

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. J.A.M.*, 2018 NSSC 120

Date: 2018-05-17

Docket: PIC No. 454052

Registry: Pictou

Her Majesty the Queen

v

J.A.M.

Judge: The Honourable Justice N. M. Scaravelli

Hearing: Pictou, Nova Scotia, November 27, 30, December 4, 5, 2017
January 15 and 16, 2018

Decision: May 17, 2018

Counsel: Jody McNeill for the Crown

Andrew O’Blenis for J.A.M.

Restriction on Publication: Pursuant to s. 486.4 of the Criminal Code, any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

The Court:

[1] The accused J.M. has been charged that:

Between the 27th day of September 2014 and the 28th day of September 2014, at or near Garden of Eden, Nova Scotia, did commit a sexual assault on L.B. contrary to section 271 of the *Criminal Code*.

[2] The evidence at trial has established that sexual activity occurred between the complainant L.B. and the accused J. M.

[3] The crown's theory is that at the time of the sexual activity L.B. lacked the capacity to consent because she was either too intoxicated or was unconscious at the time it occurred. Therefore, the crown contends J.M. could not have had an honest but mistaken belief there was consent.

[4] J. M.'s defence is that L.B. initiated and consented to the sexual activity and there were no signs that she was too intoxicated to have consented. He honestly believe that she was consenting to the sexual activity.

Review of Evidence

L.B.

[5] The complainant L. B. resides in Dartmouth, Nova Scotia. At the time of the alleged offence she was in a six year relationship with D. S. who resides in Thorburn, N.S. Although they maintained separate residences, they would travel between households on alternate weekends and spend vacation time together. At the time of trial, L. B. and D. S. were no longer in a relationship.

[6] During the weekend of September 26-28, 2014, L.B. was at the Thorburn residence owned by D. S. During the afternoon of September 27th, the couple consumed two or three beers each at home. D. S. 's son, S. Jr. arrived at the residence later in the day with some friends in his R.V. They were going to a stag party at a cottage owned by Mr. C. at the Garden of Eden, Pictou County, NS. S. Jr. suggested that his father and L.B. take his side-by-side ATV and travel across country to the Garden of Eden with another married couple that were going, Mr. W. and Ms. A.W.

[7] According to L.B. they left in the RV around 5:00 or 6:00 o'clock to pick up the ATV at S. Jr.'s home. L.B. consumed one beer while in the R.V. After arriving at S. Jr.'s home, he gave them a small cooler for the trip. Inside was a container or bottle of vodka as well as vitamin water to be used for mix.

[8] After the RV left, L.B. and D. S. drove to the home of Mr. M and Ms. A. W. in the ATV. While in their garage, L.B. consumed one or two beers. After

about an hour, the couples travelled in their respective A.T.V.'s through the woods to Mr. W. and Ms. A. M.'s cabin, a trip that took one to one and half hours.

During the trip L.B. consumed a drink of vodka that she mixed with the vitamin water. They stayed at the cabin less than an hour. While there L.B. consumed a beer.

[9] The one or two hour trip from Mr. W. and Ms. A.W.'s cabin to the Garden of Eden location through wood trails was a rough ride. They would make random stops during which vodka drinks were mixed. L.B. was unable to recall how many vodka drinks she consumed along the way.

[10] Her testimony continued:

Q. And when you arrived. Do you have any recollection about how you were feeling when you arrived at Garden of Eden?

A. I was pretty tipsy.

Q. Okay, what do you mean by tipsy?

A. I remember taking off my helmet, I remember hearing – chatting with people.

Q. Okay.

A. I remember walking into the RV.

Q. Anything else at that point?

A. And I vaguely remember chatting with young D. and L.

Q. Who's L?

A. D. Sr.'s brother.

Q. Is his last name S.?

A. S., S..

Q. Do you remember whether you had any drinks with alcohol after you arrived at Garden of Eden?

A. I would have had a drink in my hand but I don't remember.

Q. And the drink that you had in your hand, where had that come from?

A. No clue.

THE COURT: Sorry, I didn't hear that.

A. No clue. I don't remember. I don't know if it was a beer or another drink of vodka

Q. And you don't remember where that came from or what it was?

A. It wasn't ours. If it was vodka, it would have been the vodka that was left in the RV or some . . .

Q. Okay.

A. The guys would have given us a beer or I don't know.

MR. O'BLÉNIS: Your Honour I think the witness has already said she doesn't know so ultimately the questioning issue is calling for speculation.

THE COURT: Go ahead.

MR. McNEILL: If I just may have a moment Your Honour. From the portion of the trip between the cabin to Garden of Eden, do you remember how you were feeling? Can you describe how you felt during that portion of the trip?

