

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Hunter*, 2019 NSSC 369

**Date:** 20191205

**Docket:** CRH481783

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Logan Hartley Hunter

**Restriction on Publication: ss.486.4 and 486.5 cc**

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**DECISION**

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**Judge:** The Honourable Justice Patrick J. Duncan

**Heard:** September 25, 26, 27, October 31, and December 5, 2019, in  
Halifax, Nova Scotia

**Counsel:** William Mathers, for Her Majesty the Queen  
Tony Amoud, for Logan Hartley Hunter

### **Order restricting publication — sexual offences**

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

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

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

### **Mandatory order on application**

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

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

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

### **Victim under 18 — other offences**

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

### **Mandatory order on application**

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

### **Child pornography**

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

## **Limitation**

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

## **Order restricting publication — victims and witnesses**

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

## **Justice system participants**

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

## **Offences**

(2.1) The offences for the purposes of subsection (2) are

- (a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
- (b) a terrorism offence;
- (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
- (d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

## **Limitation**

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

## **Application and notice**

(4) An applicant for an order shall

- (a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and
- (b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

## **Grounds**

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

## **Hearing may be held**

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

## **Factors to be considered**

(7) In determining whether to make an order, the judge or justice shall consider

- (a) the right to a fair and public hearing;
- (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
- (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
- (d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
- (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
- (f) the salutary and deleterious effects of the proposed order;
- (g) the impact of the proposed order on the freedom of expression of those affected by it; and
- (h) any other factor that the judge or justice considers relevant.

## **Conditions**

(8) An order may be subject to any conditions that the judge or justice thinks fit.

## **Publication prohibited**

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

- (a) the contents of an application;
- (b) any evidence taken, information given or submissions made at a hearing under subsection (6); or
- (c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

**By the Court (Orally):**

**Introduction**

[1] The accused, Logan Hartley Hunter, is charged that he:

On or about the 15<sup>th</sup> day of November 2017, at or near Cow Bay, in the County of Halifax, in the Province of Nova Scotia, did unlawfully commit a sexual assault on A.G., contrary to section 271 of the *Criminal Code*;

[2] A.G.'s complaint is that on the night of November 15, 2017, she engaged in certain consensual sexual activity with the accused and S.D., but that she did not consent to all of the acts of a sexual nature that Mr. Hunter engaged her in.

[3] Four witnesses testified in the trial. The prosecution called A.G. and the investigating officer, Cpl. Kelly Plomondon.

[4] S.D. and the accused testified for the defence.

**The Evidence**

[5] A.G. is a 25-year-old woman. She has graduated from high school and has a diploma as a veterinary assistant. She is currently employed as a sales associate.

[6] Because of deafness in her right ear she can have difficulty understanding what is said to her when she is unable to see the speaker's lips. This did not cause issues in her ability to testify. She could not recall whether she had made Mr. Hunter aware of her hearing impairment and did not make S.D. aware of this issue.

[7] A.G. indicated that earlier in the month of November 2017 she had been in contact with the accused in relation to a proposed meeting with him and another female. On November 15, 2017, she sent a message to him asking if the three of them would be getting together that evening. After an exchange of messages, it was agreed that she would take a bus to Cow Bay where he would pick her up. These messages were exchanged through an online messaging application called KIK.

[8] The complainant testified that the purpose of the meeting was to engage in sexual activity with Mr. Hunter and a second woman in a "dominant-submissive" relationship.

[9] She left her boyfriend's house at around 7:30 PM. There were problems with taking the bus route that she originally intended and so she did not arrive in Cow Bay until 10 PM or a little bit later. She and Mr. Hunter continued to text throughout the evening to discuss her progress.

[10] Mr. Hunter arrived for her at about 10:30 PM. Upon recognizing him in his car, A.G. walked over to the passenger side of his car and got in. Mr. Hunter asked: "Are you excited?" and she replied "sure", assuming he was referring to the anticipated three-way sexual activity.

[11] The couple drove to a mobile home and entered together. Her recollection is that they walked into a bedroom where a woman was sitting on the bed, naked though under a blanket. A.G. did not know this woman previously, but the evidence satisfies me that it was S.D. There was a brief conversation between Mr. Hunter and S.D., after which he began to undress. He told A.G. to do the same.

[12] Mr. Hunter and S.D. were completely naked while A.G. initially kept her panties on. Mr. Hunter was standing in the middle of the room and A.G. got on her knees and began performing oral sex on him. She testified that it was consensual. She and S.D. took turns performing oral sex on Mr. Hunter. During this time, Mr. Hunter wanted his penis to go deeper into her mouth. She acknowledged that she was hesitant about this but that it was still consensual. She also testified that he pulled her hair while this was taking place.

[13] After approximately ten minutes, Mr. Hunter laid on the bed with his legs dangling over the edge of it. Each of the women took turns performing oral sex on him. After some time passed, S.D. sat on top of Mr. Hunter and began to have intercourse with him while facing toward A.G. A.G. testified that while this was taking place she continued to kneel on the floor and "... would rub on the female and... pleasure her that way while they were having sex."

[14] After approximately five minutes there was a change of position. S.D. laid down on the bed on her back. A.G. was kneeling and leaning forward performing oral sex on S.D. Mr. Hunter engaged in vaginal intercourse with A.G. from a position behind her. At that point she was unspecific as to what took place next describing it as "foreplay and more oral sex". Again, she says this was consensual and lasted ten or more minutes.

[15] Mr. Hunter then “instructed” A.G. to lay on the bed with her head over the edge of the bed. The intention was that she would perform oral sex upon Mr. Hunter, but from a position where he would be “in complete control”.

[16] It was at this point that the offending conduct took place. A.G. testified:

A: ... he then inserted his penis into my mouth and he went so far back, to the back of my throat, and I remember feeling like I couldn't breath and his stomach was pressed up against my face, and he...

Q: What were, what were his hands doing?

A: Umm... I don't remember.

Q: Okay, carry on.

A: Umm... so he did this about twice, and I started to panic because I couldn't breath and I lifted my hands up above my head and started to try to push him off me. So I was pushing on his stomach area to try to push his penis out of my mouth because I could not breath while he was doing this. Umm... I remember I started to cry, and there was, umm... visible tears at that point, umm... and then...

Q: And were you... at this point were you consenting to what was going on with the oral sex, with the insertion of the penis further down your throat so that you couldn't breath?

A: No. No.

Q: Okay, carry on Ms. G.

