

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Markos*, 2025 NSPC 21

Date: 20250811

Docket: 8692364

Registry: Dartmouth

Between:

His Majesty the King

v.

Mearig Fasil Markos

TRIAL DECISION

Restriction on Publication: 486.4 Any information that could identify the complainant shall not be published, broadcast or transmitted in any way.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 W Atwood

Heard: 2024: 26 August; 20, 27 September; 22 November; 4, 5 December
2025: 15, 16, 17 April; 9 May; 27, 30 June, 11 August in
Dartmouth, Nova Scotia

Charge: Section 271, *Criminal Code*

Counsel: Eric Taylor and Christopher Arisz for the Nova Scotia Public
Prosecution Service
Drew Rogers for Mearig Fasil Markos

By the Court:

Synopsis

[1] Mearig Fasil Markos is charged in information 854512 with sexually assaulting HL, contrary to § 271 of the *Criminal Code* (case 8692364). The offence is alleged to have occurred on 10 April 2023 at the apartment of HL in Dartmouth, Nova Scotia. The prosecution proceeded indictably, and Mr Markos elected to have his trial in this Court.

[2] The theory of the prosecution is that Mr Markos, who worked for a taxi service in HRM, drove HL to her apartment in Dartmouth, and digitally penetrated her vagina while in her living room, either without her consent, or when she did not have the capacity to give her consent due to her high level of alcohol intoxication; the prosecution asserts that the testimony of HL of Mr Markos being in her apartment is supported circumstantially by DNA evidence, and by tracking evidence placing Mr Markos's taxi at HL's apartment building for an extended period of time the morning that the offence was alleged to have happened. Further, Mr Markos identified himself to HL. A sexual-assault nurse examiner found that HL had a vaginal wound consistent with digital penetration.

[3] The theory of the defence is that HL's memory of the event was so substantially impaired by beverage alcohol that her account cannot be accepted as reliable. Further, the defence argues that the circumstances admit reasonably of multiple explanations that would not implicate Mr Markos criminally; one explanation might be that HL communicated her consent to being digitally penetrated, but is unable to remember it due to the memory-impairing effects of beverage alcohol.

[4] For the following reasons, the Court finds that, while HL seemed to be a credible witness who tried to recall what happened to her on 9-10 April 2023, the disorienting and memory-impairing effects of beverage alcohol render her account as unreliable. The Court is unable to accept her evidence, apparently identifying Mr Markos as her assailant. Based on the evidence and the governing law which the Court considers to have been decided properly, it is not necessary to consider the proposed defence of forgotten communicated consent.

[5] This is a circumstantial case.

[6] For the following reasons, the Court concludes that the evidence presented to the Court in this case does not lead to a finding of Mr Markos's guilt as the only

reasonable inference to be drawn from the circumstances. Accordingly, the Court finds Mr Markos not guilty.

Inventory of evidence--exhibits

[7] The following exhibits were tendered in evidence by the prosecution; there were no defence exhibits:

Exhibit number	Description of exhibit
1	3-page Agreed Statement of Facts
2	2-page Agreed Statement of Facts
3	Photographs taken by Det Cst Kevin Doucette
4	Sketch of apartment layout drawn by HL
5	Screen shots taken from cellphone of HL
6	Photo of [name redacted]
7	Casino Taxi employment document
8	Casino Taxi employment document signed by Mr Markos
9	Casino Taxi file copy of Mr Markos's NS Driver's Licence
10	Casino Taxi file copy of Mr Markos's HRM Taxi Licence
11	Casino Taxi record of call hail from HL assigned to "Bayar"
12	Casino Taxi dispatch-system tracking data for "Bayar"
13	Casino Taxi dispatch-system tracking data for Mr Markos
14	Casino Taxi dispatch-system tracking date for Mr Markos
15	Casino Taxi KNOX system ping tracking for Mr Markos
16	CV for Nurse Examiner Mary Jane Collins
17	CV for Specialist Jasmine Robitaille
18	PowerPoint slides on DNA basics prepared by Specialist Robitaille

19	First DNA report
20	Second DNA report
21	Third DNA report

Inventory of evidence--witnesses

[8] The Court heard from the following witnesses called by the prosecution; the defence did not call evidence:

<i>Name of witness</i>	<i>Summary of evidence</i>
HL	<p><i>HL—Direct-examination</i></p> <p>HL is the complainant.</p> <p>HL was almost 26 years old at the time of the trial, and worked as a server. She consumed beverage alcohol two days per week, but not daily. She would sometimes drink to intoxication, but generally did not experience blackouts.</p> <p>HL lived in a two-bedroom apartment building in Dartmouth.</p> <p>On 9 April 2023, she planned to go for an Easter brunch with her sister and some co-workers.</p> <p>The group went to a bar/restaurant on Argyle Street in Halifax, and were there from approximately 1:00 or 1:30 PM to 3:00 or 3:30 PM. HL ate brunch. She and her sister split a bottle of champagne, and they drank espresso martinis and mimosas. The prosecution asked a number of alcohol-by-volume questions. These did not lead to informative answers. More meaningful was HL’s description of her level of alcohol impairment as she perceived it; HL was highly alcohol impaired, and did not shy away from acknowledging it.</p> <p>HL and her party ate brunch; HL drank a “tall boy”.</p>

The group then went to a nearby bar, also on Argyle, and stayed from approximately 3:00 or 3:30 PM to 8:00 or 8:30 PM where she consumed a tall boy of beer and 2 or 3 draughts. HL did not have anything to eat.

HL and company then went down to the basement of the bar to watch a comedy show; while waiting for the show to start, she drank 3-4 Coors Light, and might have had a shot. She did not have anything to eat. The group left about 10:30 PM.

HL and her friends then went to their workplace, a restaurant/bar on Prince Street. HL might have had beer and shots, but things got hazy. HL agreed that she “would have been drunk”. HL did not remember leaving. She was wearing a grey crew neck, blue jeans, Blundstone shoes, and a Honda motorcycle coat. She had a wallet and cellphone with her. Her wallet was in her coat.