A. From the cabin to . . .

Q. From the cabin to Garden of Eden, do you remember how you were feeling?

A. I don't remember being – the ride was so rough, I just, we hit our heads, it was just, I don't know it was fast, drinks, I don't know if I had time to digest what was going on really, to tell you how I . . .

Q. Alright. Had you had anything to eat prior to your arrival at Garden of Eden. I know you mentioned, you mentioned a couple of things. You mentioned breakfast and you mentioned some lasagna.

A. Chicken lasagna would have been like at 2:00 o'clock in the afternoon, but no, we didn't eat after that.

Q. Okay and what time of day or night did you actually arrive at Garden of Eden?

A. I'm guessing it's around, I am guessing around midnight, maybe later.

Q. And the amount of sleep you got the night before? Do you remember approximately how much sleep you got?

A. I'll say an hour, a half hour.

Q. How much sleep do you normally get to feel rested?

A. Five.

Q. Excuse me Your Honour if may have a moment. When you arrived at the Garden of Eden location was there any where there, anyone there you knew other than D. Sr.? Anyone you recognized.

A. I knew D. Jr., D. Sr., L., M., A., a few familiar faces from guys that were in the RV when then came to the house. I would not be able to give you any names.

Q. What is the next thing you remember?

A. Being in the RV talking with D. and L. and laughing.

Q. Do you know what point of the night that would have been? Or how long you had been at Garden of Eden prior to that?

A. No.

Q. Do you remember how you were feeling at that point, when you were sitting there in the – you say the, the side-by-side or the RV? Your talking about the RV.

A. It's confusing because you know, what I remember and what I am being reminded of what was being happening.

Q. Okay.

A. I – to my recollection I am in the RV.

Q. Okay and how are you feeling in terms of alcohol consumption at that point, when you are in the RV, do you remember?

A. I vaguely remember going to have a seat in the side-by-side.

Q. Alright. Do you remember how you were feeling then, when you went to the side-by-side?

A. I was, I think I was sleeping.

Q. Okay, what about D. S. Sr., do you know where he was at that point when you were on the side-by-side?

A. I somehow remember him coming and saying “what are you doing, come on, get up, wake up” or.

Q. And who was that saying that to you?

A. D.Sr.

Q. Ms. B., what's the next thing you remember about Garden of Eden?

A. Other than waking up in the cabin?

Q. Okay and did you know what time of day or night it was when you woke up in the cabin?

A. It was pitch black. All the curtains were shut.

Q. Did you have a watch with you?

A. No.

Q. How about a clock, was there any clock around?

A. Don't recall.

Q. And your phone, did you have your phone with you?

A. No phone.

Q. Okay, when you woke up in the cabin can you describe specifically where you woke up?

A. I was in a bed.

Q. Okay, what about blankets or bedding. Do you remember anything about those?

A. I don't think I was fully covered. I was dressed in the bed.

Q. Anyone else in the cabin at the time?

A. No, I woke up in a panic.

Q. I'm sorry.

A. I said “no, I woke up in a panic” because I didn’t know where I was.

Q. And at that point Ms. B. do you remember what you did have in terms of articles of clothing?

A. What I had on me?

Q. Yes. Well what you had on you and whether there was any articles of clothing that you were missing?

A. I had my – I had a navy blue top that I had worn from the get go, a pair of jeans, my bra, socks.

Q. Okay and in terms of the night before, did you have anything other than your navy top? Did you have any outerwear?

A. I had layers of sweaters and jackets. I think I had two different sweatshirts and one of D.’s jackets.

Q. And what can you say about those items when you woke up in the cabin? What about the sweaters and the jacket?

A. There was no jacket I don’t think and I don’t recall the sweatshirts.

Q. Okay. Do you have any recollection of what happened to your jacket?

A. No clue.

Q. Do you have any recollection or did you have any recollection of how you ended up in that cabin?

A. No clue.

[11] After leaving the bunkhouse that morning L.B. noted that the RV and D. S. were gone. She knocked on a cottage door and was let in by Mr. C. There were five or six more people there. She did not know their names. Ultimately Mr. C. agreed to drive her back to D. S. ’s home though wood trails in his side-by-side ATV.

[12] During the trip back L.B. felt soreness in her rectum when the ATV hit a bump. Her testimony :

Q. And what if anything did you think or feel when you felt that pain in your rectum?

A. I just – a flashback.

Q. Okay and can you describe that, a flashback to, to what.

A. A voice, me saying it hurts.

Q. Okay.

A. And then realizing I just started to cry.

Q. So, the flashback you say you were having, you recall a voice and what, if anything, did you remember about a voice?

A. It just dawned on me that it wasn't D.'s voice.

THE COURT: I'm sorry I didn't hear that.