A: So, umm... he did, after I tried pushing him off of me, he did back his penis out of my mouth, and I shook my head and I told him “no”, that I did not want to do it any more, and at this point I was still crying and he slapped me across the face, and the female, she said “just do it one more time and then Daddy will fuck you again”. Umm... and then as response Logan said he won't go as far down this time and just for me to do it one more time. Umm... I did give in and agree because by that point I was feeling scared and like he wasn't going to listen to anything I had to say. Umm... though he did agree and not go as far down my throat this time. Umm... this lasted maybe ten minutes. Umm... after that I don't remember a lot of the details because I kind a zoned out in my head and I really did not want anything else worse to happen, aside from him slapping me. So I just kind of went quiet and did whatever so I could go home. Umm... in between that there\_was probably some more foreplay but I can't specifically say what exactly happened, but maybe this lasted 10-15 more minutes. Umm... and then at one point he instructed me to then lay on the bed and I was laying toward the end of the bed, but I was facing the wall and at this point he got on top of me and he started to have sex with

me again, and I kind of just laid and buried my head in the blankets because, I didn't know what else to do.

Q: Were, in your, in your mind were you consenting... After the, the moment where you tried to push him away during the oral sex, when the... when you couldn't breath, were you consenting to the sexual activity from that point onwards?

A: No.

Q: In your mind.

A: No.

Q: Alright, and what happened while you were burying your face in the blankets?

A: Umm... he had, he continued to have sex with me, umm... I don't remember specifically what the female was doing at this point in time, because again, I kind a zoned out, umm... umm... while he was having sex with me, he, grabbed my, my breast with his right hand, no sorry, his left hand, and then he was squeezing it incredibly hard, the point where it was painful, and I told him "ow", but he continued having sex with me. Umm... he then put his hand over my neck, while having sex with me, so this was his right hand and it was one hand and at that point I panicked again, and I didn't want it to continue anymore.

Q: And why did you panic?

A: Because it felt like, his hand was on my neck, and it felt like he was in complete control and my, it almost felt like my breathing was constricted a little bit. I could still breathe but it felt tight and I wasn't comfortable, and I didn't want him to continue having sex with me anymore. Umm... I took my left hand, I wrapped it around his wrist to try and lift his hand off of my neck. I then told him to stop, though I cannot say how loud that was or how much, or how much he heard it with his hand around my neck.

Q: Did he stop?

A: No, he just kept going, keeping his hand around my neck until he finally ejaculated inside of me. Umm...

Q: About how long would you say he had his hand about your neck until he ejaculated?

A: Like... I'm not, I couldn't say for sure.

Q: If you can't say for sure, I'm not asking you to guess. Carry on Ms. G.

A: Yeah, I couldn't... I can't say for sure, but it wasn't very long between his hand on my neck and me telling him to stop that he ejaculated.

Q: What happened then?



A: Umm... he then finally stopped afterwards, and the female, she then got on the bed and she gave me oral sex for a couple seconds to kind of, like, clean up his semen that had gotten on me, and by this point I was trying not to cry, and she got up and she said umm... "you can go to the bathroom and get cleaned up if you want". So I stood up and I walked out of the bedroom and then to ... the bathroom...

[17] She returned to the bedroom. Mr. Hunter and S.D. were already dressed and then she dressed as well. It was approximately 11:30 PM at that point. Mr. Hunter drove her home. S.D. was in the front passenger seat and A.G. sat in the back seat.

[18] Crown counsel sought to clarify and expand on some of this testimony.

[19] In relation to what I will characterize as the "Deep Throat" fellatio, she testified that she attempted to push the accused away and that it was about a minute after she attempted to do this before he removed his penis from her mouth. She said she was unable to breathe during that minute. She also indicated that she was unable to speak.

[20] A.G. testified that her consent to the sexual activity ended during the Deep Throat incident because the accused would not listen when she tried to push him off. She also said that she told him that she did not want to do that anymore and that he slapped her face.

[21] A.G. testified that during the last sexual act the accused's hand was about her neck for what she estimated to be one to two minutes from the time she said stop until he ejaculated and withdrew from her. She said that when she tried to move his hand away from her neck she was unable to do so. She said that the accused made no comment at that time.

[22] I would observe at this point that the suggestion of a one to two minutes delay seemed to me to be inconsistent with her first answer set out above.

[23] In summary, it is her evidence that none of the sexual activity that took place after the Deep Throat incident was consensual. The Crown Attorney asked why she did it one more time if it was non-consensual. She replied that:

... He had said that he would do it one more time, but he wouldn't go as far down this time. So he wouldn't go as far down my throat as he had before and so I said, I said, so he did that one more time. So he put his penis down my throat, though he did not go as far down.

[24] Asked again whether she was consenting to that she said no because she “did not want anything worse to happen”. She reiterated that he slapped her across the cheek after he had taken his penis out her mouth, and she said that she did not want him to continue. The slap to her face did not leave a mark.

[25] A.G. described her feelings once home:

I remember just feeling, just feeling kinda embarrassed and kind of, I didn't know how, how to wrap my head around what had happened. 'Cause I felt like he didn't listen to anything I had to say, and it didn't matter that I told him “no” or “stop”.

[26] A series of text messages were exchanged at approximately 1:00 AM of the same night. The following was the exchange:

Mr. Hunter: Did you have fun?

Ms. G.: Yeah

Mr. Hunter: Would you do it again?

Ms. G.: Do you want to do it again?

Mr. Hunter: Yes, we had fun; you didn't answer me.

Ms. G.: Yeah

Mr. Hunter: What did you like?

Ms. G.: I just like getting fucked.

Mr. Hunter: Even though I choked you and stuff?

Ms. G.: I don't always like that.

Mr. Hunter: Aww.

Ms. G.: Or when I feel like I can't breathe with your cock down my throat.

[27] There were long gaps between the next messages in the exhibit.

[28] Transmitted at 1:25 PM later in the same day:

Mr. Hunter: Yeah; I warned you that you were going to learn to take it deep.

[29] Then at 2:21 PM:

Ms. G.: Yeah

Mr. Hunter: I don't like it when you say no.

[30] Her response at 7:39 PM:

Ms. G.: I know.

[31] And the final text at 7:57 PM:

Mr. Hunter: Yeah

[32] A.G. attended the hospital on the morning after her interaction with Mr. Hunter and S.D. She was examined by a Sexual Assault Nurse Examiner who took photographs of injuries that A.G. attributed to Mr. Hunter's actions. Those were not tendered in evidence. The SANE did not testify.

[33] The complainant however, did take more photographs at about 7 PM of November 16, apparently, just before the last two text messages set out above.

[34] Exhibit 4, photograph 1 depicts her right eye. A.G. noted what she described as "red marks" above the eyelid, as well as along the side of the eye and closer to her forehead. She testified that these were present when she went to the hospital at 7 AM the morning after the alleged offences.

[35] Photograph 2 depicts "red blotches" around her left eye, and on the forehead and close to her ears. She testified that she had not noticed these prior to the exam and only noticed them afterwards.

