not sufficient. I must be equally satisfied about A. B's reliability. The Ontario Court of Appeal in **R. v. HPS**, *supra* stated at paragraphs 35 and 36:

> **35** Memory is fallible. Courts have long recognized that even an apparently convincing, confident and credible witness may not be accurate or reliable and that it is risky to place too much emphasis on demeanour alone where there are contradictions and inconsistencies in the evidence: see *R. v. McGrath*, [2000] O.J. No. 5735 (S.C.), at paras. 10-14; *R. v. Stewart* (1994), 18 O.R. (3d) 509, at pp. 515-18; *R. v. Norman* (1993), 16 O.R. (3d) 295, at pp. 311-15. As Finlayson J.A. noted in *Stewart*, at pp. 516-17:
>
> > It is evident from his reasons that the trial judge was impressed with the demeanour of the complainant in the witness box and the fact that she was not shaken in cross-examination. I am not satisfied, however, that a positive finding of credibility on the part of the complainant is sufficient to support a conviction in a case of this nature where there is significant evidence which contradicts the complainant's allegations. We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not

> the sincerity of the witness but the reliability of the witness's testimony. Demeanour alone should not suffice to find a conviction where there are significant inconsistencies and conflicting evidence on the record: see *R. v. Norman* for a discussion on this subject. [Citations omitted; emphasis added.]

[124] Evidence can be provided sincerely and may be sincerely believed by the person giving it, yet it may not be accurate or reliable. The issue here is not merely whether A.B sincerely believes her evidence to be true; it is also whether her evidence is reliable. The reliability of her evidence is what is paramount.

[125] I am prepared to accept that A.B has tried to honestly put forward her recollections of the events, as she believes them to have occurred. It is that latter caveat, however, that is of prime importance in this case. I have significant concerns with the reliability of A. B's evidence and will outline several examples.

[126] First, the complainant's evidence at times can be described as tentative. It lacked certainty. At times when she gave her answers she looked for reassurances that she was giving the correct answer. For example, she was asked by the Crown what hand the accused used to touch her while in bed. She at first answered in the form of a question, "his right hand?". The Crown then

asked her if she might be guessing and she stated, “pretty positive it would have been his right hand”. Her answers were repeatedly qualified with phrases such as, “I guess”, “if I had to guess”, “if I believe correctly”, “kind of”, “I don’t know how to really explain”, “maybe if I had to say”.

[127] I am mindful of what the Crown has properly pointed out during closing submissions. This is a young woman speaking about a very sensitive subject matter in an unfamiliar setting. However, it wasn’t just a few occasions where the complainant spoke in qualified language when describing material aspects of the allegation. It was frequent. This standing alone is hardly enough to discount her evidence broadly and unfairly. Nevertheless, it is one of several things I have considered when examining the reliability of her evidence.

[128] Second, the complainant testified that there were two nights where she had stayed overnight at the dorm. She was asked in cross examination why she failed to disclose this to police. Specifically, she didn’t tell the police that she was also at the dorm on October 7th. Her response when asked was, “I thought I did”. It was not in her statement. After reviewing her statement, she stated, “I guess I don’t really know what to say, I was obviously really stressed out and things are forgotten all the time”. Again, the fact that she spent any night at the

dorm is not evidence for which the Court will infer consent or draw an impermissible stereotypical inference. However, I can use the absence of the disclosure and the subsequent internal inconsistency in her narrative for another permissible purpose. I have considered it as part of the greater whole in assessing her reliability in recalling her specific interactions with the accused.

[129] Third, the complainant testified during cross examination that when the accused put his hand inside her shirt she tried to "block off her body". She stated she crossed her arms over her chest. After he put his hand down her pants, she curled up her legs. The complainant's direct examination was devoid of any evidence in relation to blocking off her body. She was asked why she didn't testify to this in direct. Her answer was very similar to when she was challenged in cross-examination about her direct testimony being devoid of the unwanted touching earlier in the evening. Her response in cross-examination was simply, "he didn't ask". This was in reference to not being specifically asked by the Crown. As noted, during direct examination the Crown spent a great deal of time and care with the complainant in reviewing the detailed aspects of what occurred while they were in the bed.