A. It just realized wasn't D.'s voice. (sic)

THE COURT: Thank you.

Q. And your memory of you saying the word, words, "it hurts" do you remember anything, do you remember experiencing anything when you uttered those words?

A. I was asleep, I was – it's so vague what I remember, but I was asleep. To me it didn't persist the minute I said that "it hurt", it stopped.

Q. And when you say, "it hurt" do you remember what you were referring to. What if anything you were experiencing that made you say, "it hurts"? Take your time. You let me know when you are ready, okay?

A. Yup.

Q. Alright, if that's okay with Your Lordship.

A. It woke me up and I do believe I pulled my, pushed my hand and to tell you, I don't know.

Q. When you say, "it woke you up" do you remember what it was? And when you say, "it hurt" do you remember what it was?

A. Yeah, it felt like a penis.

Q. And where did you feel that?

A. Sorry, can you ask the question again?

Q. So, you say, "it felt like a penis". Where did you feel that?

A. In my rectum.

Q. Did you have any recollection as – about where you were when you had felt that?

A. No.

Q. In your flashback do you recall . . .

A. No.

Q. . . . where that happened?

A. No.

Q. Do you have any recollection in your flashback what position you were in or where the voice was coming from?

A. I remember feeling a hand on my back.

Q. Okay, and what about the voice. Do you know where the voice was coming from?

A. My ear.

Q. Do you have any recollection, I'm sorry, about any words?

A. None.

Q. From voice? Do you remember anything else or did – were you able to remember anything else about what you were experiencing at the time? No, okay. Can you indicate to the court, specifically, if you can recall, what you were feeling in your rectum or what was it about your rectum that . . .?

A. It just burned, I was, I didn't feel any when I went in the cabin – I was just distraughted (sic) about being not knowing where D.S. was.

[13] L.B. testified she did not voluntarily agree to have any sexual activity with the unknown person at the time when she felt pain in her rectum. Further, that she did not know the accused J.M. at that time.

[14] Initially, there was no one home at D. S. 's house in Thorburn when she arrived. L.B. made calls and texts looking for D. S. Eventually D. S. returned home and arrangements were ultimately made to drive her to the Aberdeen Hospital. As staff were not available to conduct the proper examination, L.B. drove to the Dartmouth General Hospital where a forensic exam was conducted. Swabs were taken from L.B.'s vagina, anus and rectum. That evening L.B. contacted the RCMP.

[15] On cross-examination, L.B. agreed that she was feeling fine when at Ms. A.W.'s cabin. That she was starting to feel the effects on the trip from the cabin to the Garden of Eden. She could not recall much after they arrived the Garden of

Eden including how much alcohol she consumed. She could not recall if she were in any cabins during the evening. She could not recall having an argument with D. S. that evening and only learned when he told her the next day.

[16] She had no recollection of what point in time she woke to the pain in her rectum. L.B. agreed that she did not mention a penis when describing the “flashback” to the RCMP. Her testimony:

Q. Now when you were interviewed by Constable Green on September 29, 2014, you told her that the substance of your flashback was only, only, using the words “what you’re doing really hurts”. You didn’t reference any other actions or, or that a penis was felt behind you, correct?

A. Correct.

Q. And you would agree that you don’t have a specific recollection or a memory of a penis entering your rectum, correct?

A. From counselling and memory and – that’s why I remember it to the level I am saying today.

Q. So back when you were interviewed, a couple days after the incident, you didn’t have any memory or a penis being inserted in you, correct?

A. I was in shock, I don’t know.

Q. The question is, you did not have a memory of a penis being inserted into you, days after when you were interviewed, correct?

A. Correct.

Q. And you also didn’t have a memory, when you were interviewed days after, of how anything stopped on that particular evening during the flashback, right?

A. No.

Q. Your answer is no.

A. I don’t recall.

[17] L.B. acknowledged she was fully dressed when she woke up in the bunkhouse and that her belt buckle was done up. There was no indication of any

physical problems with her that morning until the drive home when the ATV hit a bump.

A.W.

