PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Muirhead*, 2025 NSPC 18

Date: 20250718
Docket: 8747918
Registry: Windsor/Kentville

Between:

His Majesty the King

v.

Courtney (aka Damion) Muirhead

TRIAL DECISION

Restriction on Publication: 486.4 *Criminal Code*
Any information that could identify the complainant shall not be published, broadcast or transmitted in any way. This document has been reviewed to remove information that would identify the complainant and may be reproduced in present form.

Judge:	The Honourable Judge Del Atwood
Heard:	2025: 25 April, 22 May in Windsor, Nova Scotia; 18 July in Kentville, Nova Scotia
Charge:	Section 271, *Criminal Code*
Counsel:	Nathan McLean for the Nova Scotia Public Prosecution Service Michael Curry for Courtney (aka Damian) Muirhead

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

By the Court:[1]

Synopsis

[1] Courtney (aka Damion) Muirhead is charged in information 862511 with sexually assaulting JW contrary to § 271 of the *Criminal Code* [*Code*] (case 8747918). The prosecution elected to proceed summarily. The offence is alleged to have occurred in the community of Falmouth, Hants County, Nova Scotia on 15 October 2023.

[2] This is Mr Muirhead's second trial on this charge. The first ended in a mistrial [the first trial].

[3] The theory of the prosecution is that Mr Muirhead placed his hand under JW's underwear and rubbed her vagina while they were passengers in the back seat of an SUV. JW was asleep, and did not have the capacity to consent to any sexual activity with Mr Muirhead.

[4] The theory of the defence is that JW initiated sexual contact with Mr Muirhead while they were seated in the SUV. He reciprocated with contact that

[1] Excerpts of this decision were read into the record on 18 July 2025. This document represents the entire judgment of the Court.

matched JW's. Accordingly, the defence asserts that Mr Muirhead's contact with JW was with her consent, communicated by gesture.

[5] I find the testimony of JW to be both credible and reliable.

[6] While there are certain aspects of Mr Muirhead's testimony that might be characterized as bearing credibility/reliability deficits, I found his account to be credible and reliable.

[7] Additionally, the Court regards the decision made by the prosecution not to call two key witnesses as having had a significant limiting effect on the ability of the Court to make credibility and reliability assessments regarding witness testimony.

[8] As I find the evidence of Mr Muirhead to be reasonably credible and reliable, and given the absence of certain key evidence, the Court finds Mr Muirhead not guilty.

[9] The following are the reasons of the Court.

Inventory of evidence

[10] At the commencement of proceedings, defence counsel made the following admissions:

- The identity of Mr Muirhead as the person seated to the right of JW in the back of an SUV driven by Mr Jerome Blye [the SUV];
- The date and location of the offence as 15 October 2023 in Falmouth, NS; and
- The voluntariness of a statement given by Mr Muirhead to police on 2 November 2023.

[11] The prosecution called two witnesses:

- JW; and
- Michaela Carson.

[12] Defence counsel called two witnesses:

- Jerome Blye; and
- Mr Muirhead.

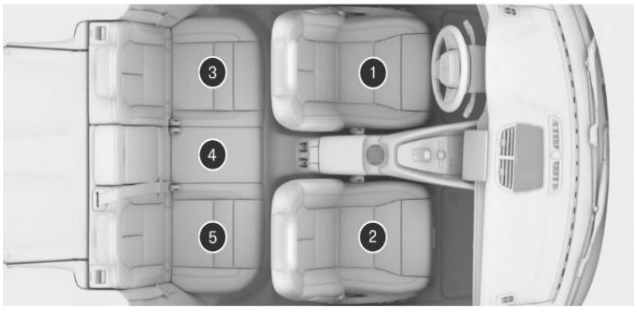
[13] There were no exhibits.

[14] Mr Muirhead was born in Jamaica; on the application of defence counsel, Patois interpretation was provided to Mr Muirhead throughout the trial. As is well known, Patois is the English-based creole language of Jamaica.

[15] The interpreter remained accessible to the Court during the testimony of Mr Blye (who is also from Jamaica) and Mr Muirhead. The interpreter was able to provide interpreter services to both Mr Blye and Mr Muirhead during direct and cross examination. I experienced no difficulty in comprehending fully their testimony without the need for interpretation. I invited counsel to inform the Court should they require interpretation at any point; neither counsel sought assistance.

[16] The following is a precis of what I consider to be the pertinent evidence given by each witness. I do not find it necessary to recite in detail matters of apparent controversy that were of no consequence.

Name of witness	***Called by: (P=prosecution; D=defence)***	***Summary of evidence***
JW	P	***Direct examination*** JW is a 33-year-old female, employed with a service station; she drives a tow truck. JW lives in Falmouth. JW punched through a heavy work week leading up to the weekend of 14-15 October 2023. She had had 13-to-14-hour work days all week, and was on the job 10 hours on 14 October 2023. JW heard from a friend, Makayela Carson, who invited her to spend a social evening together on 14 October 2023.