HL had no memory of anything until she heard someone banging on what seemed to be the window of her apartment.

HL never used Uber to get home. Casino Cabs was her primary ride-hail source.

HL woke up in her apartment in Dartmouth on her couch. She had her PJs on. Her memory was not clear.

HL identified photography of the exterior of her apartment building. (Exhibit 3)

HL drew a sketch of the interior of her apartment. (Exhibit 4)

HL stated that she was startled awake by banging on her window. She then stated: “I don’t remember clearly anything, this is what I could put together the next morning.”

“I remember a gentleman, broad shoulders, darker tone, possible dreads and beaded hair, taller than me . . . I couldn’t really remember, it could have been.”

“I remember being on the couch next to a man on my right, beer cans on the coffee table, and then I remember what happened after that.”

“It is very foggy, I remember him kissing me, going down inside my underwear and inserting his fingers inside me. I remember it hurting. I remember it being aggressive . . . rubbing and moving inside and out.” HL didn’t like it and asked the man to stop.

HL believed she was wearing underwear.

HL told the man she was gay, and was adamant that she did not want it.

HL was unable to remember anything after that until she woke up at 7:30 AM on 10 April 2023. She was lying on the couch in the living room of her apartment; she was wearing a T-shirt and underwear. The couch cushions had been removed and placed on a chair. There were beer cans and spilt beer on her coffee table. The beer cans had come from a pack she and her roommate had bought earlier.

HL stated she would never drink alone in her apartment; when returning home after a night out, she would usually put on her PJs, grab a glass of water, brush her teeth, and then go to bed.

HL eventually found her cellphone under a cushion. It was dead so she plugged it in.

She was sore in her vaginal area, hung over and sick.

HL tried to piece together the night. She knew something had happened, but didn’t know when or how.

HL wanted to make sure her sister had gotten home safely and called her. Her sister advised her what to do next.

HL discovered that she had left her jacket and wallet at a bar she and her friends had visited the night before. Her brother worked there as a bartender. She got her wallet and jacket back the next day.

HL had a group chat with friends to get a feel of what had happened the rest of the night before. She checked her Casino Taxi app [the app] to see what time she might have gotten a car and identify the driver.

The prosecutor showed HL Exhibit 5: three screen shots taken from HL's cellphone. The first two shots showed that she had used the app to hail for a cab for a pickup at 1801 Argyle Street on 10 April 2023, 12:24AM, with a destination being a bar at 5287 Prince Street. The ride was assigned to a driver identified in the app as "Bayar". The payment and tip amount were \$0.00, signifying that the ride did not take place. The third screenshot showed that HL had received a call from a friend at 12:27 AM 10 April 2023. HL would always use the app to hail rides. She did not know anyone named "Bayar."

HL went to work on Easter Monday. It was a 10-hour shift and she wasn't able to contact police. She knew that she had to get home and think about things.

HL got home after her shift at about 3:00-3:30 AM on 11 April 2023. She showered and went to bed. When she got up at around noon, she called the sexual-assault line to talk to the police.

An officer named Ford arrived at HL's apartment and gathered the beer cans from the garbage. HL turned over two pairs of underwear; she knew she had been wearing one of them 9-10 April 2023, but couldn't recall which.

The prosecutor showed HL Exhibit 3 again. HL identified her underwear in photo 28; she identified the beer cans in photo 50.

After meeting with officer Ford, HL went to the ER at the Infirmary, and met nursing staff. They administered her an antibiotic, took photographs of bruising, and collected oral, vaginal and anal swabs.

Officer Ford had taken a brief statement from her. HL met later with a Det Cst Rainault, and gave a recorded statement.

HL knew things were moving forward. An officer came to take her finger prints and pictures of her building.

A few weeks later, as HL was coming out of work early in the morning, a guy that was standing by a cab near the Alehouse approached her and asked, “Do you remember me?” HL described this person as having “all the characteristics of that night.”

HL panicked and said, “Nope.” She got in a car she had borrowed, circled back, got a description and a taxi-roof-light number; she emailed the information to Det Cst Rainault.

HL had not consented to being touched by the man who was in her apartment.

The person who had approached her had darker skin, an accent HL thought she recognized, thicker hair, and was taller than HL. HL was 5’3”.

HL stated she could not identify confidently Mr Markos in the court room as the person who was touching her in her apartment, but did recognize him as the person who approached her a few weeks later as she was leaving work. HL pointed out Mr Markos in the court room.

HL stated that she does her own laundry—no one else touches it. Other than the man she had seen in her apartment, no other male would have touched her underwear. HL lived alone and did not have a roommate.

The prosecutor asked HL if there was anyone in her life of Ethiopian origin. HL replied, “Not to my knowledge. I could have met someone from Ethiopia.” The prosecutor then asked if HL knew anyone of similar appearance. HL replied, “Not unless I had contact with them at the bar and was serving them.”

HL—Cross-examination

HL stated that there were, at one point, six in her group who had met for Easter brunch.

HL agreed that she might have had more to drink than she was able to recall.

HL couldn’t recall if something might have happened at the bar that caused her to leave. HL acknowledged telling Det Cst Rainault that she had made an “Irish exit”—*ie* when you don’t say goodbye and just go home.

HL had no memory of how she was leaving.

She stated that the app would identify the location for a taxi pickup without her having to input the location manually. Her pickup spot on Argyle Street was just down the hill near the Grand Parade.

HL agreed she had told police that she had a vague recollection of not being able to pay the taxi fare.

HL stated that she couldn’t be sure if she was making a memory because of information she had gathered.

HL stated that the banging on the window was the only thing she had confidence in that was actually a memory.

HL was unable to recall if the person banging on her apartment window was the same person she saw in her apartment.