[36] A.G. indicated that photographs 3 and 4 are partial views of her right breast and there was "... like a yellow bruise forming around where my nipple would be". Photograph 5 is a view of the entire right breast and she testified that it depicted two bruises, one closer to the nipple and one further up. Photograph 6 is another side view of the bruises on the right breast. Photograph 7 is a close-up photo of a bruise next to the nipple as well as a smaller one underneath the nipple. Photograph 8 is of a larger bruise on the breast.

[37] The quality of the photos is not very good and while there are some marks that are consistent with the description provided in A.G.'s evidence, some of them do not show the injuries to be as prominent as she describes.

[38] The "red blotches" are very indistinct and while there is bruising indicated on the right breast, the coloration is poor in the photograph. A.G. testified that there was one large bruise and two smaller ones on the right breast. The larger one

appears to be blended into the colour of the areola. The two smaller ones are best observed in photograph number seven. They are yellowish in colour and faint.

[39] In cross-examination, A.G. acknowledged that she agreed to enter into this sexual activity with the accused and S.D. knowing that it was to involve “BDSM” sexual practices. She was asked to outline her understanding of what that meant. This is a summary of her description:

- it’s a style of consensual sexual activities that usually involves bondage or submissives, ... it can be a bit rough, but that is usually communicated before hand.
- The type and degree of roughness depends on the nature of the relationship and it can be different from one person to the next.
- It can sometimes include slapping or verbal words.
- In a dominant-submissive relationship, a dominant is the one that would be in control, so during sexual activity they would take charge and tell the submissive what to do or what they would like to do.
- It can depend on the relationship, but a submissive is usually the person that will follow the orders. They can communicate to the dominant what they like, but usually the submissive should be in control of what takes place because they are on the receiving end of the rougher sex.
- Although the submissive usually would follow the order of the dominant, the activity must still be consensual.
- This is done through some agreed kind of communication.
- A safe word is one that is used by the submissive to let the dominant know to stop something or slow something down.

[40] Turning to the specifics of the evening in question, she testified that although she knew this was to be an agreed to BDSM experience, there was no “safe word”. She identified Mr. Hunter as the “Dom” and herself as the “Sub”. She described S.D. as also taking the role of the dominant, especially where she encouraged Mr. Hunter to “take control”, or to do things that A.G. was not agreeing to.

[41] Her position on this question is summed up in this exchange:

Q: At... the times that you were consenting to the sexual activity with Mr. Hunter and this third party, would you agree that this was a BDSM situation or scenario?

A: Yes, in the moments that I was consenting.

[42] She agreed with counsel for the accused that during the first instance of fellatio, while he was standing and she was kneeling, that Mr. Hunter attempted to push his penis “as far down her throat as possible”. She responded by exerting some physical resistance to him but was still consenting because she “did not feel forced to do anything.” She distinguished this from later incidents by the degree of force she used in resisting his attempts to do things she did not want. She agreed that she did not tell Mr. Hunter that on that first occasion he went further than she wanted to and gave him no verbal cues that she did not want him to do this. A.G. acknowledged that she gagged a few times during this incident and her eyes may have watered.

[43] In relation to the next two instances of fellatio, she said that he asked her to lie on the bed and she did so. She testified that Mr. Hunter went further than she wanted to on the first occasion, but she did not tell him that. In cross-examination she agreed that she “permitted” him to do this.

[44] On the next occasion she started to tear up and tried to push him off by raising her hands above her head and pushing on his stomach. Mr. Hunter is, she agreed, overweight and one of the problems with breathing was that while his penis was in her mouth his stomach was hanging over her face. She tried to push his penis out of her mouth.

[45] When he withdrew his penis, she did not recall having any difficulties breathing, or hyperventilating.

[46] A.G. testified that after that time she told the accused “no” and that she did not want to continue with that anymore. It was S.D. though that responded first by saying: “Do it one more time and Daddy will fuck you again”. It was at this point that Mr. Hunter agreed that he would not go as deep if she did it again. She described her reaction in these terms:

A: Yes, there... there... there were, was a discussion in terms of him continuing, but at that point I also felt like if I were to, have truly voiced what I felt, it wouldn't have mattered, he would have just said do it anyway, I don't care.

Q: But you will agree with me, you didn't voice how you felt?

A: Yes, I will... I will agree with you, I did not voice that.

...

Q: Based on the interactions that the three of you had, regarding just do it one more time and Daddy can fuck you, and I'm not gonna go as deep this time, would you agree with me that the verbal and physical cues that you were giving at the time, were that you would continue to let him put his penis in your mouth?

A: Umm... I let him do it one more time out of fear that he would do something worse than slap me. So, yes.

Q: And would you agree with me that he actually didn't go as far and didn't go as long.

A: I would agree with you.

...

Q: At any point, again, sorry not at any point. During this particular umm... incident of you laying on the bed and him placing his penis in your mouth in a manner that you are saying you weren't consenting to -at any point did Mr. Hunter threaten you?

A: No, not verbally.

Q: Did he make any promises to you?

A: No.

Q: So you would agree that your realization that it didn't matter what you said was a conclusion that you had made, not based on any verbal comments that he made to you.

A: Not based off of verbal comments, no, but I had made it off of physical cues.

Q: You will agree with me that when the female made the comment about "do it one more time" she was in your proximity?

A: Yes.

Q: Would you agree with me therefore, that she would have been close enough to have seen you crying.

A: Umm... she may have been close enough, but not to the extent that... it was also very dark in the room, there were... so I could not say for sure that she would have.

Q: That's fine. Would you agree with me that she would have been in enough proximity to have heard you say "no"?

A: Yes.

Q: Do you agree with me that it is likely that the comments she made "do it one more time and Daddy will fuck you" was in response to you saying "no"?

A: Yes.

Q: You also said at the preliminary inquiry that after this incident, so the incident involving the umm... oral sex over the bed, you wanted to just get it over with, do you agree with that?

A: Yes.

Q: And when you say getting over it, would you agree with me that that means you wanted to just have him ejaculate and move on from this?

A: Ess... Essentially, yes. I wanted, in my mind I, I thought that agreeing and having him finish was a safe assumption in my head.

Q: After that happens you then continue to have umm... sex with each other, is that what was going on?

A: Yes. I don't remember a lot of the specifics in between the, the last sex act with the choking, but yes, essentially it was more foreplay and...

Q: And will you, do you know how long time had passed between the oral sex incident and the choking incident?

...

Q: Do you believe it was ten minutes or more?

A: Probably more like 15 to 20.

Q: Would you agree with me that during those 20... 15 to 20 minutes of activity you were not making any verbal cues that you were not consenting?

A: Not verbally, no.

Q: Okay. Would you agree with me that you, during that 15 to 20 minutes you are not making any physical cues that you were not consenting?

A: Yes, I would.

[47] So, after 15 to 20 minutes of other sexual activity, the accused had intercourse with the complainant, during which he pinched her breast and choked

her. In cross-examination she testified that he grabbed her breast with one hand and squeezed. She voiced the word “ow” but in what she described as a “whimper sound”. He did not remove his hand but “kinda kept playing with them”, meaning her breasts. This occurred while she was lying on her back on the bed with him lying on top of her. She had her legs up and around him as they were having intercourse.