		Ms Carson picked up JW the evening of 14 October. They stopped for about 1-1.5 hours at the home of a friend, A, where they had a couple of drinks. Ms Carson and JW then went to a bar in New Minas. JW drank 2-3 glasses of rum and Coke, spread out over two hours. At around 01:30 hrs on 15 October 2023, JW and Ms Carson left the bar and were going to wait get a drive home with Ms Carson's father. While waiting, they encountered Jerome Blye, Mr Muirhead, and Mr Blye's cousin Alex. Mr Blye and Ms Carson had been married, but, as of October 2023, were separated. Mr Blye, Mr Muirhead and Alex were in the SUV. Mr Blye was driving. Ms Carson decided to get a drive home with Mr Blye, and JW got in the SUV with her. This was the seating arrangement:  1 Mr Blye 2 Ms Carson 3 Alex 4 JW

		5 Mr Muirhead (This is a public-domain stock image, and was not tendered as an exhibit by any party. It represents seating positions only, as described by JW; it does not represent interior colours, contours, dimensions, or detailed features. Although vehicle photography can be of fact-finding assistance in cases when the scene of an alleged crime is the passenger compartment of a motor vehicle—see *R v Wallace*, 2021 NSPC 65—no photography of the interior of the SUV was tendered in evidence.) JW described her level of sobriety as a 4 on a 1-to-10 scale. Ms Carson and Mr Blye were talking. JW fell asleep as Mr Blye drove toward her home in Falmouth. She described being able to fall asleep at any time, and her long work hours made it worse. JW was awakened by Ms Carson as they arrived at JW's home. Ms Carson said, "J, we're here." In an instant, JW noticed that Mr Muirhead had his hands down her pants. His left hand was underneath her underwear, moving around her vagina. JW pushed Mr Muirhead's hand away. JW thanked Mr Blye for the drive and went inside her home. JW didn't even know

		what to say. She just wanted to get out as quickly as she could. Mr Muirhead got out on the passenger side to let JW exit the SUV. JW entered her home. She was inside 30 seconds when she heard tapping on a window and saw Mr Muirhead. JW pushed past Mr Muirhead and asked where Ms Carson and Mr Blye were. Mr Muirhead responded, "Down there." It was about 02:15-02:30 hrs. JW had not wanted to have Mr Muirhead touch her in the way she described in her testimony. JW felt awful. She spoke with police on 31 October 2023. ***Cross examination*** JW had encountered Mr Muirhead only a few times prior to 15 October 2023; it was when he had business at her place of work. JW had been wearing leggings, which she agreed were like tight yoga pants. She was wearing a tank top that was not tucked in. There was considerable cross examination about a stop at a fast-food restaurant during the drive to JW's home in Falmouth. This did not reveal anything informative or material, other than that JW was awake for

		it. It seemed to be a controversy without consequence. JW did not recall much of the conversation in the SUV. She did not speak with Mr Blye or Ms Carson. JW agreed that her bodyweight on 15 October 2023 was greater than on the day of trial. JW was asked a number of anatomical questions. She was directed to testimony she had given during the first trial. I did not find this cross-examination informative. At one point, it was necessary for the Court to intervene. Defence counsel confronted JW with a portion of her cross-examination evidence that was purportedly inconsistent with evidence she had given during the first trial; however, defence counsel misquoted JW's cross-examination evidence. There was, in fact, no inconsistency between her evidence in this proceeding and the evidence she gave in the first trial. Defence counsel withdrew the line of questioning. JW denied an assertion by defence counsel that she had never been asleep JW denied rubbing Mr Muirhead outside his pants on his penis. JW denied guiding Mr Muirhead's hand to her vagina outside her pants. JW denied that she and Mr Muirhead hugged on her back deck. This was a

		problematic other-sexual-activity issue, which required the intervention of the Court as it was not integrally connected to what took place in the SUV.
Makayela Carson	P	***Direct examination*** Ms Carson has known JW for most of her life. JW had told her that Mr Muirhead had had his hands down her pants. This prior-consistent-statement evidence was hearsay, and the Court does not assign any weight to it. Ms Carson's account of what she and JW had done the evening of 14 October 2023 was consistent with JW's account. JW was not "obliterated" after their evening at the bar in New Minas. Ms Carson's father and step mother arrived at the bar to give JW a drive home, but Ms Carson and JW were not ready to leave. JW and Ms Carson left later with Mr Blye. Ms Carson's evidence on the seating arrangements in the SUV matched JW's testimony. Ms Carson had known Mr Muirhead for a number of years. During the drive, Ms Carson and Mr Blye were yelling; Mr Muirhead was awake and telling them to make their relationship work.

		Alex was quiet. JW was not talking, and was snoring, but had been awake during the fast-food stop. Ms Carson was not turned around and it was dark inside the SUV. Later on during direct examination, Ms Carson acknowledged she might have turned sideways at one point. When the SUV pulled into JW's driveway, Ms Carson called out to JW and woke her up. Ms Carson tired to wake up JW multiple times. JW asked, "Where are we?" Ms Carson could not recall which back door JW used to exit the SUV. As the remaining group were about to leave, Mr Muirhead said something to Mr Blye; then after a couple minutes, Mr Muirhead returned to the back seat. It was not clear whether Ms Carson had seen Mr Muirhead exiting the SUV. ***Cross examination*** Ms Carson agreed that she and Mr Blye argued for the duration of the drive—arguing, not yelling. Mr Muirhead kept interjecting. Ms Carson did not agree that JW was interjecting in the argument.

		Ms Carson did not agree that she was turning and talking to JW. Ms Carson did not agree that JW told her to keep facing the front. Ms Carson did not agree that Mr Muirhead was ganging up on her in the argument with Mr Blye; as far as she was concerned, he was neutral. Ms Carson did not know Alex very well. He was Mr Blye's cousin.
Jerome Blye	D	***Direct examination*** Mr Blye described Alex as a cousin who had been in Nova Scotia, but had left the province, maybe sometime in December 2024. Mr Blye had driven the SUV (a 2016 Equinox) with Alex and Mr Muirhead to the bar in New Minas; he agreed to give JW a drive home. Mr Blye's testimony about the seating arrangement of the group matched JW and Ms Carson's. Mr Blye described the fast food stop. At one point, Ms Carson turned around and took off her seat belt; she was facing the back seat most of the drive home.