	<p>HL was unable to recall if it was she or the male who had spilled the beer.</p> <p>HL agreed she had told police that she had let the male into her apartment through her door facing the roadway. However, she no longer had a recollection of doing it.</p> <p>HL could remember just bits and pieces of the digital penetration and kissing; she agreed with the suggestion from defence counsel that the memories came as flashes. She was unable to recall what had led up to the kissing and digital penetration.</p> <p>HL agreed that it was possible that she couldn't verbally get out the words telling the male to stop, but, for her, she had said it out loud.</p> <p>HL was unsure how long the male had been in her apartment; she did not know how he had left.</p> <p>HL did not know whether her doors were locked or unlocked when she woke up the next morning; however, she always locks them behind her.</p> <p>Defence counsel asked HL whether she had told the driver that brought her home that she wasn't able to pay, and would go into the apartment to get money. HL did not remember that.</p> <p>Defence counsel suggested that the window banging had happened after the male had already been in the apartment. HL did not remember that. Defence counsel asked if the male came back because he had left his keys. HL stated that the question did not trigger a memory.</p> <p>Defence counsel asked if the fingering and kissing might have happened back at the bar on Prince Street. HL replied, "No, I specifically recall it was my couch and wearing my T-shirt, not my sweater."</p>
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HL stated that she hadn't been told that the DNA of a second male had been found on her underwear. HL had no explanation for that.

HL stated that it was two weeks later—or a little less—when she was approached by the person who asked, “Do you remember me?”

Defence counsel asked HL if the name [name redacted] meant anything to her. HL's reply was, “Not to my knowledge, no.”

Defence counsel showed HL Exhibit 5, a photograph apparently of [name redacted]. HL did not recognize the person in the photograph.

Defence asked HL if she knew why the fingerprints of [name redacted] might have been found on her window.

In response to a prosecution objection regarding defence apparently adducing alternative-suspect evidence, and anticipating that defence might be seeking to lead expert fingerprint evidence without having provided requisite notice, defence counsel abandoned the line of inquiry dealing with [name redacted].

HL agreed that she would be unable to recognize the male who had been in her apartment.

Defence counsel then asked the expansive question, “If I say that it was not Mr Markos, what would your response be to that?” HL replied with an equally expansive answer: “My response then is what was the interaction in front of the Alehouse?”

HL stated that the fingering took her quite a while to recall. She got up to pee. It was sore, and there was blood. Then she had a flashback.

HL noticed a smell of “burnt ashes and smelled like marihuana.” She had no memory of who put a roach in one of the beer cans.

	<p>HL agreed that she had told Det Cst Rainault that she had probably invited the male to come in. “It was all piecing things together—there was that I actually remembered.”</p> <p><i>HL—Redirect</i></p> <p>HL stated that her inside apartment door needs to be manually turned. It does not lock on its own.</p> <p>HL remembered mentioning the vaginal bleeding to the SANE nurse.</p>
Cst Heather Ford	<p><i>Ford—Direct-examination</i></p> <p>Constable Heather Ford has been with Halifax Regional Police for 10 years as a patrol officer.</p> <p>She was dispatched to HL’s apartment on 11 April 2023. HL told her that she had been sexually assaulted by a male and offered a couple of items of assistance.</p> <p>Cst Ford seized 5 empty beer cans that HL said she had cleaned up the morning before. HL turned over two pairs of underwear, which Cst Ford placed in a paper bag which she labelled. Photographs of the seized items appear throughout Exhibit 3.</p> <p>A number of questions followed, dealing with continuity and contamination issues. These inquiries were not necessary, given the admissions in ¶ 4-6, and 8-9 of an Agreed Statement of Fact, tendered as Exhibit 1.</p> <p><i>Ford—Cross-examination</i></p> <p>Cst Ford testified that she was the initial investigator. HL’s case was then assigned to a sexual-assault investigator.</p>
Brian Herman	<p><i>Herman—Direct-examination</i></p>