[18] Ms. A.W. and her husband travelled with L. B. and D. S. to the Garden of Eden location in their ATV. She testified she did not consume alcohol that evening. Ms. A.W. estimated they arrived at the party around 10:00 pm. Her and her husband only stayed ½ hour or so before leaving. L.B. was asleep in the passenger seat of the ATV and woke up after they arrived. Ms. A.W. saw L.B. come out of the main cottage cabin and walk towards the RV where she used the bathroom. In terms of intoxication Ms. A.W. testified she did not know L.B. that well. She did not think L.B. was intoxicated when they left her and her husband's camp but she was drunk by the time they arrived at the Garden of Eden. Ms. A.W. observed L.B. staggering down a path from the cottage. Despite a little slurring of her words, Ms. A.W. thought L. B. "could still walk and talk". When Ms. A.W. and her husband left the scene, L.B. was back in the cottage. Ms. A.W. did not see J.M. at the party while they were there.

D. S. Jr.

[19] S. Jr. testified the bachelor party took place at Mr. C.'s cottage in the Garden of Eden. There are a number of cottages close by. There is a bunkhouse between Mr. C.'s cottage and the next cottage but further back in the woods, approximately 100 – 200 feet away. There was a fire pit not far from the cottage. He estimated there were approximately 40 people at the stag party. All men except for L.B. and Ms. A.W. People mingled inside the cottage and also outside around the fire pit.

[20] S. Jr. thought L.B. and S. Sr. arrived around 8:00 pm. They parked the ATV side-by-side close to the front step of the cottage. S. Jr. described L. B. as being intoxicated when she arrived. He believed everyone was intoxicated that evening including himself. He began consuming alcohol earlier that day while playing golf. He continued drinking and acknowledged consuming cannabis as well as a drug he believed to be “acid” that evening. He stated that L. B. was both in and out of the RV and the cottage that evening. The last time S. Jr. saw L.B. that evening she was “passed out” in the ATV side-by-side. She was slumped over in the passenger seat and was wearing a jacket at the time. He estimated the time to be around midnight. About an hour later, D. S. came into the RV complaining about an argument with L.B. That she was not cooperating. D. S. wanted to leave. They drove the RV down the road and stayed overnight, leaving sometime in the morning.

[21] After learning about L.B.'s complaint of assault the next day, S. Jr. started making phone calls to persons who were at the party including Mr. C.'s cottage. One of the calls was to the accused J.M. who he considered a long term friend. When asked if he saw L.B. that evening, J.M. said he did not see her since she was passed out on the ATV. When S. Jr. told him L.B. was saying she was raped, J.M. acted surprised that something happened.

[22] On cross-examination S. Jr. acknowledged that he did not report that conversation with J.M. to the RCMP when he gave his statement. That it was weeks before the trial that he told the RCMP of the conversation. S. Jr. explained that when he made the initial statement to the RCMP he did not think J.M. was involved. That he did not disclose any conversations he had with other persons at the time he gave the statement to the RCMP.

[23] S. Jr. acknowledged he told the RCMP in his statement that L. B. spent most of the time in the cottage that evening. However, he testified that he was mistaken. That she spent more than half of the time in the RV and outside.

[24] When asked about his statement to the RCMP that he could not speak to the state L.B. was in when they left that evening, S. Jr. responded that he was changing his story. That he was certain she was very intoxicated.

D. S.

[25] D. S. confirmed his six year relationship with L.B. He testified they ended their relationship around February 2015. D. S. testified that he and L.B. had consumed beer in the afternoon. That his son gave them a container of vodka prior to the trip. He stated that both he and L.B. consumed beer at the residence of Mr. W. and Ms. A.W. During the trail ride they would often stop due to rough conditions and have drinks. L. B. would drink the vodka. D. S. only consumed beer throughout the day and that evening. Their plan was to stay in his son's R.V. overnight.

[26] D. S. estimated they arrived at the Garden of Eden at approximately 9:00 pm although he was not sure of the time. He described L. B. as fairly intoxicated when they arrived. D. S. told her to go to the RV while he was socializing at the cottage and outside by the nearby fire pit.

[27] D. S. did not see L.B. for approximately two hours before she entered the cottage where he and other men were gathered. When he spoke to her in the cottage D. S. described her as being pretty much incoherent. He said she was incapable of communicating with him and looked at him as if she did not know who she was. D. S. indicated he had observed her intoxicated before during their relationship but never to that extent.

[28] D. S. was upset with her being in the cottage and told her to go back to the RV. When he walked out of the cottage approximately 10 minutes later she was passed out on the ATV side-by-side with her head on the steering wheel. D. S. shook her to wake her and told her he was upset with her coming into the cottage. He stated she mumbled and slurred words that he could not make out. Mr. C. came to the door of the cottage and inquired about the yelling. D. S. admitted to being intoxicated at the time. He got her out of the four wheeler and was holding on to her as she resisted and “bolted” . He was left holding the coat that she was wearing. He did not know where she went. D. S. did not peruse her and went to the RV. He slept in the RV and when he returned to his house in the morning L.B. was in the bedroom crying. She told him she thought “they did something bad to me”.