		At Exit 7 off Highway 101, Ms Carson turned to JW and woke her up. Mr Blye turned the radio up, and Ms Carson stopped talking. Mr Blye was not paying attention to what was going on in the back seat. JW's house is a 5-6 minute drive from Exit 7 off Hwy 101. After stopping at JW's house, JW got out on Alex's side after Alex got out. JW said, "Goodnight" and walked away. Mr Muirhead got out of the SUV for maybe 2 minutes. "Then we went straight home." Mr Blye recalled talking to police about a different issue; no policeman asked him anything about the situation with JW. ***Cross examination*** Mr Blye insisted that he was focussed on the road. However, he saw Ms Carson turn to face the back. Mr Blye and Mr Muirhead were friends; they had known each other for three years or so. The last time they had talked before the trial, it was about friendship and life. Mr Blye found out about Mr Muirhead being charged when Ms Carson messaged him about it. He then texted Mr Muirhead;

		they talked about the situation only 2 or 3 times. Mr Blye and Mr Muirhead didn't talk about what Mr Blye remembered; they talked about what Ms Carson had told him had happened. Mr Blye did not want to know what really had happened in his car. Mr Blye agreed he had spoken with Mr Muirhead since the first trial. "He's my friend, we speak all the time."
Mr Muirhead	D	***Direct examination*** Mr Muirhead is the accused. He is Black and is a member of the Jamaican diaspora in Canada. The legal status of his residency was not explored during the trial. Mr Muirhead was with Mr Blye and Alex at the same bar in New Minas as patronized by JW and Ms Carson; they were attending a birthday celebration for a co-worker of Mr Muirhead's. They had arrived about 22:00-22:30 hrs on 14 October 2023 and stayed for 4 to 4.5 hours. Mr Muirhead stopped drinking after 2 Keiths, as he had to work the next day. After leaving the bar with Mr Blye and Alex, Mr Blye received a text message from Ms Carson looking for a drive; Mr Blye drove back to pick up Ms Carson. JW was with her. Ms Carson and JW got into Mr Blye's SUV.

		Mr Muirhead described the same seating arrangement as in the testimony of Mr Blye, Ms Carson and JW. The group stopped for fast food, and then got on Hwy 101 at "Exit 12 or so." Everyone was talking and eating. Mr Blye and Ms Carson were going through a breakup, and Mr Muirhead was saying they should fix things up. That conversation never really stopped. Around Exit 11, Mr Muirhead could feel a hand rubbing on his leg. Mr Muirhead thought it was JW's right hand on his left leg. Mr Muirhead then used his left hand on JW's right leg, rubbing it too JW took Mr Muirhead's hand and "dragged" it on her front, her vagina, outside her clothing. Mr Muirhead started to squeeze JW's vaginal area then tried to place his hand under JW's clothes. JW sucked in her belly. JW opened her legs wider to let Mr Muirhead put his hand down. JW began squeezing Mr Muirhead's privates at the same time. Mr Muirhead didn't notice JW reacting to his hand down her underwear. This evidence did not engage the provisions of § 276 of the *Code*, as it formed part of the single transaction that comprised the

		alleged offence and was integrally connected to it: *R v McKnight*, 2022 ABCA 251 at ¶ 254 and 258-260; leave to appeal dismissed, 2023 CanLII 562. See also *R v Choudhary*, 2023 ONCA 467 at ¶ 29. Ms Carson was turned, talking toward the back. Everyone was still talking. The back seat was dark. The touching stopped when the SUV reached Exit 8. Defence counsel steered Mr Muirhead away from embarking on an answer about Alex because of a concern that the answer might engage the other-activity provisions of § 276 of the *Code*. Mr Blye stopped at JW's home. Alex got out of the SUV first, followed by JW. Mr Muirhead followed JW to catch up with her. Mr Muirhead knocked on a window of JW's home. JW came out through her back door and asked, "where is the car". Mr Muirhead turned to her and said, "Can we finish what we started in the car?" At this point in the direct examination, questioning of Mr Muirhead began to elicit evidence of other sexual activity that did not form the subject matter of the charge. This required the intervention of the Court. Defence counsel withdrew the question.

		Defence counsel then embarked on questioning Mr Muirhead about things he had told police about statements JW had made to him while at her home. This, again, required the intervention of the Court. It is not permissible for defence counsel to put to an accused person exculpatory statements given to police prior to trial, merely to have those statements adopted by the accused. A prior, out-of-court statement, especially if appearing to be consistent with the in-court testimony of a witness (even when the witness is the accused), is inadmissible as evidence of any fact asserted. It is hearsay and self-serving. There was an easy workaround: Mr Muirhead could easily have been asked directly about the words JW had spoken to him, rather than what he had told police JW had said. Defence counsel chose not to pursue this. ***Cross-examination*** Mr Muirhead was asked about illumination inside the SUV. He testified that there were headlights from oncoming vehicles. He knew who was sitting beside him. Mr Muirhead acknowledged that he had given a statement to police. He took it seriously, and was honest. At the commencement of the trial, defence counsel admitted the voluntariness of Mr Muirhead's statement.

		Mr Muirhead testified that "There's nowhere I can say [JW] was asleep." Mr Muirhead remembered Mr Blye asking, "Who am I dropping off first?" Mr Muirhead heard Ms Carson saying, "J, J!" J responded by saying, "Uhh." Mr Muirhead acknowledged that he and Mr Blye were good friends, and that they talked often. Mr Muirhead said that it was a lie that JW was snoring. Mr Muirhead had seen JW once or twice at the place where she worked. Mr Muirhead thought that no one in the back of the SUV was belted. " I know I wasn't wearing a belt." At around Exit 11, Mr Muirhead felt JW rubbing his leg; he thought she was using her right hand. The prosecutor confronted Mr Muirhead about this description—it would have been physically awkward for JW to reach over with her right had and touch Mr Muirhead in the middle seat. It was necessary for the Court to intervene at this point, as the testimony of JW, Ms Carson, and Mr Blye was entirely consistent on the subject matter of seating positions: JW was seated in the middle of the back seat, and Mr Muirhead was on her right.