[130] Again, it is impermissible stereotypical reasoning to expect that a complainant would fend off her attacker or draw any conclusions or assessments based on what a complainant did or didn't do. However, this material expansion of her evidence in cross examination was very different than her direct evidence. It can be used in assessing the internal consistency of her testimony and ultimately her reliability.

[131] Fourth, the complainant's evidence during cross examination also evolved in several ways on other points of evidence. The complainant was questioned in cross- examination about her level of alcohol consumption on October 10th. She was confronted with the possibility that she had consumed more than two drinks. She stated, "I had a few. I don't remember exactly how many I had as it was so long ago". Her testimony during cross-examination of not remembering how many drinks conflicts with her very clear direct testimony that she only had one or two drinks in total that evening.

[132] Fifth, she was cross-examined about the alleged vaginal touching. It was revealed for the first-time during cross-examination that there had been digital penetration. The Crown in re-direct asked the complainant why she didn't testify to this in direct and she stated, "I don't know, I really don't have an answer for you". When asked during cross-examination if she was awake

when the touching occurred, she stated, “Yes, I was in that halfway, awake, sleep, kind of asleep with one eye open sort of situation”.

[133] It is not unusual or alarming to find various discrepancies between a police statement and trial testimony. As well, it is to be expected that there could be some variation between direct-examination and cross-examination. Courts have cautioned against arbitrarily applying too high of a standard when it comes assigning weight to inconsistencies especially on peripheral details relating to matters of marginal relevance. However, here the areas of concern were not peripheral details or on matters of marginal relevance. The complainant had reliability issues when it came to core aspects of the very allegation before the court and her interactions with the accused.

Absence of Motive to Fabricate

[134] There is no onus on an accused to prove that a complainant had a motive to invent a false allegation. This issue was never really a live issue at trial in the sense that defence didn’t push it forward. Defence did not advance this theory during cross-examination, through the calling of defence evidence, or during closing argument. Despite this, the Crown argued in closing that the

Court should place emphasis on the fact that the complainant had “no motive to fabricate”.

[135] Naturally, there is an innate desire to search for, understand, and attach meaning to human motivation. However, a few strong cautions have emerged from appellate courts. Most recently the Supreme Court of Canada in **R v. Gerrard**, [2022] S.C.J. No.13 stated at paragraph 4:

> **4** ….. Lack of evidence of a complainant's motive to lie may be relevant in assessing credibility, particularly where the suggestion is raised by the defence (*R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at paras. 10-11; *R. v. Ignacio*, 2021 ONCA 69, 400 C.C.C. (3d) 343, at paras. 38 and 52). Absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, is a common sense factor that suggests a witness may be more truthful because they do not have a reason to lie. That said, when considering this factor, trial judges must be alive to two risks: (1) the absence of evidence that a complainant has a motive to lie (i.e. there is no evidence either way) cannot be equated with evidence disproving a particular motive to lie (i.e. evidence establishing that the motive does not exist), as the latter requires evidence and is therefore a stronger indication of credibility -- neither is conclusive in a credibility analysis; and (2) the burden of proof cannot be reversed by requiring the accused to demonstrate that the complainant has a motive to lie or explain why a complainant has made the allegations (*R. v. Swain*, 2021 BCCA 207, 406 C.C.C. (3d) 39, at paras. 31-33).

[136] The Ontario Court of Appeal in **R v. M.S.**, 2019 ONCA 869 stated at paragraph 16:

> **16** This court has provided ample direction on the permissible use of a motive to fabricate in assessing credibility at the trial level. A misplaced emphasis on motive overlooks the fact that motive is, at best, a secondary consideration, and offers limited assistance to either party when sexual offences are in issue. At trial, the chief task is – and must remain – whether the Crown has met its burden beyond a reasonable doubt.