	<p>Mr Herman has been the president of Casino Taxi [Casino] for 12 years, and has been with the company for 21 years.</p> <p>Given the admissions contained in ¶ 1-2 of Exhibit 1, it is possible to summarize the evidence of Mr Herman as follows.</p> <p>Casino has a staff of 25 persons, and anywhere from 350-450 independent contractor drivers.</p> <p>Exhibits 7-15 are business records of Casino.</p> <p>Exhibits 7-10 are records of Mr Markos's terms of employment with Casino, and include his Nova Scotia driver's licence and his HRM taxi licence. Drivers are issued tablet computers [tablets]: they log into these to complete trip requests for passengers.</p> <p>Each driver is assigned a roof-light number, and ID number for Casino's dispatching system; each driver self-selects a PIN for the tablet the driver has been issued. Drivers use their roof-light number, PIN, and ID number to log into the dispatching system on their tablets.</p> <p>The dispatching system is connected to a backend platform, so that dispatchers can see the locations of drivers who are logged into the dispatching system; this allows dispatchers to assign customer hails to drivers in a time-and-cost-efficient manner.</p> <p>The system is connected to a cell network so that Casino can track drivers so long as they are logged into the dispatching system.</p> <p>There is a secondary Samsung KNOX system [KNOX] that transmits periodic GPS locations of tablets. KNOX pings every hour, as long as a tablet is powered on; the driver need not be logged into the Casino dispatching system for KNOX to transmit pings.</p> <p>Casino is unable to track locations if a tablet is turned off.</p>
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	<p>Time references in the next exhibits are on the 24-hour clock: XX:XX:XX=hr:min:sec. All recorded times are for 10 April 2023.</p> <p>Exhibit 11 is a record of an app-originated taxi hail. It can be cross-referenced to Exhibit 5: the screen shots taken from HL's cellphone. HL hailed for a cab at 00:24:30 hrs. The hail was assigned to a driver named "Bayar" for a pickup at an address on Argyle Street. The hail was closed at 00:31:02 hrs as a "no show".</p> <p>Exhibit 12 is a reproduction of two maps containing Casino dispatch-system tracking data for the tablet assigned "Bayar" from 00:26:00-01:25:00 hrs, and then from 01:25:00-01:40:00 hrs, when "Bayar" signed off. At no point was the tablet assigned to "Bayar" tracked to Dartmouth.</p> <p>Exhibit 13 is a reproduction of three maps highlighting Casino dispatch-system tracking data for the tablet assigned to Mr Markos.</p> <ul style="list-style-type: none"> • Between 00:05:45-00:50:39 hrs on 10 April 2023, Mr Markos's tablet was located in the downtown core of Halifax. • At 00:50:39 hrs, Mr Markos's tablet is at Scotia Square on Barrington, heading north to Gottingen, then to Dartmouth. • Casino tracking followed the tablet across the MacDonald Bridge, with a right turn onto Wyse Rd, then right onto Windmill Rd, arriving between Mott St and Best Street at 00:58:48 hrs-01:02:53 hrs. This is the location of HL's apartment building. <p>Exhibit 14 is a reproduction of 5 maps highlighting KNOX ping-tracking data for Mr Markos's tablet.</p> <ul style="list-style-type: none"> • At 00:57:53 on 10 April 2023, the tablet is tracked to the intersection of Wyse Rd and the approaches to the MacDonald Bridge. • At 03:09:20, the tablet is tracked to a location between Best and Mott Streets, directly adjacent to HL's apartment building. • At 05:34:44, 07:42:57, and 09:59:00 hrs, the tablet is tracked to a location near the intersection of Herring Cove Rd and Glenora Av.
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	<p>Exhibit 15 is a reproduction of a map highlighting Casino dispatch-system tracking data for Mr Markos’s tablet on 24 April 2023. At 03:38:31 hrs, the tablet was located on Brunswick St, just across from the Alehouse. This matches approximately the time and location when HL was approached by the person who asked, “Do you remember me?”</p> <p><i>Herman—Cross-examination</i></p> <p>Of the questions asked on cross, the one that revealed pertinent new information is that Mr Markos’s tablet stopped returning dispatch-system data after 01:02:53 because the tablet had likely gotten logged off.</p>
Mary Jane Collins	<p><i>Collins—Direct-examination</i></p> <p>Mary Jane Collins is a Sexual Assault Nurse Examiner, and was qualified to give opinion evidence on the nature and significance of injuries to the female genitalia in the context of sexual assault.</p> <p>Nurse Examiner Collins met HL on 12 April 2023 and had no contact with her after that. HL consented to Nurse Examiner Collins completing the SANE procedure.</p> <p>Nurse Examiner Collins conducted a preliminary physical examination of HL. She observed no evidence of strangulation or of anal penetration; those sorts of injuries require immediate attention.</p> <p>Nurse Examiner Collins offered HL STI prophylaxis and collected blood and urine for toxicology. Nurse Examiner Collins completed oral, anal and vaginal swabs; this allowed the collection of a DNA reference sample. She collected pubic-hair samples.</p> <p>Nurse Examiner Collins observed no bruises or abrasions on HL’s body.</p> <p>The last part of the procedure was a genital exam. Nurse Examiner Collins noticed that the labia around HL’s vagina was very red. At</p>

	<p>the 6-o'clock position, there was an abrasion. It was the exterior region of the vagina. Nurse Examiner Collins described the abrasion as a removal of the top layer of skin. Nurse Examiner Collins did not do any photography of HL's genital area, as it would be too personal, and potentially trauma-causing.</p> <p><i>Collins—Cross-examination</i></p> <p>Defence counsel cross-examined Nurse Examiner Collins on notes and records she had made during the SANE examination of HL. This did not lead to much information additional to what the Court had learned during direct-examination. That is, except for one point: Nurse Examiner Collins clarified that the redness around HL's vagina would be described more accurately as a friction burn.</p> <p><i>Collins—Redirect</i></p> <p>Nurse Examiner Collins was asked to offer an opinion about what might have caused the friction burn. She stated that the abrasions were consistent with being caused by a penis, an object or a finger, in her opinion.</p>
Det Cst Kevin Doucette	<p><i>Doucette—Direct-examination</i></p> <p>Detective Constable Kevin Doucette has been a member of the Halifax Regional Police for 16 years; he was with the RCMP for a year before that.</p> <p>He is attached to the Forensic Identification Section.</p> <p>Det Cst Doucette took the photography contained in Exhibit 3, and he authenticated it as accurate. He also conducted forensic-identification procedures on the two pairs of underwear and the 5 empty beer cans that Cst Ford had obtained from HL on 11 April 2023. He labelled a gray pair of underwear as police exhibit 3, and a black pair as police exhibit 4. He assigned police exhibit numbers to each beer can, from 5 to 9.</p>

	<p>Det Cst Doucette conducted photography of the exterior of HL’s apartment on 14 April 2023. He did not do any interior photography of HL’s living room; he stated that he had not been tasked to do so: “I was only requested to process the outside.” At that point, four days had passed, HL had cleaned up her apartment.</p> <p>Det Cst Doucette was able to raise fingerprints from an exterior window of HL’s apartment, and two of the beer cans. There was no evidence that this led to any print-match results.</p> <p>Det Cst Doucette obtained a DNA warrant to collect a bodily substance from Mr Markos, and obtained a DNA sample from him. He labelled this as police exhibit G-1.</p> <p><i>Doucette—Cross-examination</i></p> <p>Det Cst Doucette was not cross-examined.</p>
Jasmine Robitaille	<p><i>Robitaille—Direct-examination</i></p> <p>Jasmine Robitaille is a biology reporting specialist with National Forensic Laboratory Services, RCMP Edmonton. She was qualified by the Court as a biology forensic specialist, able to provide opinion evidence on the search and recovery of possible biological material, including the interpretation of body-fluid-identification test results, as well as the development and interpretation of DNA typing profiles, including the application of statistical significance to any matches or inclusions found.</p> <p>Specialist Robitaille processed and examined the black pair of underwear (police exhibit 4) and Mr Marcos’s DNA sample.</p> <p>Specialist Robitaille also reviewed reports prepared by an Ottawa-based specialist, Marie-Eve Bonicalzi. Specialist Robitaille verified the accuracy of the process and the results set out in Specialist Bonicalzi’s reports. Specialist Bonicalzi processed and examined</p> <ul style="list-style-type: none"> • both pairs of underwear, • three of the beer cans,

- the vaginal and anal swabs obtained from HL by Nurse Examiner Collins,
- the known sample of DNA collected by Nurse Examiner Collins from HL and,
- the known sample of DNA collected by Det Cst Doucette from Mr Markos.