		The prosecutor attempted to continue with this line of questioning; however, Mr Muirhead was clear that he was not seated in the middle. Again, his testimony on that point was completely in line with the witnesses called by the prosecution. Mr Muirhead stated that, during most of the drive, Ms Carson was turning toward the back, then turning toward Mr Blye, talking about fixing their relationship. There were times when Ms Carson was looking right at JW. During some of the time Mr Muirhead and JW were having sexual contact, Ms Carson was looking at the back. Mr Muirhead agreed that, in going through roundabouts to get on the highway after the fast-food stop, he noticed "[JW] falls asleep." But then everyone started talking. Mr Muirhead didn't know what exactly JW was saying, but she was talking all the time. Mr Muirhead described leaving work at 19:00 hrs on 14 October. He does not do drugs, except for cannabis. One joint is normal for him. He had one joint and two beer.

		As of October 2023, Mr Muirhead was married. Mr Muirhead was asked if it had been his wife who first mentioned the allegation made against him. Mr Muirhead stated he had found out from Mr Blye. Mr Muirhead understood at first that JW had alleged he had asked for a kiss. Mr Muirhead later found out in a 'phone call with Mr Blye that JW had alleged he had touched her while she was asleep. Mr Muirhead denied talking about the allegations with Mr Blye after that. "We don't like to talk about that after that a second time." However, Mr Muirhead agreed that the topic did come up one or two more times; he was unable to recall the dates. Mr Muirhead and Ms Carson had been on good terms, but they walk past each other now. Mr Muirhead acknowledged that he did not have a discussion with JW. He was unable to say specifically where he was looking when he and JW had sexual contact. "I'm looking inside the car." Mr Muirhead agreed that he could see JW's face. "Yeah, I'm right beside her."

		The prosecutor asked what JW's face looked like. Mr Muirhead replied that there was no negative look on her face. Mr Muirhead stated that "[s]he took my hand up the front outside of her pants." "She pulled in her belly when . . . so my hand could go down between her tights." The prosecutor asked Mr Muirhead how long his hand was down JW's pants. "It was Exit 8 or so . . . it was between Exit 11 and Exit 8 . . . probably 15 minutes . . . I drive the road every day . . . I'm not going to say I looked over and see Exit 8 . . . it was probably Exit 8." Mr Muirhead acknowledged talking to Mr Blye on 25 April 2025 and saw him before court.

Sexual assault § 271—elements of the offence

[17] Section 271 of the *Code* states:

> 271 Everyone who commits a sexual assault is guilty of
>
> . . .
>
> (b) an offence punishable on summary conviction . . . .
>
> . . . .

[18] Section 265 of the *Code* states:

> 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;
>
> . . . .

[19] The external elements of sexual assault are:

- an accused person having voluntary physical contact with the complainant;
- the objectively sexual nature of the physical contact; and
- the absence of the complainant's consent.

R v Chase, 1987 CanLII 23 at ¶ 11-13, [1987] 2 SCR 293 at 302; *R v Ewanchuk*, 1999 CanLII 711, [1991] 1 SCR 330 at ¶ 25 [*Ewanchuk*]; *R v GF*, 2021 SCC 20 at ¶ 25; *R v Al-Rawi*, 2021 NSCA 86 at ¶ 89.

[20] Under the external-element heading, consent is determined by whether the complainant subjectively wanted the sexual contact to take place: *Ewanchuk* at ¶ 48; *R v Barton*, 2019 SCC 33 at ¶ 89 [*Barton*]. Any perception harboured by an accused person about the state of mind of the complainant is irrelevant in the external-element analysis; there is no need to inquire into it: *R v Kirkpatrick*, 2022 SCC 33 at ¶ 28 [*Kirkpatrick*]; *Barton* at ¶ 87-89; *Ewanchuk* at ¶ 30; *R v BC*, 2024, BCPC 138 at ¶ 10-16.

[21] Subjective consent is defined in § 273.1 of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question."

[22] A judicial determination of whether a complainant voluntarily agreed to engage in a sexual act requires a subjective inquiry into the complainant's state of mind at the time of the act: *Ewanchuk* at ¶ 27.

[23] A person who is asleep is not capable of consenting to sexual activity: *R v Al-Rawi*, 2018 NSCA 10 at ¶ 33; *R v Crespo*, 2016 ONCA 454 at ¶ 8.

[24] What will constitute the "sexual activity in question" is tied to context, and relates to particular behaviours and actions; it will be defined by the evidence and the allegations of the complainant: *Kirkpatrick* at ¶ 40; *Barton* at ¶ 88.

[25] Evidence of consent may be circumstantial, and may include evidence of a complainant's words and actions, before and during the incident: *Ewanchuk* at ¶ 29.

[26] Judicial experience informs me that consent will almost always be a circumstantial-evidence issue. There was a time in forensic history when courts needed a complainant to say, "I did not consent." In the result, prosecutors would typically ask the inevitable question, "Did you consent?" A highly experienced

trial judge in Newfoundland and Labrador considered a question of that nature as objectionable, as it invited, not evidence, but a conclusion.

[27] Consent will be assessed based on a totality of circumstances.

[28] And so, if a complainant in a sexual-assault case describes being asleep, blacked-out, overpowered, overwhelmed by numbers of sexual aggressors present, intimidated, threatened, coerced, or otherwise deprived of agency, a trier may correctly infer, based on the circumstances, that the complainant did not consent to sexual contact, regardless of utterances that might suggest otherwise.

[29] Consent must have been present at the time the sexual activity in question takes place: § 273(1.1).