[29] Under cross-examination D. S. acknowledged he was not aware of the amount of alcohol L.B. may have consumed after they arrived at the cottage. When challenged that he did not mention that she was incoherent or foggy in his earlier statement to the RCMP, D. S. replied that he made those comments but not in those exact words. In the replay of his video statement to the RCMP, D. S. stated that L.B. had too much to drink, that she was not in the right frame of mind.

Further that she was upset with him and did not know what she was doing when she pulled away from him when he tried to get her to go.

RCMP

[30] As part of their investigation, the RCMP interviewed J.M. as one of the persons who attended the party at the Garden of Eden. The purpose was to obtain a statement and a DNA sample. No DNA sample was obtained.

[31] The RCMP launched a plan to obtain a cast off DNA sample from J.M. On June 23, 2015 members of the RCMP in two unmarked vehicles followed J. M.'s vehicle to the parking of Central Supplies in Stellarton, Nova Scotia. Constables Wadden and Dawson parked their vehicle approximately 10 – 15 feet away from J.M.'s vehicle. Corporal Lilly parked his vehicle approximately 40 feet away. All members observe J.M. exit his vehicle. He was smoking a cigarette at the time and tossed it on the ground prior to entering Central Supplies. Corporal Lilly observed Constable Wadden immediately walk to the still smoking cigarette on the ground and seize it using tweezers and rubber gloves from a DNA kid. The DNA sample was sent for analysis.

DNA SAMPLES AND ANALYSIS

[32] On September 28, 2015 a sexual assault examination and collection of forensic evidence was conducted on L.B. by two qualified nurses at the Dartmouth General Hospital. Ms. Jane Collins was the examining nurse. Swabs were taken from L.B.'s vagina, inside the outer area of the anus and inside the rectum. Ms. Collins noted some redness in the vagina as well as tenderness in the anus and rectum area. There were some scratches and abrasions on L.B.'s shins and thigh.

[33] Under cross-examination Ms. Collins confirmed there was no evidence of trauma in the vagina area. She stated she was unable to conduct an examination L.B.'s rectum because she was tender in that area. L.B.'s jeans formed part of a forensic kit delivered to the RCMP.

[34] Mr. Stephen Denison, DNA expert, was involved in examining the forensic material collected from L.B. Male sperm obtained from the vaginal, anal and rectal swabs was examined and identified as a single male profile labeled Male Profile #1.

[35] Ultimately, the cigarette butt obtained from J.M. was received and DNA analysis performed. J.M.'s DNA matched the male sperm from Male Profile #1 regarding the vagina, anal and rectal swabs. The chances of another Caucasian having the same profile was one in 300 trillion. The sperm sample located on L.B.'s jeans did not contain as much DNA as the other samples. However, it was

Mr. Denison's opinion that the sample matched Male Profile #1. The chances of a Caucasian having the same profile as J.M. from this sample was 1 in 9 trillion .

J.M.

[36] The accused J.M. testified on his own behalf. On September 27th, 2014 he travelled to his father's cottage at the Garden of Eden on his ATV arriving at approximately 1:00 pm. He brought food, clothing and a cooler containing 14 beers. He estimated he arrived at Mr. C.'s cottage, where the party was being held, around "supertime" as "it was getting dark". There were approximately 20 people there at that time and there was a bonfire outside in the fire pit. J.M. placed his cooler outside the cottage. More people arrived as the evening went on.

[37] J.M. testified that he did not know the complainant L.B. He was not aware that D. S. was in a relationship with her. The first time J.M. saw L.B. that evening she was mingling inside the cottage. She had a drink in her hand. About an hour later she was standing outside the cottage near his cooler of beer. There were people around. J.M. asked her "how come a pretty girl was here by herself". L.B. smiled and said "you think I'm pretty". They talked for a few minutes. J. M. stated that L.B. seemed fine when talking to him. He assumed she was drinking like everyone else. She did not have any drink in her hand at that time.

[38] J. M. testified that L.B. started flirting with him. She stroked his leg and started to cup his crotch and told J. M. she bet she could make him come. He replied that he bet that she could not. When L.B. started to pull at his zipper, J.M. suggested they go around the back of the cottage. L.B. followed him. J.M. suggested they go to the bunkhouse. The lights were off in the bunkhouse when L.B. put her hands down his crotch and opened his belt buckle. His zipper was still down at the time. J.M. pulled out his penis and L.B. got down on her knees and performed oral sex on him for approximately five minutes. J. M. commented that he didn't think she was going to win the bet. L.B. then undid her pants and pulled them down past her knees. She bent over leaning on the couch and J.M. got behind her and had vaginal sex that lasted about five minutes. Towards the end J. M. joked that she did win when he ejaculated inside of her and outside of her. Afterwards, they fixed their clothes and J.M. left the bunkhouse. L.B. was sitting on the couch when he left.