[48] As he was having sex with her he put his hand on her throat. She testified that she put her hand on his wrist to lift it off and said “stop”. When asked to describe how she made that statement her testimony was:

A: ... I am very soft-spoken, so what I meant by that was, I did verbalize it and say it out loud, but I did not scream it or say it to an extent like...

...

Q: I’m gonna suggest to you that when you said “stop”, he was in the moment of climax. Would you agree with that?

A: No.

Q: Would you agree with me that when you said “stop”, there was nothing to indicate to you that he had heard you say it?

A: Yes, I would... I would agree, he did not indicate yes or no that he had heard. But in my mind, I assumed that was just because he was in the middle of sex.

[49] A.G. stated that when she went home she was embarrassed and ashamed, and perhaps humiliated.

[50] In relation to the text messages she agreed that she did not block him from messaging with her. She was asked to explain her responses to the texts. Her answers are paraphrased in brackets:

Mr. Hunter: Did you have fun?

Ms. G.: Yeah *[she testified that she thought a quick response would end the discussion]*

Mr. Hunter: Would you do it again?

Ms. G.: Do you want to do it again? *[she testified that her true answer would have been “no”, but that she was afraid of what he would say if she sent him that answer]*

Mr. Hunter: Yes, we had fun; you didn’t answer me.



Ms. G.: Yeah *[she described this as another thing she texted in passing, in hopes that he would stop sending her messages]*

Mr. Hunter: What did you like?

Ms. G.: I just like getting fucked.

Mr. Hunter: Even though I choked you and stuff?

Ms. G.: I don't always like that. *[ she said that she did not mean the word "always" to imply that she liked it sometimes... ]*

Mr. Hunter: Aww.

Ms. G.: Or when I feel like I can't breathe with your cock down my throat.

[51] Transmitted at 1:25 PM later in the same day:

Mr. Hunter: Yeah; I warned you that you were going to learn to take it deep.

[52] Then at 2:21 PM:

Ms. G.: Yeah *[She acknowledged that she was agreeing with him on that statement but didn't want a full discussion with him at that time]*

[53] She agreed that there may have been spanking, and while she could not recall that specifically, if it occurred then it would have been consensual.

[54] The cross-examination ended with:

Q: I'm gonna suggest to you as well Ms. G. that a lot of your lack of consent was happening in your head, but not necessarily being expressed to Mr. Hunter and the female party. Would you agree with that?

A: To an extent, yes, but for, but for me I... once it got to a point where I realized he was being, he was going to be violent if I disagreed after I had said "no" and stopped the first time, I was scared that if I tried to voice it again, or fully tried to stop him, like get up and get dressed, that it would resort to more violence I didn't want.

Q: But again you will agree with me that at no point, other than the slap to the face, were you threatened with any violence during this incident. Correct?

A: Not during, no.

[55] In redirect examination, A.G. was referred to her preliminary inquiry evidence in relation to telling the accused to “stop” while being choked. She adopted the following as the complete answer to this line of questioning:

So I told him to stop, I told him to stop, but I’m not sure how loud it was or how, or really how much I actually verbalized it, but I did tell him to stop once and by this point he didn’t stop and his hand was, he just kept it wrapped around my neck and I felt like he was in complete control and I was really kind of scared in that moment and I just wanted it over with. And he kept his hand wrapped around my neck until he eventually came inside of me and then he finally stopped.

[56] The second line of redirect was in relation to her responses to questions as to whether Mr. Hunter threatened her. She stated:

What I took as a threat was when he slapped me because I, I took that as, that if he slapped me, what other kind of violence was he willing to do if I said “no”.

[57] Cst. Kelly Plamondon of the RCMP testified that this complaint was first received by Sgt. McCormack who assigned her to investigate A.G.’s complaint.

[58] A.G. caused the officer to believe that she only knew Mr. Hunter by his screen name, not his real name. So, on December 5, 2017, they went to S.D.’s residence, the place of the alleged offences, to obtain information to identify the two people involved with A.G. on the night in question.

[59] S.D. acknowledged her own involvement but was uncomfortable providing Mr. Hunter’s name. She indicated that she would have the accused contact the police, which she did.

[60] Cst. Plamondon conducted an interview of A.G. on December 8, 2017, which was also the day that she received copies of the photos taken by the complainant, and the text messages that were tendered in evidence as Exhibits 3 and 4. Both were emailed to the officer.

[61] Mr. Hunter, after being contacted by S.D., called the officer and made an appointment to be interviewed which took place on December 15, 2017.

[62] S.D. is a 38-year-old who is the owner of the mobile home where these events took place. She described her relationship with the accused as friends for many years.

[63] S.D. and Mr. Hunter decided to have a sexual interaction with a third party who was the complainant. She testified that this was intended to involve “light” aspects of BDSM. She was asked to explain her understanding of BDSM, which she described in these words:

...it’s like in a more erotic, ... sexual way to be. Like a different practice, more of like, like bondage and ... submissives, dominants; people just, ... exploring their sexuality in a way that isn’t considered traditional .... by society.

[64] She described the roles of the participants:

A dominant is ... a person that...asserts dominance over another person, ... that person usually is in a trustworthy position; they’re in,... a like assertive position over someone else I guess is the best way to say.

...

A submissive is someone that does what the dominant tells them to and entrusts the dominant ... that they won’t ...actually, ... hurt them, ..... A submissive is somebody that just submits to the dominant...

[65] Asked to give examples of things that would happen during BDSM sexual experiences she listed bondage (tying one up), “rougher oral sex...” and “different types of games like smacking”.

[66] She testified that Mr. Hunter was the dominant member of the trio, and she and A.G. were the submissives.

[67] She acknowledged that because of the passage of time she was uncertain of some details. In cross-examination she was cautioned to distinguish that which she was sure of, from that which she was not. My review of her evidence takes account of the distinctions she made.

[68] When A.G. and Mr. Hunter arrived at her home on the evening in question she recalls meeting them in the kitchen and offering a glass of wine, which was declined. She did have a glass herself but was not intoxicated.

[69] Her recollection is that the three of them went into her bedroom and Mr. Hunter asked the complainant to undress, which she did. He then began to rub A.G.'s breasts and genital area. He brought her over to the bed where S.D. was. She cannot recall at exactly what point she removed her own clothes but knew that it was very soon after they entered the room.

[70] The first thing that she believes occurred was that she and the complainant performed oral sex upon the accused. This is how she described it:

“The oral sex, it would have been a bit firm, definitely. ... more of like, I guess you could call it deep throating where, you know like she, he would have her, like she would put her head down as deep as she could and just kind of, like oral sex...”