Although Specialist Robitaille was examined at length, the relevant opinions she was able to offer the Court were set out in ¶ 5 of the Agreed Statement of Fact, Exhibit 1:

- A DNA typing profile obtained from the swabs of two beer cans collected by police from HL matched the DNA typing profile of Mr Markos.
- A DNA typing profile obtained from a third beer can was consistent with having originated from two individuals. The major component matched HL. Male DNA was also detected, but no DNA typing profile could be obtained.
- The DNA typing profile from the vaginal swab collected from HL matched the known DNA sample from HL. No male DNA was detected.
- Both pairs of underwear contained DNA typing profiles of HL. Male DNA was detected on one pair (the black pair that Det Cst Doucette had labelled as police exhibit 4). No male DNA was detected on the other pair.
- Further testing conducted on the black pair of underwear obtained a Y-STR DNA typing profile (a profile-development process that targets the Y chromosome in males) from the interior-middle-centre-crotch to the middle-lower-front panel.
- This profile was of mixed origin, consistent with having originated with two male individuals.
- The major-component profile matched the DNA typing profile of Mr Markos. As Y-STR DNA typing is a process for exclusion, not identification, this result means that neither Mr Markos nor any of his paternal male relatives can be excluded as the donor of the major component.
- No meaningful comparison could be made with the minor component due to the weakness of some of the components.

	<p>The minor contributor contributed only 5 percent to the profile.</p> <p>Specialist Robitaille stated that the testing processes cannot determine how DNA got deposited on a surface. Direct transfer is more likely to leave a DNA deposit than secondary transfer, which is more likely than tertiary. Specialist Robitaille provided the following explanation:</p> <ul style="list-style-type: none"> • Primary transfer: I touch an object and deposit my DNA. • Secondary transfer: I shake hands with person X; I then touch a bottle and leave X's DNA on the bottle. • Tertiary transfer: A touches B. B's DNA is transferred to A. A touches C and deposits B's DNA on C. <p>Specialist Robitaille testified that tertiary transfer is very rare and not usually identifiable unless the transferred substance is a wet bodily fluid. Wet fluids are rich in DNA and are more easily transferred.</p> <p>Specialist Robitaille was asked by the prosecutor to consider a hypothetical situation of Mr Markos, working as a taxi driver. His hands come into direct contact with the hand of an unidentified male—direct hand-to-hand contact by handshaking or some other means—or the hands of Mr Markos come into contact with money or an object with DNA of an unidentified male; then, within hours of that contact, Mr Markos's hand rub up against the underwear of a female in a location similar to where the two major/minor profiles were found on HL's black underwear: would that scenario be consistent with the Specialists' findings? Specialist Robitaille stated that the proposed scenario could generate results similar to what she observed in this case from her analysis of HL's black underwear.</p> <p><i>Robitaille—Cross-examination</i></p> <p>Out of the questions asked on cross-examination, the following were material and relevant answers.</p>
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In response to a defence inquiry about semen, an issue that had not been raised on direct, Specialist Robitaille stated that both pairs of HL's underwear were tested for semen. There was a positive test on one for semen, but semen could not be confirmed.

Defence counsel asked Specialist Robitaille if simply riding in Mr Markos's cab could have led to the deposit of DNA on HL's black underwear. Specialist Robitaille stated that this would be possible but highly unlikely or very unlikely, as it would be a tertiary transfer, if she had touched a door handle with Mr Markos's DNA. The DNA would have had to have gone from Mr Markos's hand to the door handle (one transfer), from the door handle to HL (a second transfer), and from HL to her underwear (a third transfer).

Specialist Robitaille offered that the literature does not support the transfer of male DNA to female underwear through social interaction, except in cases of cohabiting males. It was not clear to the Court whether Specialist Robitaille adopted this research as accurate.

Defence counsel asked if a DNA transfer by Mr Markos sneezing would account for the observed Y-STR DNA-profile result. Specialist Robitaille stated that it was less likely than direct transfer, but more likely than the first defence door-handle scenario. Similarly unlikely would be Mr Markos's DNA profile ending up on HL's black underwear through sneezing or through conversation.

Defence posited a scenario of Mr Markos touching a can, depositing saliva, and then HL touches the can, and later her underwear. Specialist Robitaille concluded that this would still be tertiary transfer, but more likely than the first defence scenario as it involved contact with a bodily fluid.

Robitaille—Redirect

Specialist Robitaille stated that she did not author the report that discounted male-DNA transfer to female underwear through social interaction, but it had been peer reviewed.