[137] The Ontario Court of Appeal in **R v. Bartholomew**, 2019 ONCA 377 stated the following with respect to motive to fabricate:

> **21** …. From the defence perspective, proof of such a motive provides a compelling alternative to the truth of the allegations. From a prosecutor's point of view, a proved absence of motive to fabricate provides a powerful platform to assert that the complainant must be telling the truth.
>
> **22** However, problems occur when the evidence is unclear -- where there is no apparent motive to fabricate, but the evidence falls short of actually proving absence of motive. In these circumstances, it is dangerous and impermissible to move from an apparent lack of motive to the conclusion that the complainant must be telling the truth. People may accuse others of committing a crime for reasons that may never be known, or for no reason at all: see *R. v. J.V.*, 2015 ONCJ 815, at para. 132; *R. v. Sanchez*, 2017 ONCA 994, at para. 25; *L.L.*, at para. 53; *R. v. T.G.*, 2018 ONSC 3847, at para. 30; *R. v. Lynch*, 2017 ONSC 1198, at paras. 11-12.
>
> **23** Therefore, in this context too, there is a "significant difference" between absence of proved motive and proved absence of motive: *L.L.*, at para. 44, fn. 3. The reasons are clear. In *R. v. B. (R.W.)* (1993), 24 B.C.A.C. 1 (C.A.), Rowles J.A. explained, at para. 28: "it does not logically follow that because there is no apparent reason for a motive to lie, the witness must be telling the truth." This point was

> made in *L.L.*, in which Simmons J.A. said, at para. 44: "the fact that a complainant has no apparent motive to fabricate does not mean that the complainant has no motive to fabricate" (emphasis added). See also *R. v. O.M.*, 2014 ONCA 503, 313 C.C.C. (3d) 5, at paras. 104-109; and *R. v. John*, 2017 ONCA 622, 350 C.C.C. (3d) 397, at para. 93.

[138] What the Crown has relied upon in support of their position is very thin. The Crown has essentially suggested that because the trial evidence reflects “no evidence of animosity” this can be equated to “no motive to fabricate” . As a result, “no motive to fabricate” bolsters the complainant’s credibility.

[139] It is important to put things in context. Although the evidence supports positive interactions between the parties, they had only known each other for four days. Outside of these four days the parties were essentially complete strangers to one another, they lacked any prior history. The fact that the complainant had a good relationship with the accused and lacked animosity at the time of the events standing alone falls short of proving absence of motive **R v. Bartholomew**, *supra*.

[140] It is impermissible for this Court to move from an absence of evidence that the complainant had to motive to fabricate to the conclusion that the complainant must be telling the truth.

Contact Prior to Entering the Bedroom

[141] Although counsel didn't focus a great deal on the complainant's evidence with respect to her evidence that the accused had "been physical" with her earlier in the evening I have considered it. As outlined, the complainant during cross examination revealed for the first time that throughout the evening the accused had been "near me, touching my back, having his hands on my hips". She testified that she would walk away every time it would happen.

[142] The accused was asked by Mr. Egereonu, whether or not he had physical contact with the complainant prior to entering the bedroom. He immediately agreed and provided a contextual explanation. As outlined, he stated they were playing games, she got "scores", and he tapped her on the back stating "good job". His evidence on this point went untested by the Crown. The Crown didn't ask a single question about it.

[143] The *actus reus* of sexual assault is established by the proof of three elements: touching, the sexual nature of the contact, and the absence of consent. The burden rests with the Crown to prove all three aspects of the *actus reus* beyond a reasonable doubt. I am satisfied that even on the

accused's narrative, as it relates to this incident, it has been established beyond a reasonable doubt that he did touch the complainant and that he intended to touch her. I am satisfied that the touch was in the absence of the complainant's consent. He took it upon himself to touch her, didn't make any inquires, just assumed he could, and did.