[71] The accused was laying on the bed while she and A.G. took turns performing fellatio. She acknowledged that there was some gagging, which she demonstrated in court.

[72] The complainant then laid on the bed and the accused had vaginal intercourse with A.G. S.D. described A.G. as “... moaning and ... normal sex sounds of ...[a] healthy relationship sex kind of thing...” It was, she said, an “enjoyable moan”.

[73] She testified that no one was tied up but there was “smacking” which she described this way:

I know, like, probably like on my ass or butt and on her butt, and on boobs, definitely would have been boobs.

[74] Asked if she saw smacking anywhere else, she said that she did not.

[75] I will note at this point that all three participants agree that they were together at all times during the sexual activities.

[76] S.D. testified that the word “no” was not used, but that A.G. did say “please stop” when Mr. Hunter placed his hand on her neck during intercourse on the bed toward the end of the activity. S.D. stated that Mr. Hunter let the complainant's neck go, and he appeared to be ejaculating. She estimated that his hand was on the complainant's throat for less than ten seconds in total. A portion of her statement to the police was put to her, in which she said that there was a delay between A.G. asking him to “stop” and when he actually stopped. She adopted her answer which

was that it was “like about five seconds later”, although she also allowed that it could be as much as ten seconds. She maintained that he was ejaculating as A.G. asked him to stop.

[77] Crown Counsel paused in his cross examination for ten seconds asking S.D. at the end of it whether that was about the length of time that he had sex with A.G. after she said stop. Her response was “approximately, yes”.

[78] When asked if anyone was forced to do things she said “no” but that there were “strong suggestions”. She had provided an example of this in direct examination:

A: I remember when she was giving him oral sex she was gagging, which is normal when you deep... well to most people, it's normal when you're deep throating someone to be gagging and umm... eventually, you could tell she was kind a like, you know, like, whatever, and I was just like “just do it one more time and he'll have sex with you”, and she did it one more time and then they proceeded to have sex.

Q: So after you made, right before you made that comment, had she made any comments to you?

A: Not that I can recall.

Q: And after you had made that comment, did either of them say anything?

A: Either of them say anything? Umm... no, I don't think.

Q: And so after you made that comment what did, what happened?

A: Umm... well... then she just proceeded to do it one more time and then they proceeded to have sex.

[79] In cross-examination she described the complainant as “kind of resistant” during the deep throating. She did not recall the complainant saying no or stop, although she thought it was possible.

[80] She was asked to explain the role of consent in BDSM:

A: I guess, yeah. Umm... well usually it's something, consent would be, like, I guess, depending on... if it's just a generalized situation, consent usually is something that's set up umm... if, if somebody's screaming their head off and says something then, that's not consent, but normally its just that you're agreeing to be there and agreeing to be part of things and the person, you have a conversation with before and everybody knows what's gonna happen and...

Q: Can BDSM include no consent?

A: Well it can include no consent, providing that there is a safe word or something established prior to the situation.

Q: In this particular situation, was there a safe word?

A: No, not that I was aware of. ...

[81] S.D. expressed surprise when the police came to her during their investigation, as in her opinion, given the understanding she had of what sexual activity the parties were there to engage in, the sexual activity was “vanilla... dull”.

[82] Logan Hunter was the final witness in the trial. He was 30 years old at the time of the alleged offences. He described S.D. as a friend and somewhat regular sexual partner. He identified A.G. as also having been a sexual partner. The only evidence of this is that of the evening in question.

[83] He testified, as did A.G., that the two of them communicated by text message using the KIK messaging app. It was agreed that the two of them would join in a sexual threesome with another female that was previously unknown to A.G. As other witnesses testified to, it was intended that their sexual activities would feature aspects of BDSM sexual practices. He stated that he understood the acronym to represent “bondage, domination and submission”. Before stating his understanding of what the “M” stood for Crown counsel suggested that the “S” stands for sadism and the “M” for masochism. The accused deferred to the Crown on this definition.

[84] Mr. Hunter described this as sexual activity that “usually features rougher sex, bondage, and... the typical roles would be, ... a dominant and submissive.” In cross-examination he agreed that it can include the infliction of pain for sexual gratification or taking pleasure from receiving pain during sex.

[85] He defined a dominant as a person who is the director of the activities. They usually lead the sexual encounter or the nonsexual encounter if it is not all sexual.

[86] He described a submissive as a willing participant who wants the dominant to tell them what to do, or to perform acts that the dominant sees fit. He distinguished a submissive from a masochist in that a submissive partner can but does not always participate in the infliction of pain.

[87] He confirmed that there was no “safe word” established at the beginning of this encounter. He disagreed that pain is necessarily inflicted as part of this type of sexual experience. In his view, it was enough for A.G. to signal that she was distressed by an activity by simply using the word “stop”, without it having to be designated as a safe word. His release of her throat immediately after she told him to stop, was his example that showed this to be the case.

[88] He stated that the parties must agree to identify which of them would be dominant and which would be the submissive. The relationship is not intended to be equal. It was understood that on this evening the two women would be submissive, and he would be the dominant.

[89] When he picked A.G. up in Cow Bay he asked whether she was excited about the events planned for the evening and A.G. indicated yes.

[90] His recollection is that when they went into the residence, S.D. was already in the bedroom. He and A.G. joined her in the bedroom. At that point everyone was dressed. He recalled S.D. offering a glass of wine, which was declined.

[91] He believes he instructed both of the women to get undressed, which they did and then the three of them began to engage in sexual activity. It started with him standing in the room and the two women on their knees taking turns performing fellatio.

[92] After that he is uncertain of the sequence. He recalled that at one point he sat on the edge of the bed while they took turns performing fellatio. He also recalled that the two women performed oral sex on each other. At one point, while on the edge of the bed, S.D. sat on top of him and engaged in intercourse. While this was taking place, A.G. performed oral sex on S.D.

[93] The next thing that occurred was A.G. laid on the bed with her head hanging over the edge of the bed and began to perform oral sex on him. He recalled that at one point S.D. encouraged A.G. to perform oral sex on him one more time and then they would then switch to having intercourse. His perception was that S.D. was getting impatient watching him receive oral sex. After S.D. made this comment A.G. opened her mouth, and he put his penis in one more time. After that concluded they moved onto the bed to have intercourse.

[94] He disagreed with A.G.’s account of how the oral sex took place. He said that while she was in this position he inserted his penis into her mouth on at least

three occasions and possibly more, pausing between each time in order that she could catch her breath. Each pause was a little longer than the one before so that she could catch her breath. When asked to describe A.G.'s demeanour during oral sex, he indicated that she gagged on each occasion and turned a shade of red at times. He acknowledged that her eyes may have watered. He saw these reactions as an "involuntary reflex". He did not see any indication that she was in a state of discomfort beyond what the natural consequences of that sexual activity would create.

[95] He denies that she said "no" or pushed against him at any time during the acts of oral sex. He denied issuing any threats to her and denied that he "smack[ed] her" on the cheek.