	<p><i>Robitaille—Question from the Court</i></p> <p>There was a positive screening test for semen, but no spermatozoa identified, so semen could not be confirmed.</p> <p>The Court asked about the palms of two hands coming into contact with each other. Specialist Robitaille confirmed that palms of the hands shed DNA. They don't have to but they can; it would make it more likely if the hands were perspiring. The Court proposed a scenario of a male person helping a female person needing assistance walking, leading to hand-to-hand contact, and the female then touching an item of intimate apparel. A transfer would not necessarily have to happen; however, it could. It would be a secondary transfer, which would be more likely than a tertiary one.</p>
<p>Det Cst Tanya Rainault</p>	<p><i>Rainault—Direct-examination</i></p> <p>Detective Constable Tanya Rainault has been a police officer since 2008,</p> <p>She was the lead investigator in this case.</p> <p>Although she maintained a physical, paper notebook, she documented electronically on each day the work that she had completed in Mr Markos's case.</p> <p>Det Cst Rainault called HL and provided her with information to make contact with a SANE nurse.</p> <p>She took an audio-video recorded statement from HL on 14 April 2023.</p> <p>Based on information provided to her by HL, Det Cst Rainault began collecting information from Casino and the Registry of Motor Vehicles.</p> <p>Det Cst Rainault canvassed the area of Barrington St and 1 Government Place where she believed HL had gotten picked up by a</p>

	<p>taxi. She obtained CCTV footage taken in the vicinity of 1 Government Place on 10 April 2023 at 12:50 AM; it showed a taxi picking up a fare and then heading north on Barrington. The quality of the footage did not provide more detail. The CCTV footage was not tendered in evidence.</p> <p>On 14 April, Det Cst Rainault did a canvass of residents at HL's apartment building.</p> <p>Det Cst Rainault tasked Det Cst Doucette with forensically processing the exterior windows at HL's apartment. She did not request any forensic work for the interior of HL's apartment, as she was more concerned about getting prints from the outside windows.</p> <p>Det Cst Rainault spoke with 2 of HL's friends who had been with her on 9-10 April 2023.</p> <p><i>Rainault—Cross-examination</i></p> <p>Det Cst Rainault testified that there was no CCTV footage of any of the establishments HL had attended on 9-10 April 2023, and there was no CCTV footage from HL's apartment building.</p> <p>Det Cst Rainault did not do a canvas of persons who might have been at the last establishment HL attended before she headed home.</p> <p>Det Cst Rainault talked to two of HL's friends only; based on what HL had told her, those two seemed the most likely to have relevant information.</p>
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Voir-dire trial management

[9] Police obtained an audio/video-recorded statement from Mr Markos. At the start of the trial, the prosecutor informed the Court that the statement would not be tendered as part of the case for the prosecution; however, it could be used to cross-examine Mr Markos, should he choose to testify. This practice is permissible: the

prosecution may hold back a statement by an accused to a person in authority, in order to use it for cross-examination, provided the choice to defer not serve as a camouflage for case splitting: *R v EA*, 2021 ONSC 1048 at ¶ 7; *R v Osborne*, 2019 ONSC 839 at ¶ 11; *R v King*, [1998] OJ No 662 at ¶ 28 (SCJ); *R v Brooks*, 1986 CanLII 1168, [1986] BCJ No 510 at ¶ 114 (CA). A statement held back by the prosecution for cross-examination as to credit must still be proven voluntary beyond a reasonable doubt: *R v BG*, [1999] 2 SCR 475 at ¶ 32.

[10] Defence counsel did not admit the voluntariness of Mr Markos's statement.

[11] Defence counsel sought to have a voluntariness *voir dire* conducted before the close of the case for the prosecution, so that Mr Markos would know the extent of his cross-examination risk, should he decide to testify.

[12] The prosecutor very fairly agreed to this procedure.

[13] The *voir dire* eventually proceeded, and took about half a day. It involved watching Mr Markos being interviewed by police. At the conclusion of the *voir dire*, defence counsel conceded voluntariness, and informed the Court that Mr Markos would not be calling evidence.

[14] It might be argued that the prosecution should be obligated to inform an accused of the use it intends to make of a statement the accused gave to police: as

inculpatory evidence to be led during the prosecution's case-in-chief, or solely as a cross-examination tool for impeachment. If for cross-examination only, a corollary is that the accused is entitled to have a voluntariness *voir dire* heard and decided before calling evidence, as was done in this case.

[15] I do not believe that an accused is entitled to this level of litigation certainty.

[16] How the prosecution chooses to utilize an accused's statement would seem to be a strategic decision. The prosecution is required to disclose evidence to the accused; it is not required to reveal strategy. Trial strategy would ordinarily be covered by a litigation or work-product privilege: see, *eg*, *R v O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411 at ¶ 87.

[17] In my view, once the state has disclosed to defence any statement made by an accused to a person in authority, the constitutional disclosure obligation for that piece has been fulfilled. Even if the prosecution should elect not to introduce the statement as part of its case, the accused would know the real potential of it being deployed on cross.

[18] In my view, the best practice—and one that would promote time efficiency—would be to conduct voluntariness *voir dices* only when an accused's statement is about to be used: during the case for the prosecution when it is ready

to be presented in evidence; or after the accused has testified and the prosecution is ready to embark on cross-examination—the prosecution need not tip its hand before then, as it is a strategic choice.

[19] Had I taken that approach in this case, half a day of *voir-dire* time might have been saved.

Admissions

[20] At the start of the trial, the Court was presented with two comprehensive Agreed Statements of Fact, Exhibits 1 and 2; these formal admissions covered expansively the continuity and integrity of seized exhibits, the validity of the scientific procedures used to test them, and the accuracy and authenticity of electronic data. As covered by § 655 of the *Code*, formal admissions are to be treated by the court as conclusive of the facts that have been acknowledged as true: *R v Castellani*, 1969 CanLII 57, [1970] SCR 310 at 317; *R v Curry*, 1980 CanLII 4454, (1980), 38 NSR (2d) 575 at ¶ 26 (NSCA); *R v Falconer*, 2016 NSCA 22 at ¶ 45.

[21] Court time is finite, and criminal cases are heard subject to a constitutional mandate that they be concluded within a reasonable time.

[22] Admissions assist in fulfilling that mandate, as they promote trial efficiency. Once a formal admission is made, no further evidence is needed, and time is usefully conserved.

[23] However, that efficiency is degraded when superfluous or duplicative proofs are offered in evidence in the face of admissions.

[24] It is necessary to raise this point, as the Court was required to exercise its trial-management function at various points to try to advance through direct-examination lines of inquiry that appeared to offer proofs of what had already been fully admitted. Time might have been spent more usefully hearing from some of the group who were last with HL at the bar on Prince Street.