[30] Ongoing consent is required for the duration of the sexual activity in question, and a person cannot give advance consent to sexual activity that is expected to happen later: ¶ 273.1(2)(a.1). The law does not recognize broad, advance consent: *Barton* at ¶ 99. Furthermore, consent to one type of sexual activity is does not constitute consent to any type of sexual activity.

[31] A person who has validly communicated a consent to engaging in sexual activity may withdraw that consent at any time: *Barton* at ¶ 88; *R v JA*, 2011 SCC 28 at ¶ 40, 43.

[32] There is no such thing as implied consent arising from a prior relationship or a complainant's passivity—and so there is no defence of implied consent: *Ewanchuk* at ¶ 31. Consent cannot be implied from a complainant's silence, passivity or ambiguous conduct: *Barton* at ¶ 98; *R v Kruk,* 2024 SCC 7 at ¶ 36 [*Kruk*]; *Ewanchuk* at ¶ 31.

[33] A complainant is not required to have offered some minimal word or gesture of objection: *R v M (ML)*, 1994 CanLII 77 (SCC), [1994] 2 SCR 3, rev'g 1992 CanLII 4822, 117 NSR (2d) 74 (AD).

[34] Only "yes" means "yes". Anything else is "no": *R v Goldfinch*, 2019 SCC 38 at ¶44.

[35] The Court must remain mindful that proof of lack of consent is borne by the prosecution on a criminal standard. Accordingly, in this case, the prosecution must prove beyond a reasonable doubt that:

- JW did not consent to being touched by Mr Muirhead; and
- did not consent to the sexual nature of Mr Muirhead's actions: *R v Dinardo*, 2014 ONCA 758

Sexual assault and assault—the fault element

[36] There are two fault elements inherent in sexual assault and assault:

- the intention of the accused person to have physical contact with the complainant; and,
- the knowledge of the complainant's lack of consent, or a wilful blindness or recklessness about it.

Barton at ¶ 87; *Kirkpatrick* at ¶ 28; *Ewanchuk* at ¶ 42.

[37] Wilful blindness exists when an accused person's suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries: *R v Briscoe*, 2010 SCC 13 at ¶ 21.

[38] Recklessness refers to the state of mind of a person who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk: *Sansregret v The Queen*, 1985 CanLII 79, [1985] 1 SCR 570 at 582.

[39] If the Court were to find that JW had consented to the specific physical contact Mr Muirhead had with her, or if the Court were left in a reasonable doubt about it, then the only legal outcome would be an acquittal.

Defence of honest but mistaken belief in communicated consent expressly not advances

[40] The defence of honest but mistaken belief in communicated consent is raised frequently in charges involving sexual violence. It is not necessary for the Court

consider it in this case, as counsel for Mr Muirhead acknowledged in closing argument that there would be no air of reality to it: based on the theory advanced by the defence, not only did JW consent to the sexual activity in question, she also initiated it. Mr Muirhead's description of the controversial event does not admit of him being mistaken.

Stereotypical reasoning and generalized assumptions

[41] The adjudication project requires that trial judges be alive to authentic legal controversies, and be prepared to grapple with evidentiary conflicts when they might have a bearing on ultimate issues. In trials involving allegations of sexual violence, the controversies that tend to gain the most traction involve assumptions about human behaviour; it is a subject matter that has been the focus of substantial intermediate-appellate and apex analysis.

[42] Judges are permitted to rely on logic, reason and common sense in assessing witness credibility: *R v ARD*, 2017 ABCA 237 at ¶ 8-9, aff'd 2018 SCC 6; cited with approval in a minority concurring opinion in *Kruk* at ¶ 186.

[43] *Kruk* came to the SCC following a number of intermediate-appellate decisions which struck down convictions in sexual-violence trials; the reversals in

those cased were based on trial judges supposedly having relied on ungrounded common-sense assumptions, to the detriment of the accused persons in those cases.

[44] According to the intermediate-appellate-court-invented "rule", there was seen to be an equivalency between, on the one hand, prohibited reasoning based on myths and stereotypes about victims of sexual violence (identified first in *R v Seaboyer*, 1991 CanLII 76, [1991] 2 SCR 577 at 604 *et seq*; later codified in § 276 of the *Code*; and then developed in a host of later cases, the most recent from the SCC being *R v Kinnamore,*, 2025 SCC 19) and, on the other, supposedly ungrounded common-sense assumptions about human behaviour that ended up being detrimental to the cases of persons charged with sexual violence.

[45] In the majority opinion in *Kruk* at ¶ 24 (there was one concurring minority opinion), the Court rejected the equivalency argument, and found that it disregarded the "distinct nature of myths and stereotypes" that are unjustly applied to sexual-violence complainants. The majority went on, and observed at ¶ 26-28 that the equivalency argument worked to transform all factual generalizations rendered by trial courts into errors of law, thus imposing a false symmetry to the circumstances of accused persons.

[46] Unlike generalizations about the circumstances of persons who have been charged, myths and stereotypes about victims reflect what the majority described at ¶ 38 as "inaccurate, outdated, and inequitable social attitudes . . . [that] impeded the equal treatment of sexual assault complainants and, hence, the overall fairness of trials."

[47] Efforts to eliminate myths and stereotypes about victims of sexual violence (both in statute and the common law) do not create any "special benefits in law for complainants in sexual assault cases": ¶ 44. Rather, they "remove discriminatory barriers", "level the testimonial field", "and ensure the truth-seeking function of the trial is not distorted."

[48] And so the SCC did not recognize trial-court reliance on ungrounded common-sense assumptions as constituting an error of law having the same effect as reliance on prohibited myths and stereotypes.