[39] J.M. did not know what time in the evening they had sex. He testified that D. S. 's RV was still parked at the bottom of the hill after the encounter. J.M. stated L.B. did not lose consciousness during the encounter. He had no concerns regarding her level of intoxication. In terms of his level of intoxication J.M. stated

he had a “buzz on”. He was unaware of how many beers he had consumed to that point.

[40] Under cross-examination J.M. denied that he had anal sex with L.B. He could not explain how his DNA got in her rectum. L.B. did not complain of pain during their encounter.

[41] The following Sunday morning J.M. stated he dropped into Mr. C.’s cottage before going home. There was talk among the men about a phone call from S.Jr. regarding L.B.’s complaint. J.M. did not disclose that he had sex with L.B. As a result of hearing of the complaint, J.M. consulted legal counsel the following day because he feared he may be in trouble and wanted some legal advice.

[42] J.M. acknowledged the call from S.Jr. days later. He denied telling him that the last time he saw L.B. she was asleep in the ATV. He told S. Jr. he did not know what happened to L.B. His evidence is that he was following the advice of his lawyer at that time.

[43] Under further cross-examination J.M. stated that he had slept on the couch in Mr. C.’s cottage that night. J.M. was in the cottage when L.B. walked in that morning. J.M. showed her where the washroom was. There was no discussion of sex.

[44] When pressed on the time of sexual activity that evening, J.M. stated it would have been a couple hours after he had arrived at the party. That L.B. did not appear to be drunk at the time. That he did not notice any staggering or slurring of her words.

[45] Under re-direct J.M. acknowledged he would have consumed all of the beer he would have brought with him from approximately 3:00 pm until 2:00 or 3:00 pm. He felt that he was definitely intoxicated by 12:00 midnight or 1:00 am.

LAW

[46] The accused J.M. is presumed innocent and bares no burden to prove his innocence. This presumption is only displaced if the crown proves, beyond a reasonable doubt, that J.M. is guilty of the offence charged.

[47] The accused J. M. testified on his own behalf. The court is required to apply the principles set out in *R. v. W.(D.)* [1991] SCR 742. These principles were reviewed in *R. v. D.N.S.* 2007 N.S.C.A. 16.

13 In **W.(D.), supra**, at p. 758 Cory J. suggests the following jury instruction on the question of credibility:

- First, if you believe the evidence of the accused, obviously you must acquit.
- Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
- Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do

accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

14 In **R. v. P.S.B.** (2004), 222 N.S.R. (2d) 26; [2004] N.S.J. No. 49 (Q.L.), Cromwell J.A. writing for this Court, explained the significance of the **W.(D.)** instruction in this way:

[56] **W.(D.)** is concerned with how a trier of fact should apply the burden of proof in a criminal case where the accused testifies. In brief, the trier must remember that the issue is not whether he or she believes the accused, but whether the evidence as a whole convinces the trier of fact of the accused's guilt beyond a reasonable doubt. If the trier of fact believes the exculpatory evidence of the accused, an acquittal must follow. However, even if the trier does not believe that evidence, the trier must ask him or herself if it nonetheless gives rise to a reasonable doubt. Finally, if the trier does not believe the accused and is not left in doubt on the basis of that evidence, the trier must still address and resolve the most critical, in fact, the only question in every criminal case: Does the evidence as a whole convince the trier of guilt beyond a reasonable doubt?

15 **W.(D.)** prohibits a trier of fact from treating the standard of proof as a simple credibility contest - in other words, discounting the evidence of the accused merely because it is inconsistent with that of the complainant, which evidence he prefers. This does not mean, however, that a witness's credibility is assessed in isolation from the rest of the evidence. In conducting that assessment it is unavoidable that the evidence of witnesses be compared. (**R. v. Hull**, [2006] O.J. No. 3177 (Q.L.) (C.A.)). In that process, the evidence of the accused may be disbelieved. That evidence may nevertheless create a reasonable doubt about the persuasiveness of the Crown's evidence, in this case, that of the complainant. In other words, the reasoning process is not complete with the rejection of the evidence of the accused.

[48] Assault is defined in section 265 of the criminal code as, in effect, a touching without the consent of the complainant. Section 273.1 gives a specific definition of consent for the purpose of the offence under section 271.