[96] He could not clearly remember what happened after the last time that A.G. performed oral sex during this sequence. He thought that there was a period of time during which there may have been further sex acts with S.D. The next thing he clearly remembered was engaging in intercourse with A.G. on the bed and in a missionary position, meaning that A.G. was lying on her back and he was on top facing her with his penis between her legs and her legs open. He acknowledged that during sex he was grabbing, pulling and squeezing on her breasts and nipples. He does not believe that there was anything objectionable in the way this took place.

[97] He testified that as he was "getting close to climaxing" he placed his hand around A.G.'s neck and held it there. He recalled as he approached climax that A.G. said "stop" and that intercourse ended very quickly after that.

[98] Once the intercourse concluded, S.D. performed oral sex on A.G. following which the three participants cleaned up, got dressed and left to take A.G. home.

[99] Mr. Hunter recalled, when asked, that there was some spanking on the buttocks of one or both of the women. It would have been with an open hand slap. He was firm in his denial that he did not slap the face of either woman. He was asked about his observation of A.G. during the last act of intercourse. He said that she:

... seemed to be enjoying it. She was moaning and laying on the bed. She was face up and I could see her face clearly and she did not seem upset. The fact that she was moaning and laying there without saying anything, or there was not distress on her face or anything, everything seemed like it was going well.



[100] His evidence with respect to the choking incident was:

A: When I initially placed my hand on her throat, everything was fine. She was still moaning, we were still having sex, as, as if nothing had changed from like, the moment before I had placed my hand on her neck. I would say that as I was getting very close to climaxing, she kind of looked up at me and that's when she said "stop" and that was the only indication, up to that point that there had been any discomfort resulting in my hand being around her neck. She still seemed to be breathing, like I could hear her moaning and breathing. It wasn't sounding like she was unable to breath or being difficult, like, gasping for air or trying really hard to like, get a breath, or anything. I don't think that I was squeezing very hard around her neck, so I wasn't restricting her air flow very much, at least based on the signals that I could see from my point of view.

Q: How long do you believe your hand was on her neck, until she said "stop"?

A: I don't think it was very long, like, I would say maybe, like, ten seconds until she said "stop".

Q: And how long do you believe, if at all, time passed between your hand being on her throat, her saying "stop", and you removing your hand?

A: I believe that... I definitely reacted quickly, like once she said "stop", that I released my hand, I would say within like, one second or two seconds at most. And then I was still on top of her, like, I didn't remove my body from on top of hers, I just released my hand, and then a few seconds after that, then I got off of her and then they had oral sex.

[101] Mr. Hunter confirmed the evidence of the investigator. When he learned of the complaint, he contacted the police and attended to provide a statement. He was surprised because he saw the text messages as confirmation that A.G. had enjoyed the experience.

[102] He closed his evidence in direct saying:

Q: After having heard Ms. G.'s version of events, could you comment on how you may have reacted or how you would have reacted if that had taken place.

A: I definitely would not have proceeded if there was a point during the oral sex where, as she had said that she had pushed me away and said no repeatedly, and then I think that that would have ended the sexual encounter. That we would have stopped and that I would not have proceeded to try and get her to do it again. That we would have stopped and talked about how we were feeling and, probably, if she was upset or

feeling she didn't want to continue, then I probably would've driven her home at that point and that would've been the end of the evening. I definitely didn't want to make anybody feel like they were forced or that they couldn't say no, or that they had to proceed with all those sexual events because they felt like they were under the threat of violence or that they were unable to stop with the rest of the evening.

Q: Could you elaborate a bit more on the time that your hand was on her throat? Can you comment on the nature of the force that you may have been using?

A: I, like I said I don't think I was squeezing very hard, it was more about... I guess it's like a symbol, like, you have that power that if your hand is there... So it's not about the actual like, making it so somebody can't breathe. It's just about resting your, like, placing your hand there and then holding. So I don't think that I squeezed very hard and that I could still see that she was breathing and did not appear to be struggling for air or showing any sign of distress.

Q: At any point that you had your hand on her throat did you feel any resistance?

A: No.

Q: At any point while you had your hand on her throat were you attempting to overcome her?

A: No. When I put my hand on her throat she was just laying there and we were having sex, so it was just an act of, I guess, sexual... It was something that, I guess, I enjoy, its something that turns me on. So it's something that I did, it wasn't used as a means to like, get her to continue having sex because we were already having sex and everything was going fine.

Q: ... Between the time that you had your hand on her throat and she said "stop" did you have any opportunity to remove your hand sooner?

A: When she said "stop" I feel like I removed my hand as quickly as I could process that she was requesting it to stop, like, there wasn't a long pause or anything. I think that when it happened, because I was like, on top of her with my one hand above, like on her neck, and then one hand supporting my weight, that I didn't immediately get off of her, but I did let go of her throat pretty much right away.

[103] In cross-examination, Mr. Hunter was asked questions about portions of the text messages that suggested prior sexual activity between he and A.G. He responded that there had been previous conversations on this topic, but that he understood that he was not permitted to give that evidence. I note that A.G. had a similar response in her testimony.

[104] Neither the prosecution or the defence elected to make an application under s. 276 to seek the admission of evidence of prior sexual activity. I can only assume that this is what both witnesses were referring to. I have instructed myself to draw no inferences based on the testimony of either of these two witnesses that might suggest prior sexual activity as between them. In saying this, I must respect the tactical decisions made by the respective counsel.

[105] As such I will assess what weight to attach to the text messages in Exhibit 3 by reading them and considering the explanations given by each of the parties as to the meaning they intended by their own messages. I will not consider the speculation of each witness as to what the other party might have meant and will not assess them on the basis of any possible previous relationships or conversations that may have existed but are not in evidence.

[106] Mr. Hunter was examined against a statement that he gave to the police in which he indicated that he had his hand on A.G.'s neck for maybe 20 seconds in total, and no more than 30. He acknowledged that the choking action while having sex stimulates him. He could not say the precise number of seconds that passed after he was told to stop and when he finished having sex with A.G. His evidence on this issue remained that he did so as quickly as he could process the request.

[107] In response to a question from the Crown Attorney, Mr. Hunter confirmed that he interpreted A.G.'s request that he "stop" to relate only to the choking action and not to the intercourse. When asked why he didn't ask A.G. to confirm this to be the case, he said that it would have taken as long to ask the question as it took for him to withdraw his penis from her vagina, as he was ejaculating at about the same time.

[108] Near the end of his cross-examination he was asked whether he was in charge of the boundaries. He said that "boundaries are mutual, and you don't know until you hit one".... I think that if she had have said no or stopped or pushed me away, as she has indicated in her testimony, that's what would've happened. It would've been a boundary that she was in charge of."

[109] That concludes my review of the evidence.