[49] Nevertheless, while there are now, as a result of *Kruk*, constraints on appellate review regarding trial-level generalizations about human behaviour—generalizations that do not engage the prohibited myths and stereotypes—this does not eliminate the need for trial judges to exercise caution, as unrestrained assumptions about human behaviour may still lead to palpable and overriding

error: *Kruk* at ¶ 3 and 52. A key point in *Kruk* is that trial courts should avoid drawing extravagant inferences from ambiguous, uncontroversial or neutral facts.

Sexual assault and sites of privacy

[50] In this case, Mr Muirhead is alleged to have sexually assaulted JW in the confines of an SUV; there were two other passengers in the car, along with the driver.

[51] The Court must be alert to the improper generalization that sexual assaults happen only in places of privacy

[52] At least one academic author has suggested that it is actually a prohibited myth—much as the twin myths about complainant credibility and consent—to base a judgment on the assumption that sexual violence happens only in places of privacy: Lisa Dufraimont, "Myths and Stereotypes in *R v Spicer*" (2023), 87 CR (7^{th}) 75-76; and see *R v Spicer*, 2023 ONCA 232 at ¶ 29. I agree with the conclusion of the author.

[53] In this case, there is no room for arguing the improbability of sexual contact in a tight space with witnesses present to see it; this is because Mr Muirhead admits having physical, sexual contact with JW in the back seat of the SUV. His defence is not the improbability of it, but that it was fully consensual.

Sexual assault and delayed reporting

[54] The doctrine of recent complaint was a court-created stereotype that required a complainant to immediately report a sexual assault or face an adverse inference regarding credibility: *Kribs et al v The Queen*, 1960 CanLII 7 (SCC), [1960] SCR 400 at 405. This myth was abrogated statutorily by SC 1980-81-82-83, c 125, s 19, found now in § 275 of the *Code*.

[55] The failure of a complainant to immediately report being sexually assaulted cannot be treated as an automatic credibility deficit or as the basis for an adverse inference: *R v DD*, 2000 SCC 43 (CanLII), [2000] 2 SCR 275 at ¶ 63 [*DD*]. There is no inviolable rule on how people who are the victims of trauma, such as sexual assault, will behave: *DD* at ¶ 65; *R v Koge*, 2022 NSPC 37 (CanLII) at ¶ 86. Some might report immediately being sexually assaulted; others might wait, for a wide variety of reasons. Waiting might have to do with knowing that the trial process can be humiliating and degrading for victims of sexual violence: *R v JJ*, 2022 SCC 28 (CanLII) at ¶ 1; *R v Mills*, 1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668 at ¶ 119.

[56] JW described being sexually assaulted by Mr Muirhead; she said it occurred on 15 October 2023. She could not believe it had happened. That might explain why did she did not utter any sort of comment of start or surprise just before she

exited the SUV. JW did go to police on 31 October 2023. That interval of time is completely understandable.

Avoidance of implicit bias

[57] Mr Muirhead is Black, and a member of an immigrant community.

[58] Persons with this background have frequently faced profound structural disadvantages in the Canadian criminal justice system, simply because of their ancestry and personal histories. The Court must assess the evidence presented in this trial in a way that does not implicate racially biased or stereotypical reasoning based on race or nationality.

[59] While the risk of racial profiling by police may be a legitimate basis for inquiry, there is no evidence of it having occurred in this case. The investigator was not called as a witness, and the issue was not explored by either counsel.

W(D)

[60] *R v W(D)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 at 758 [*W(D)*] is the modern prototype case on analyzing evidence in a criminal trial. According to the counter on CanLII.org, it has been cited in written decisions over fifteen thousand times as of today.

[61] *R v JAF*, 2021 NSSC 357 [*JAF*] was a summary-conviction appeal from an acquittal in a sexual-assault case; the appeal hearing proceeded *ex parte*, and so without the benefit of an argument from the acquitted respondent, which is problematic. At ¶ 36 of the decision allowing the appeal, the trial judge was faulted for not "conduct[ing] the equivalent of a *WD* [sic] analysis". This seemed to suggest that the trial judge ought to have recited and then progressed through the *W(D)* algorithm in analyzing the evidence. These sorts of intermediate-appellate cases miss the point that the intended audience for *W(D)* is the lay jury; further, the precise formulation of the *W(D)* reasoning path is not beyond criticism: *R v JHS*, 2008 SCC 30 (CanLII), [2008] 2 SCR 152 at ¶ 9-10. It might well be that *JAF* represents the same sort of exercise that was overturned recently in *R v Young*, 2025 NSCA 41, rev'g 2024 NSSC 277.

[62] What is more important than the recitation of the well recognized principles that are the daily working material of trial courts is the proper application of them.

[63] Trial judges must be alive to authentic legal controversies, and must be prepared to grapple with evidentiary conflicts when they might have a bearing on ultimate issues. Still, as judges are presumed to know the law and to have used evidence properly—*R v Lindsay*, 2023 SCC 33 at ¶ 2; *R v GF*, 2021 SCC 20 at ¶

74; *R v Burns*, 1994 CanLII 127 (SCC), [1994] 1 SCR 656 at 664—it should be possible for a judgment to be succinct *and* legally sufficient.

Motive to lie

[64] In *R v Gerrard*, 2022 SCC 13 at ¶ 4 (CanLII) [*Gerrard*], the Court drew a distinction between a proven absence of a complainant's motive to lie and the mere absence of evidence of a motive to lie. In other words, absence of evidence is not evidence of absence. Common sense suggests that a witness may be more truthful when the witness does not have a reason to lie. Common sense and judicial experience suggest also that proof of a motive or proof of a lack of it will not come from direct evidence; it will be deduced from the circumstances.

Cross examination on prior statements

[65] A statement made by a witness—including an accused person—prior to trial may be the subject of cross-examination under either § 10 or 11 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*] .