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

Where no consent obtained

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (2) not limiting

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

[49] Section 273.2 deals with mistaken belief and consent.

Where belief in consent not a defence

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

- (a) the accused's belief arose from the accused's
 - (i) self-induced intoxication, or
 - (ii) recklessness or wilful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[50] The elements of sexual assault were recently reviewed in *R v. Al-Rawi*

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19 *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 is the seminal decision on the elements the Crown is required to prove in a sexual assault prosecution. The decision cemented the demise of implied consent and reinforced the necessity of focussing on the subjective state of mind of the complainant to determine if he or she did not consent to the sexual touching.

20 The *actus reus* of the offence is simply the intentional sexual touching of the complainant and the absence of consent. Justice Major, for the majority, wrote:

[23] A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

...

[25] The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, and *R. v. Chase*, [1987] 2 S.C.R. 293.

[26] The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

[51] The burden is on the crown to prove beyond a reasonable doubt that L.B. did not consent to the sexual activity complained of. In this case, that she was too intoxicated or was unconscious and therefore lacked the capacity to consent to the sexual activity at the time it occurred, and that J.M. knew that L.B. did not consent or was reckless, that is, J.M. did not honestly believe that consent was present.

[52] The court in *R. v. Al-Rawi*, went on to consider the principles regarding capacity of a complainant to consent to sexual activity.

32 A complainant must have the capacity to consent to the sexual activity in question. The exact test or dividing line to determine capacity and incapacity has not yet been authoritatively settled by the Supreme Court of Canada.

33 Of course, an unconscious complainant lacks the capacity to consent

34 The Supreme Court in *R. v. J.A.*, [2011 SCC 28](#) reiterated this axiom--the definition of consent in s. 273.1 requires a complainant to be conscious throughout the sexual activity in question. Any consent given before loss of consciousness is inoperative. But what impairment of cognitive ability short of loss of consciousness voids capacity to consent?

...

66 Therefore, a complainant lacks the requisite capacity to consent if the Crown establishes beyond a reasonable doubt that, for whatever reason, the complainant did not have an operating mind capable of:

1. appreciating the nature and quality of the sexual activity; or
2. knowing the identity of the person or persons wishing to engage in the sexual activity; or
3. understanding she could agree or decline to engage in, or to continue, the sexual activity.

67 In cases where consent and capacity to consent are live issues, the trial judge must determine if it has been established beyond a reasonable doubt that the complainant did not consent, or lacked the capacity to consent. As detailed above, these inquiries are entirely subjective.

...

69 Difficulties present where the complainant, due to the ingestion of drugs or alcohol, truly has little or even no memory of the event. Absent direct evidence from a complainant that subjectively she did not consent, the judge or jury frequently must rely on circumstantial evidence to determine the absence of consent

70 Where a complainant testifies that she has no memory of the sexual activity in question, the Crown routinely asks: "Would you have consented?" Despite the potential to discount the typically negative response as speculation, the answer is usually received into evidence, and depending on the reasons, may or may not have a bearing on the determination if consent or capacity to consent were absent

71 In any event, a trial judge is required to consider all of the evidence adduced at trial and direct his or her mind to making the necessary findings of fact or mixed

law and fact presented by the issues to be decided. In doing so, the judge must not start with any presumptions that certain types of witnesses are inherently credible or reliable, nor must the judge employ stereotypical myths or flawed assumptions.

...

73 A trier of fact is not to assess each piece of evidence individually on a standard of proof beyond a reasonable doubt (*R. v. Morin*, [1988] 2 S.C.R. 345). Rather, the trier of fact must take into consideration all of the circumstantial evidence relevant to any particular element.

74 When the evidence is entirely circumstantial, the judge must again consider all of the evidence. If after considering that evidence, existence of the elements is the only reasonable or rational inference, the trier of fact should draw the inference that the elements, and hence guilt, have been established beyond a reasonable doubt (see *R. v. Villaroman*, *supra* at para. 41). If there are other reasonable or rational explanations inconsistent with guilt, the inference must not be drawn and the accused acquitted.

Time of Sexual Activity

[53] The timing of the sexual activity is at issue in this trial. I conclude from the evidence that the sexual activity that L.B. complained of occurred sometime after midnight following the altercation between her and D.S. at the ATV.

[54] The evidence of Ms. A.W. as to the time of arrival at the Garden of Eden is the most reliable. She did not consume alcohol that day or evening. Her evidence is that she and her husband, together with L.B. and D.S. arrived around 10:00 pm. She and her husband left around 10:30 pm.