Cross examination

[25] The task of a cross-examiner in a criminal trial is not an easy one. The witness to be questioned will likely be opposed in interest to the cross-examiner, which will pose manifold challenges. The cross-examination project seeks, among other things, to challenge the credibility and reliability of the opposing witness, diminish the damaging effect of answers given on direct, and elicit exculpatory evidence when it is certain to be given

[26] Cross-examination is not a means of obtaining answers to questions left unanswered on direct. Nor is it intended to fill in gaps that might remain after direct-examination. Ambiguities, uncertainties, or gaps that remain after a direct-examination are generally better left alone. An unbounded, voyage-of-discovery cross-examination of an opponent's witness might uncover information detrimental to the cross-examiner's case. Judicial experience informs me that the most effective cross-examinations are those that are finely tuned, focussed, and economical. A best practice is not to ask a question on cross unless certain of the answer. Broad cross-examination questions that admit of expansive-narrative answers tend to backfire. Some of the most effective cross-examinations I have encountered begin and end with: "I have no questions for this witness."

[27] Finally, it is typically a thin-ice expedition for a cross-examiner to try to out-expert an expert.

Avoiding implicit bias

[28] Mr Markos is Black, and a member of an immigrant community.

[29] 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.

[30] HL was asked on direct-examination if there was anyone in her life of Ethiopian origin. HL replied, “Not to my knowledge. I could have met someone from Ethiopia.” The prosecutor then asked if HL knew anyone of similar appearance. HL replied, “Not unless I had contact with them at the bar and was serving them.” The Court must approach this evidence with precaution, and not treat it in a way that would link culpability to a racial or stereotypical profile.

[31] While the risk of racial profiling by police may be a legitimate basis for inquiry by the defence, there is no evidence of it having occurred in this case. I am satisfied that Det Cst Rainault went where she believed the evidence led her.

A circumstantial case

[32] If a female person has her vagina digitally penetrated without her consent, that is a sexual assault. There is no room for ambiguity. I am satisfied that HL was the victim of such an assault. The question in this trial is whether Mr Markos is the one who did it.

[33] There is no direct evidence against Mr Markos. HL cannot identify him as her assailant. The prosecution argues that the Casino tracking data, the DNA and

Y-STR DNA profiles developed from the beer can and HL's black underwear, and Mr Markos's action in identifying himself to HL a couple weeks after the alleged offence, all lead irresistibly to the conclusion that Mr Markos was HL's assailant.

[34] Defence argues that many other non-incriminating explanations arise from these circumstances.

[35] The Court must apply the binding principles in *R v Villaroman*, 2016 SCC 33 (CanLII), [2016] 1 SCR 1000 [*Villaroman*]:

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R v Comba*, 1938 CanLII 14 (ON CA), [1938] OR 200 (CA), at 205 and 211, per Middleton JA, aff'd 1938 CanLII 7 (SCC), [1938] SCR 396; *R. v. Baigent*, 2013 BCCA 28, 335 BCAC 11, at ¶ 20; *R v Mitchell*, [2008] QCA 394 (AustLII), at ¶ 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R v Bagshaw*, 1971 CanLII 13 (SCC), [1972] SCR 2, at 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[39] I have found two particularly useful statements of this principle.

[40] The first is from an old Australian case, *Martin v Osborne* (1936), 55 CLR 367 (HC), at 375:

In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, *according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of*

the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]

[41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.

[42] The second is from *R v Dipnarine*, 2014 ABCA 328, 584 AR 138, at ¶ 22 and 24-25. The court stated that “[c]ircumstantial evidence does not have to totally exclude other conceivable inferences”; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

[43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

Analysis of the evidence

[36] HL had consumed significant quantities of beverage alcohol prior to the alleged offence; by her own admission, her memory was hazy, foggy, and unclear. She had to “put it back together”.

[37] The jurisprudence is undecided whether the effect of ingested alcohol on human memory or cognition can be the subject of judicial notice: see *eg R v Hoffner*, 2005 CanLII 32924 at ¶ 65-68 (ONCS); *R v Shyshkin*, 2007 CanLII 16444 (ONSC) at ¶ 149; but see *R v DL*, 2022 MBQB 127 at ¶ 51.

[38] As in *R v MAM*, 2025 NSPC 1, that issue does not arise here, as HL acknowledged in both direct and cross-examination that her memory was highly faulty due to her elevated and memory-inhibiting level of alcohol impairment.

While I believe that HL tried to be truthful, her recollection of events is, quite simply, unreliable. She acknowledged that her memory, beginning when she arrived at the bar on Prince Street, was hazy. She testified initially that she couldn't remember clearly anything when she woke up the next morning at 7:30 AM. She then began to piece things back together. She described on cross her memories of the kissing and fingering coming back as flashbacks. She stated that she gathered information from others to help piece things back together. These circumstances operate as profound reliability deficits.

[39] The circumstances of HL parting with her group raise questions. She seemed to have taken off suddenly, and left behind her coat and wallet. What had happened that led to a seemingly precipitous departure? Further, while it might be assumed that HL was alone when she left her group, there is no evidence on that point.

[40] HL first tried hailing a cab with the app on Argyle Street, but was a no-show. Had she encountered a problem?

[41] While the tracking evidence from Casino satisfies the Court that it was Mr Markos's cab that returned HL to her apartment, it does not establish that HL was the only passenger in the cab.

[42] No photographs were taken by police of HL's living room, the specific site where the sexual assault occurred, according to HL's testimony; no photographs of the interior of her apartment were taken at all. By the time Det Cst Rainault had gotten tasked to the investigation, two days had passed, and HL had already cleaned up her living room—the scene was, essentially, contaminated. Crime-scene photography can be a valuable source of circumstantial evidence in a criminal case: *R v Jacklyn-Smith*, 2013 NSPC 71 at ¶ 20. The fact that photographs of HL's living room were not taken is not to be treated as having a penalizing effect; nor may the Court draw an adverse inference against the prosecution or the police. However, the Court must factor this absence of material evidence into the analysis of the circumstances.