### **Legal Principles**

[110] The accused is charged with an offence contrary to s. 271 of the *Criminal Code*, being sexual assault upon the person of A.G..

[111] A person commits a sexual assault when, without the consent of another person, they apply force intentionally to that other person, directly or indirectly in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.

[112] A conviction for sexual assault requires that the Crown prove beyond a reasonable doubt that the accused committed the *actus reus* and had the necessary *mens rea*.

[113] The *actus reus* is established when the evidence satisfies the trier that the accused touched the complainant in a sexual way, and without their consent. (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23).

[114] The *mens rea* consists of the accused's intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 42).

[115] Consent is treated differently at each stage of the analysis. For purposes of the *actus reus*, "consent" means "that the complainant in her mind wanted the sexual touching to take place" (*Ewanchuk*, at para. 48). Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and a trier of fact accepts this evidence, then there was no consent (see *Ewanchuk*, at para. 31). At this point, the *actus reus* is complete.

[116] "Consent" is defined in s. 273.1(1) of the *Criminal Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question". The "sexual activity" referred to by the section, and therefore the activity consented to, is taken to encompass the specific physical sex act or acts, the sexual nature of the activity and the identity of the partner in those acts (*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55 and 57).

[117] The characteristics of a valid consent include that:

- There is a conscious agreement to engage in the sexual activity, as I have just described that term;
- The agreement to engage in the sexual activity is voluntary;

- There is a "subjective consent in the mind of the complainant that is present at the time of the sexual activity" (s. 273.1(1.1) *CC*);
- The agreement is in relation to every sexual act in the particular encounter.

[118] Consent can be revoked at any time (see, s. 273.1(2)(e) *CC*).

[119] Section 265(3) of the *Criminal Code* directs that where the complainant has appeared to communicate consent to the activity, or otherwise submitted to the sexual activity, that apparent consent is statutorily vitiated where the complainant did so by reason of:

- the application of force to them or to another persons (s. 265(3)(a) *CC*);
- threats or fear of the application of force to them or to another person (s. 265(3)(b) *CC*);
- fraud (s. 265(3)(c) *CC*); or
- the exercise of authority by the accused over the complainant (s. 265(3)(d) *CC*).

[120] In these circumstances, the prosecution must demonstrate a nexus between the participation in the sexual activity and the conduct said to vitiate consent.

[121] In addition to the above, s. 273.1(2) provides a non-exhaustive list of circumstances where "no consent is obtained." These include:

No consent obtained

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

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
  - (a.1) the complainant is unconscious;
- (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
- (c) the 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.

[122] This provision effectively requires the complainant to be conscious throughout the sexual activity in question. The only relevant period of time for the complainant's consent is while the touching is occurring. Consent requires a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act.

[123] In summary, the *Criminal Code* sets out a "two-step process" for analyzing consent to sexual activity. The "first step" is to determine whether the evidence establishes that there was "no voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant consented to the sexual activity, or their conduct raises a reasonable doubt about the lack of consent, the "second step" is to consider whether there are any circumstances that may vitiate their apparent consent.

[124] Section 265(3) defines a series of conditions under which the law deems the attendant circumstances to be an "absence of consent", notwithstanding the complainant's ostensible consent or participation.

[125] Section 273.1(2) also lists conditions under which "no consent" is obtained. The "first step" requires proof that the complainant did not voluntarily agree to "the touching, its sexual nature, or the identity of the partner".

### **Position of the Defence**

[126] The accused advances a variety of responses to the allegations made against him.

- He says that he did not hear the complainant say "no" or otherwise communicate to him that she was not consenting to the last act of fellatio that she performed upon him;
- He denies slapping her in the face;
- He acknowledges squeezing her breasts during intercourse, but he was not aware that the complainant was not consenting to these acts;
- He admits that he put his hand on the complainant's throat during intercourse but that it was not intended to enable an act of sexual

assault. When the complainant said “stop” he took that to refer to the choking and he immediately stopped, and almost immediately after, he withdrew his penis from her vagina.

[127] As previously indicated, the burden is on the Crown to prove beyond a reasonable doubt that the complainant did not consent to the sexual activity she complains of.

[128] Mr. Hunter says that, if A.G. was not consenting to all or some of the sexual activity, he mistakenly believed that she voluntarily agreed to participate in the sexual activity with which the accused has been charged and which he acknowledges took place.

*Mistaken Belief in Apprehended Consent*

[129] Mr. Hunter does not have to prove that he honestly believed that A.G. voluntarily agreed to participate in the sexual activity with which he is charged. It is Crown counsel’s task to prove beyond a reasonable doubt that Mr. Hunter had no such belief. If I have a reasonable doubt about whether Mr. Hunter honestly believed that A.G. consented to the sexual activity with which he is charged, then I must find Mr. Hunter not guilty.

[130] A belief is a state of mind, Mr. Hunter’s state of mind. To determine whether he honestly believed that the complainant voluntarily agreed to participate in the sexual activity for which he is charged I must consider all of the circumstances surrounding that activity, including what each of them did or said, and what they did not do, or did not say.

[131] The accused must honestly believe that the complainant voluntarily agreed to participate in the sexual activity which she says she did not consent to. There is no honest belief if Mr. Hunter saw the risk that A.G. would not voluntarily agree to participate in the sexual activity but went ahead anyway in spite of that risk. Similarly, there can be no honest belief if Mr. Hunter was aware that he needed to find out whether A.G. would agree to participate in this activity but did nothing about it because he did not want to know the truth. Nor can there be an honest belief in A.G.’s voluntary agreement to participate in the sexual activity unless the accused took the steps a reasonable person would take in the circumstances, as Mr. Hunter knew them, to find out whether A.G. agreed to participate in the activity.

[132] Mr. Hunter's belief must be honest, but it does not have to be reasonable. Having said that, the reasonableness of his belief can still be an important factor to consider in assessing whether he actually had the honest belief he claims.

[133] The law requires that if, having considered the totality of the evidence, I have a reasonable doubt whether Mr. Hunter honestly believed that A.G. voluntarily agreed to participate in the sexual activity with which he is charged, then I am required to find him not guilty of the charge under s. 271 of the *Code*.

### **Credibility and Reliability**

[134] In this case, the evidence of the three participants has more in common than in its differences. However, it does differ on some evidence material to the proof of the allegations against Mr. Hunter.

[135] In fulfilling my responsibilities, it falls to me to decide how much or little of the testimony I accept. I may believe some, none or all of it.

[136] The testimony of all witnesses must be assessed having regard to the passage of time and recognizing that it generally impacts negatively on the ability of persons to reliably recount past events.

[137] To the extent that there are any concerns about reliability based on the passage of time, it is self-evident that such allegations are capable of belief. Some events are so memorable that even when the surrounding details are obscured by the passage of time, the principle allegations can be accepted as proven beyond a reasonable doubt.