[55] The altercation between L.B. and D.S. occurred some two hours later around midnight. L.B. was wearing a jacket throughout the evening until the altercation

with D.S. when he woke her up on the ATV. D.S. was left holding the jacket when she “bolted”. L. B. woke up in the bunk house the next morning without the jacket.

[56] As a result, I do not accept J.M.’s estimate that the sexual activity occurred a couple hours after he arrived at the cottage around suppertime when it was getting dark.

Credibility

L.B.

[57] Despite her lack of memory, I found L.B. to be a credible witness. She testified in a forthright manner without attempting to embellish upon or exaggerate her degree of intoxication that evening. She described herself as being “pretty tipsy” when she arrived at the Garden of Eden. She continued to consume alcohol but was unsure exactly what she was drinking or how much she drank. She was able to give an accurate account of events throughout the day and evening to the best of her recollection. The gaps in her memory were genuine. L.B. was not evasive or argumentative during cross-examination. I am confident that she was trying to be truthful.

[58] L.B.'s evidence of seeking help and disclosing her complaint as soon as she arrived at D.S.'s home as well as attending two hospitals and contacting the RCMP is admissible as part of the narrative of how the matter came to the attention of the RCMP and not as to the truthfulness of the complaint. The evidence showing fact and timing of the complaint can assist the court in assessing credibility. *R. v. Dinardo* [2008] 1 S.C.R. 788.

J.M.

[59] I did not find J.M. to be a credible witness. He was evasive under questioning about the time the sexual activity occurred. Under direct-examination he testified he had no knowledge of the time it had occurred. Under cross-examination he testified it was a couple hours after he arrived at the cottage which was around supertime when it was getting dark. When further pressed under cross that the sexual activity occurred after the encounter around midnight between L. B. and D.S. at the ATV, J.M. responded that he did not know.

[60] J. M.'s evidence about L.B.'s degree of intoxication that evening is inconsistent with her evidence and the evidence of other witnesses. He testified L.B. seemed fine during their encounter. That he had no concerns about her level of intoxication. Other witnesses described L. B. as being intoxicated when she

arrived at the Garden of Eden. According to witnesses, she progressed from being unsteady on her feet, slurring her words but coherent to extremely intoxicated and incoherent by midnight. According to his own evidence J.M. was intoxicated after midnight.

[61] J. M. testified the sexual act committed was oral sex performed on him and vaginal sex. He denied that he performed anal sex on L.B. This is inconsistent with the combination of L.B.'s evidence, the evidence of the examining forensic nurse and DNA evidence confirming J.M.'s sperm inside L.B.'s rectum. J.M.'s evidence on these main points does not hold up in light of the other evidence. The only rational conclusion is that anal sex occurred.

D.S.

[62] I find D.S. to be a credible witness. He was no longer involved in a relationship with L.B. at the time of the trial. He acknowledged being intoxicated that evening and that he was upset with L.B. for not remaining in his son's RV. In his opinion L.B. was intoxicated and had enough to drink when they arrived at the Garden of Eden. Although he did not observe her drinking after he arrived, his observation of her later that evening was that she was incoherent and incapable of communicating. She looked as if she did not know who he was.

[63] Generally lay witnesses opinion evidence may not be reliable. However, the witness may testify to facts within his knowledge, observation and experience. D. S. testified that he observed L.B. intoxicated many times before during their six year relationship but never to that extent.

Decision

[64] Based on the totality of the evidence I am satisfied that L.B. was extremely intoxicated to the extent of being incoherent at the time of the encounter between herself and D.S. at the ATV around midnight. However, I am not satisfied beyond a reasonable doubt that she would have been intoxicated to the degree that she lacked the capacity to consent to sexual activity when it occurred as there is no evidence before me as to the amount of time that expired between midnight and when the sexual activity actually occurred. Intoxication itself, does not undermine consent. I do however accept L.B.'s evidence that she was asleep when she felt pain in her rectum which is the sexual activity complained of. This sexual activity was anal intercourse on the part of J.M., a complete stranger to her at the time.

[65] An unconscious complainant cannot consent. Although there is evidence of vaginal sex, L.B. had no memory of sexual activity before she woke to pain in her rectum. Consent must be throughout the sexual activity in question. Even if

consent to sexual activity was given before loss of consciousness this renders consent inoperative.

[66] Based upon the whole of the evidence I have accepted, I am satisfied the crown has proven beyond a reasonable doubt, lack of consent to the sexual activity and that there was no mistaken belief in consent on the part of the accused J.M.

[67] Accordingly, I find the accused guilty of the offence of sexual assault.