[66] Section 10 permits cross-examination on any *written or recorded statement* relative to the subject matter of the case; it is noteworthy that the statement need not be inconsistent with the testimony of the witness. However, the statement must have been written or recorded.

[67] Section 11 of the *CEA* allows for cross-examination on *any* statement "inconsistent with . . . [the] present testimony" of the witness.

[68] Neither provision is a memory-refreshing mechanism; an opponent's witness does not have to acknowledge being in need of memory refreshing to allow counsel to embark on a § 10 or 11 *CEA* cross-examination.

[69] Should a witness admit making an earlier statement inconsistent with the present testimony of the witness, the earlier statement does not become proof of the truth of what was said unless the witness should go on to adopt the statement: *R v Livermore*, [1995] 4 SCR 123 at ¶ 54; *R v Mauger*, 2018 NSCA 41 at ¶ 29. If unadopted, the statement may be used to assess credibility only.

[70] When a prior statement is used for cross-examination purposes, the statement is not put in as an exhibit: *R v Rowbotham*, [1988] OJ No. 271 at ¶ 121. The reason is this: evidence is admissible if it is informative, relevant, material, not subject to an exclusionary rule, and of sufficient probative value as not to be outweighed by prejudicial effect. When a statement is used for cross-examination as to credit, only that portion of the statement as used for cross-examination purposes meets this test for admissibility. In such a case, receiving an entire statement as an exhibit—when only a small fragment of it is legally admissible,

and even then for a limited purpose only—is inefficient and renders the statement prone to misuse.

[71] Cross examination of an opponent's witness on the contents of a prior statement requires precision. When the prior statement that is the subject of the alleged inconsistency is in writing, has been transcribed from a sound recording, or is accessible in a digital or analog audio format, word-for-word precision is required. The law is clear: it is improper to ask a witness a question that misstates the evidence: *R v W(RS),* 1990 CanLII 10983 (MBCA); 55 CCC (3d) 149 at 156-160 [*W(RS)*].

[72] It was necessary for the Court to intervene twice during this trial to take corrective action during questions on prior statements: once during the cross examination of JW; later, during the cross of Mr Muirhead. While I am satisfied that these were inadvertent missteps, inadvertence does not lessen the potential damage that can arise from problematic cross examination.

[73] In the case of the cross examination of JW about the position of her body and the arrangement of her clothing and seat belt, defence counsel acknowledged the error in misquoting her earlier testimony and withdrew the allegation of an inconsistency. This, in my view, is the correct approach.

[74] A contrasting approach is one that brushes past a concern raised by the Court about a cross-examination question, and then seeks to press on with the problematic inquiry. This occurred during cross-examination of Mr Muirhead, when questions were put to him erroneously premised on him being seated in the middle of the back seat of the SUV. I am of the view that such a tactic is not a best practice. In such a circumstance, the trial judge is obligated to intervene, as was made clear in *W(RS)*.

Reasonable doubt and the absence of evidence

[75] The Court is well aware that the proof-beyond-a-reasonable-doubt standard does not require absolute certainty. The Court must examine the totality of the evidence, as a criminal proof may come from more than just the sum of its parts.

[76] However, the Court must be alive to the absence of key evidence in a trial. As stated in *Kruk* at ¶ 62:

> Some elements of the totality of the evidence may give rise to a reasonable doubt, even where much -- or all -- of the accused's evidence is disbelieved. Any aspect of the accepted evidence, or the absence of evidence, may ground a reasonable doubt. Moreover, where the trier of fact does not know whether to believe the accused's testimony, or does not know who to believe, the accused is entitled to an acquittal . . . . (Internal citations omitted.)

See also *R v Patel*, 2024 NSCA 40 at ¶ 55.

[77] This is not meant to penalize the prosecution for choosing not to call certain witnesses, as that choice is within the sole discretion of the prosecution; however, that comes with the caveat that, if the prosecution decides not to call a material witness, it "risks failing to meet the burden of proof incumbent upon it and losing the case": *R v Cook*, 1997 CanLII 392 (SCC), [1997] 1 SCR 1113 at ¶ 30.

Analysis of the evidence

[78] With respect to the two prosecution witnesses, I found that the evidence of JW and Ms Carson appeared to be credible and reliable. Both appeared to be trying to tell the truth and to be accurate. JW and Ms Carson recounted a social evening out with friends that was entirely normal and unremarkable. Their description of who was seated where in the SUV matched the evidence of Mr Blye and Mr Muirhead.

[79] JW said that she had fallen asleep in the back of the SUV. She had just wrapped up a heavy-duty work week with long hours. She had socialized with Ms Carson at the bar in New Minas until the early hours of 15 September 2023. Falling asleep in the SUV would have been a normal fatigue response. Her evidence on that point was supported by Ms Carson and Mr Blye: both saw her sleeping, and Ms Carson heard her snoring. Even Mr Muirhead's evidence of

JW's verbalized "uhh" reaction to having her name called out by Ms Carson suggests a startled-awake reaction.

[80] As noted in the preceding discussion of elements of a § 271 offence, a sleeping person cannot consent to sexual activity.

[81] JW's description of Mr Muirhead groping her vaginal area when she woke up did not require the court to imagine a physically impossible act.

[82] In fact, Mr Muirhead acknowledged, mostly, doing what JW said he had done—with the difference that JW had initiated it and consented to it by gesture.

[83] JW had only encountered Mr Muirhead a couple of times prior to 15 October 2023, and only at her place of employment. There was no evidence that she would be motivated to fabricate a complaint of sexual assault against him.

[84] I would repeat the observation made earlier in this decision that the absence of evidence is not evidence of absence.