[144] However, I have concerns with respect to my ability to be satisfied beyond a reasonable doubt that in all of the circumstances, examined in an objective fashion, that the conduct was of a sexual nature. The first concern I have is in reconciling the differing versions of the events. The version the complainant provided is very different from that of the accused. The accused stated he only tapped her on the shoulder to say "good job" in the context of playing the game after she had accumulated scores. His evidence was that he didn't put his hands on her hips, stayed consistently near her, or made repeated physical contact.

[145] Second, I have concerns with respect to the complainant's reliability with respect to this interaction. This evidence was never mentioned in her police statement, nor did she testify to it in direct. It had only come out for the first time during pressing cross examination. It is possible and not unusual that a witness may leave out details when providing police statements. It is also not

unusual for a witness to leave out things when they testify during direct examination. It is unreasonable to hold a witness to perfection. However, this was a material portion of evidence. In fact, it is an entirely separate and distinct allegation.

[146] The complainant was given an opportunity in cross examination to explain why these details were being raised for the first time. Her response was full stop, “because I wasn’t asked”. It is difficult for to the Court to accept this explanation, especially in the context where the Crown was very persistent and detailed in their repeated questioning of the complainant as to when and where she was touched. I am unable to accept beyond a reasonable doubt that these events occurred in the manner as outlined by the complainant.

[147] This isn’t about picking a side or version of events. However, as noted I am simply unable to accept the evidence of the complainant on this point. The accused’s unchallenged contextual evidence leaves me with a doubt as to whether this touching was of a sexual nature. In examining the contextual nature of accused’s evidence, I have considered a number of things including but not limited to; the part of the body touched, the nature of the force used, the duration of the touch, where the touching events occurred, and the absence

of other actions or words of the accused which may have painted the touching in a sexual light.

[148] I will conclude by stating that Mr. Koge's tapping the complainant on her back in the context of socializing that evening was certainly ill-advised and not acceptable. However, I am unable to conclude that the Crown has proven his actions constituted a sexual assault beyond a reasonable doubt.

Conclusion

[149] The Crown's case is heavily grounded in the testimony of the complainant. Counsel have argued that the decision in this case hinges on credibility and reliability. While those certainly are valid and essential considerations, I will again note that this is not strictly a credibility contest. As stated earlier, it is also not about picking a side. It is not a matter of who I should believe, it is a matter of whether, based on all the evidence or absence of evidence, the Crown has proven its case beyond a reasonable doubt. It would be improper for the Court to simply choose which version of the events to believe, if any. That is not the test.

[150] The Court of Appeal in **R. v. Mah**, [2002] N.S.J. No. 349 reminds trial judges very clearly of their role at paragraph 41:

> **41**...the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[151] As stated very recently by Justice Campbell in **R. v. Speers**, [2022] N.S.J. No. 51 at paragraph 56:

> [56] The issue is not which of the witnesses is more believable or even which one is telling the truth or something closest to the truth. It is whether on the evidence, considered as a whole, there is a reasonable doubt with respect to any one of the essential elements of the offence.

[152] As outlined earlier, the evidence of the Mr. Koge was considered having regard to the other evidence. Mr. Koge need not be more credible or reliable than the other evidence. Such evidence needs only to be credible or reliable enough to raise a reasonable doubt. Mr. Koge was unmoved in his testimony. He was challenged hard by the Crown in cross examination.

[153] Many aspects of Mr. Koge's testimony were consistent and reasonable. There were no identifiable concerns with respect to the reliability of his evidence.

[154] When I examine the evidence in this matter together as a whole, including the evidence of the complainant, together with the evidence of the accused, I must find that I have a reasonable doubt as to whether or not the events as alleged occurred. For this reason, I find Mr. Koge not guilty on the charge of sexual assault.

Russell, Shane JPC