[43] I approach the DNA evidence and the opinions of Specialist Robitaille with some level of precaution. The DNA reports were data rich: the Court must not be overwhelmed by them. Further, the Court must be mindful that the Y-STR DNA evidence, developed from HL's black underwear, is evidence of exclusion, not identification.

[44] I have considered the combined effects of the Y-STR DNA evidence developed from HL's underwear, the DNA evidence developed from the can of beer, the tracking data from Casino, and HL's identification of Mr Markos as the

person who approached her outside the Alehouse asking, “Do you remember me?”

This combination of evidence satisfies me that it was Mr Markos who drove HL back to her apartment. But, again, the evidence does not establish that HL was the only passenger.

[45] Given HL’s very high level of alcohol intoxication, it seems probable that she would have needed help getting from the cab into her apartment. If Mr Marcos had needed to guide her—which seems to be a reasonable hypothesis—that direct contact with HL could plausibly have led to a secondary deposit of DNA with Mr Markos’s profile type, if HL later touched her own underwear. This would explain the positive result on which so much of the theory of the prosecution rests. As defence counsel observed in closing argument, DNA evidence offers proof of contact, not conduct.

[46] The Casino tracking data establishes that Mr Markos was either at or near HL’s apartment from approximately 01:02:53 hrs on 10 April 2023 to at least 03:09:20, the time of the last KNOX ping from HL’s address. The DNA profile developed from one of the beer cans proves that Mr Markos was likely drinking beer in the apartment. That evidence is verified scientifically and technically. But the rest of the case for the prosecution depends on the reliability of the memory of HL, and I do not find it reliable. Data cannot make up for damaged memory.

[47] Mr Markos likely now regrets his decision to approach HL outside the Alehouse and identify himself to her. However, it does not seem to be the action of a person with a guilty mind. Further, no evidence was led by the prosecution when or if HL provided to Det Cst Rainault a physical description of the person inside her apartment who sexually assaulted her, or that HL went through a *Sophonow*-compliant-photopack-identification procedure. Her description in court was clear: “Broad shoulders, darker tone, possible dreads and beaded hair, taller than me.” It would have been helpful to know if HL had offered that description to police before encountering Mr Markos outside the Alehouse. Out-of-court statements can be admitted into evidence when a witness is unable to identify an accused in court, but is able to testify to a description previously given as in, say, a statement to police: *R v Swantson*, 1982 CanLII 423. As it is, it is unclear whether seeing Mr Markos outside the Alehouse revived a memory HL had of the physical characteristics of her assailant, or led her to jump to a conclusion.

Findings of fact

[48] On 9 April 2023, HL, accompanied by her sister, friends and coworkers, went out for Easter brunch. Through the afternoon and into the evening, HL consumed a substantial quantity of beverage alcohol. This had a disabling effect on her ability to observe, perceive, comprehend, commit to memory and recall

things that she did and things that happened to her, running from around 10:30 PM on 9 April 2023 until about 7:30 AM on 10 April 2023.

[49] HL somehow hailed a Casino taxi to take her back home to Dartmouth. It is unclear whether anyone was with her. The driver who took her to Dartmouth was Mr Markos.

[50] HL and Mr Markos arrived at HL's apartment at around 1:02 AM on 10 April 2023. Again, the Court is unable to determine whether there was anyone else in the cab with HL and Mr Markos.

[51] I believe that, due to HL's high level of intoxication, it is reasonable to believe that Mr Markos had to assist her getting to her apartment door. This might plausibly have led to Mr Markos's DNA being transferred directly to HL's hands, and then from her hands onto her black underwear. Although Specialist Robitaille described this as a secondary DNA transfer, and so less likely than a primary mode, she did not reject it as irrational or fanciful. I conclude that it is reasonably plausible that HL transferred Mr Markos's DNA to her black underwear by touching it after having had hand-to-hand contact with Mr Markos, without implicating any criminal conduct by Mr Markos. Moreover, correctly observed by defence counsel, DNA evidence is proof of contact, not conduct.

[52] Mr Markos went into HL's apartment with HL and was there until approximately 3:09 AM on 10 April 2023. I believe that he consumed a quantity of beer while there, and might have smoked cannabis.

[53] I do not know if Mr Markos was the only person in the apartment with HL, or if anyone arrived at the apartment after Mr Markos left.

[54] I find that, at some point between the late evening of 9 April 2023 and the early morning of 10 April 2023, someone digitally penetrated HL's vagina; I base this on HL's memory (degraded as it was) of it happening, and on the observations made by Nurse Examiner Collins of a HL's vagina presenting with a friction wound consistent with digital penetration. However, because of the frailty of HL's memory, I am uncertain whether that event occurred in HL's apartment or whether Mr Markos was the one who did it.

[55] I am unsatisfied that Mr Makos's guilt as the person who sexually assaulted HL is the only reasonable inference to be drawn from the proven circumstances. Accordingly, the Court is, as a matter of law, left in a state of reasonable doubt and finds Mr Markos not guilty.

[56] Given this finding, it is not necessary to address the supplementary arguments that were presented to the Court by counsel arising from *R v Stewart*,

2025 NSCA 57 [*Stewart*]. *Stewart* appears to have identified a circumstantial-evidence argument of forgotten communicated consent. To be sure, the judgment of the Court certainly cites *Villaroman* correctly. However, in a legal construct where the apex court in Canada has decided that there is no such thing as implied consent, and that only “yes” means “yes” and everything else means “no”, it is difficult to understand the outcome that was reached in *Stewart*. In any event, in the circumstances of this case, it is not necessary to apply it.

[57] The Court is indebted to counsel for their valuable assistance. I would like to thank especially Mr Abawajy for the superb level of interpreter services he has provided to Mr Markos throughout this trial.

Atwood, JPC