[85] Furthermore, the Court must not impose a burden of proof on Mr Muirhead to establish that JW would have a motive to lie: *R v Riche*, [1996] NJ No. 293 at ¶ 15 [*Riche*]; *R v Ignacio*, 2021 ONCA 69 at ¶ 37-60; *R v Wallace*, 2021 NSPC 65 at ¶ 59 [*Wallace*].

[86] Ms Carson's evidence was uncontroversial and of neutral effect: she did not notice anything wrong going on in the back seat. This is understandable, as she was focussed on her discussion with Mr Blye, which became animated at times.

[87] The Court will now turn to the evidence of Mr Blye and Mr Muirhead.

[88] In closing argument, the prosecution appeared to propose that the Court not accept the evidence of Mr Blye, as he and Mr Muirhead are good friends, and they spoke frequently. To the contrary, I found Mr Blye to be a credible and reliable witness. In fact, he offered evidence that supported a core part of the prosecution theory: that JW was asleep for part of the drive to Falmouth. His evidence was largely nonpartisan: he did not notice what was going on in the back seat of the SUV as he was focussed on his driving.

[89] I found Mr Muirhead's evidence mostly credible and reliable. He was not dramatic, histrionic or argumentative. I did not find his testimony to have been impeached on cross-examination. His description of mutually consensual sexual activity with JW was not physically impossible.

[90] His testimony on cross-examination about the duration of the sexual activity—from Exit 11 to Exit 8 on Highway 101, about 15 minutes in duration—does not seem plausible. If it had gone on that long, I am confident Ms Carson

would have noticed it. This may be indicative of a fabricated account; however, the fact is that most witnesses offer very imprecise evidence—sometimes wholly inaccurate—regarding time pinpoints, durations and distances. Life events do not occur with participants monitoring stopwatches or GPS devices—and so the Court is quite accustomed to credible and reliable witnesses being away off when reckoning times and distances.

[91] It was argued that the fact that Mr Muirhead had to be asked questions on cross several times, and that he had difficulty with key questions, ought to be treated as credibility deficits. I do not agree.

[92] In *R v Stephan*, 2021 ABCA 82 (especially at ¶ 131-148), rev'g 2019 ABQB 715, an intermediate-appellate court found that a trial judge had exhibited conduct giving rise to a reasonable apprehension of bias, given the judge's unfounded criticism of the manner in which an expert witness (who appeared to have been a foreign-trained physician) had enunciated words during his testimony.

[93] In my view, fluency, command of language and immediacy of response are not the sorts of metrics that should be used in assessing credibility and reliability in a multicultural society. Furthermore, I would note that I have tried cases when prosecutors have argued that, when prosecution witnesses have taken time to

formulate answers, such deliberation be regarded as a marker of a careful witness who is making an extra effort to be truthful.

[94] What is of greater concern to the Court is the fact that neither the police investigator nor the third backseat passenger, Alex, was called by the prosecution.

[95] Testimony from investigators can be problematic, as when they end up giving pseudo-narrative evidence that is a cloak for discreditable-conduct or similar-acts evidence: see *R v MAM*, 2025 NSPC 1 at ¶ 28-35.

[96] However, investigators may also be sources of useful contextual and circumstantial information that can assist triers-of-fact in making credibility assessments.

[97] One important fragment of information the investigator might have been able to offer is information on the whereabouts of Alex, the third backseat passenger. His surname remains unknown to the Court. Mr Blye thought that Alex had left Nova Scotia in December 2024; the date for the first trial had been docketed about 8 months before that. Alex was sitting right next to JW, in close quarters, at the time of the alleged offence. Was he interviewed? Was he subpoenaed? Could he have testified remotely? This person would appear to be a material and important eyewitness to key events. The Court did not hear from him.

In circumstances when the Crown bears the burden of proof of each element of an offence beyond a reasonable doubt, that missing piece operates as a profound absence of evidence.

[98] Hearing from the police investigator in this case might have clarified that absence-of-evidence issue. The investigator was not called.

Findings of fact

[99] After having analyzed the evidence, the Court would make the following findings of fact:

- On 15 October 2023, JW and Ms Carson entered an SUV being operated by Mr Blye; Mr Blye was driving them home.
- Ms Carson sat in the front passenger seat of the SUV; JW sat in the middle of the back seat, Alex on her left, Mr Muirhead on her right.
- At some point during the drive from New Minas to JW's home in Falmouth, JW fell asleep. The Court cannot determine how long she was asleep.
- At some point during the drive, there was sexual contact between JW and Mr Muirhead. By JW's account, the contact started when she was asleep, and so when she had no capacity to consent to it. Once

she realized what Mr Muirhead was doing to her, she pushed his hand away, indicating that she wanted him to stop. She had never consented to being touched in such a way. That never changed. By Mr Muirhead's account, JW initiated sexual contact with him by rubbing his left leg. He mirrored JW by rubbing her right leg in a similar fashion. JW then took Mr Muirhead's hand and placed it on her vaginal area outside her clothing. He then reached inside her underwear and began squeezing her vagina. JW sucked in her stomach and spread her legs. JW then began squeezing Mr Muirhead's privates at the same time. This account would support a finding that JW had communicated, by gesture, her continuing consent to the sexual activity engaged in by Mr Muirhead.

- The Court finds the accounts of both JW and Mr Muirhead reasonably credible and reliable.

- The Court is also actuated by the principle that reasonable doubt may arise from the absence of evidence. The prosecution did not call two key witnesses: the investigator, and Alex, a person who was seated in the SUV directly next to JW at the time of the alleged offence.

- Given the Court's assessment of credibility, and given that the Court has not heard from two material and important witnesses, the Court is unable to determine which of the accounts of JW and Mr Muirhead should be believed on the issue of communicated consent.

[100] As the Court is left in a state of reasonable doubt about the essential element of communicated consent, the Court finds Mr Muirhead not guilty.

Atwood, JPC