[138] Similarly, any significance that might be attached to the passage of time before coming forward to complain, must be assessed in the individual circumstances of the case. It is well understood that victims of sexual assault cannot be expected to act in any certain way. Each person's experiences and ways of dealing with such incidents are individual to them.

[139] While stated by the court in the context of a civil trial the following statement in *Faryna v Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at paras. 9 and 10, is a useful reminder of some of the factors a judge should be alert to in making findings as to credibility. In making this reference I am clear in my mind as to the different standard of proof that exists in a criminal case than exists in a civil case:



9 If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection, it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, *see Raymond v. Bosanquet* Tp. (1919) 59 S.C.R. 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

[140] Mr. Hunter testified. When a person charged with an offence or offences testifies, his evidence must be assessed in the same way that the testimony of any other witness would be assessed. I may accept all, part, or none of Mr. Hunter's evidence.

[141] If I believe the testimony of Mr. Hunter, that he did not commit the offences charged, then I must find him not guilty.

[142] However, even if I do not believe the testimony of Mr. Hunter, if it leaves me with a reasonable doubt about his guilt then I must find him not guilty of the offence.

[143] Even if the testimony of Mr. Hunter does not raise a reasonable doubt about his guilt, if after considering all the evidence I am not satisfied beyond a reasonable doubt of his guilt, then I must acquit

## **Analysis**

[144] Having reviewed the evidence I have reached the following conclusions.

[145] A.G., Mr. Hunter and S.D. all gave their evidence in a generally straightforward manner. They were responsive to questions and not argumentative. There were some differences in the sequence of events testified to, and the degree of detail as to some of the sexual activities varied. Most of these differences can be accounted for by the passage of time, and the fact that over the course of about an hour spent together there was a great deal of moving about by the three persons as they shifted between sexual partners and sexual acts. Their decisions as to what would happen next, during that hour or so, appeared to be unscripted and largely spontaneous, possibly depending upon what Mr. Hunter, as the dominant, instructed.

[146] While there are important differences on material points, in many respects they tell the same story.

[147] The accused was previously known to both of the complainant and S.D. He acted as the intermediary in arranging a sexual encounter that all three would participate in on the evening of November 15, 2017. They shared a common understanding that the purpose of their meeting was to have sex together, that would include sexual practices associated with BDSM, that is, by their understanding, bondage, dominance, submissiveness and sadomasochism. The parties saw it as something outside the mainstream of human sexual interaction.

[148] There is a wide range of behaviours countenanced within the sphere of BDSM sexual interactions. These practices were known to them as possibly involving “rough sex”, slapping, and verbal directions by the dominant to the submissives. This could include physical acts of rougher oral sex. They understood that it can involve more significant acts such as tying up a participant and the infliction of pain.

[149] All agree that when a submissive does not agree to a specific activity then they are to use a safe word, if one has been agreed to in advance, to stop the unwanted act.

[150] In this case, there is no evidence that the parties had such a discussion and so the parameters of what might be permitted was left unstated. Notwithstanding this important failure, all understood that the submissives had an element of control

during the interaction and that they were to communicate their lack of consent when something was unacceptable, at which point the dominant participant was to stop. Mr. Hunter's testimony was that simply saying "stop" was all that was required for A.G. to signal a lack of consent.

[151] Nevertheless, the failure of all three participants to discuss in advance what they thought was permitted was a likely a contributing reason for this matter to have included conduct that led to the laying of criminal charges.

[152] A summary of A.G.'s complaint is that she consensually went to the residence of S.D. with Mr. Hunter. Once there the three went into a bedroom and disrobed. They remained in that room for approximately an hour during which time acts of mutual fondling, fellatio, cunnilingus and intercourse took place. A.G. says that certain of the acts with the accused were non-consensual and the prosecution says that the accused is criminally liable for them. The alleged acts which she says were non-consensual are:

- The last act of fellatio after she said no to deep throating;
- That he slapped her face;
- any sexual acts that took place after he slapped her face which included:
  - that he pinched her breast hard enough for her to say "ow" and have bruising;
  - that he choked her during intercourse;
  - the last act of intercourse.

[153] In assessing the evidence I make the following findings. I am unable to reject the evidence of Mr. Hunter. He answered all questions in a straightforward and appropriately responsive manner. There was no indication of evasiveness and he did not seek to minimize his conduct in any way that undermined his credibility. Some of his answers can be viewed as unflattering and even open up the potential for him to be found culpable in some respects. How this assessment impacts on criminal liability will be examined in relation to the various complaints listed above.

[154] S.D. was initially very reticent in answering questions, not because she was trying to be unhelpful, but because she found it difficult to describe some of the

activities while testifying in open court. With assurances of the court, she opened up and answered the questions to the best of her ability. She had a tendency to use the term “I would have”. Cross examination, as I noted previously, resolved for me what she actually recalled and what she was uncertain of. I had no sense that she was trying to mislead the court. I noted her friendship with the accused, but again found no basis to conclude that she was trying to assist him. The only concern I have is with respect to her memory. Her recollections were not as detailed as those of A.G. and Mr. Hunter. I think all three of these persons shared the challenge of trying to accurately recall the sequencing of events in the room.

[155] A.G. presented in a confident and clear manner. There are some aspects of her testimony that I question and others that I accept. I will deal with her complaints sequentially.

#### *Acts of Fellatio*

[156] A.G. admits that the initial acts of fellatio were consensual. I accept that at one point she decided that she did not want to have Mr. Hunter’s penis so deep in her throat that it caused her to gag and tear. During a pause between acts of fellatio, she expressed this and S.D. reacted to her by suggesting that if she did it again then Mr. Hunter would have intercourse with her.

[157] I accept that until that occurred, neither of Mr. Hunter nor S.D. saw anything in A.G.’s words or actions that communicated that A.G. did not want to continue this activity. In saying this, I am expressing my doubts about A.G.’s evidence that she attempted to push the accused away. If she did that it was not apparent to the accused. This could be explained by the fact that he is a large man and she may not have used enough force to make her intentions known to him. I accept his evidence that he paused between acts of fellatio recognizing that the act would naturally have the effect of causing some gag reflex.

[158] I also accept that whether or not Mr. Hunter heard A.G. say that she did not want to do this again, he became aware that she was uncomfortable with the “deep throat” experience and so he promised not to put his penis so far into her mouth. When he next did so, he kept his promise and did not try to have her repeat the deep throat fellatio.

[159] A.G. says that she did not consent to that last act of fellatio, but that she did it out of fear, in part because of being slapped. I do not accept that the accused slapped her in the face. He denied it and S.D. does not support A.G.’s accusation.

There is no physical evidence suggesting a slap to A.G.'s cheek. It is also inconsistent with how both of them reacted – promising intercourse, which A.G. acknowledges enjoying and consenting to, and a discussion that respected her desire to not perform deep throat fellatio. This would be consistent with the understanding that as a submissive she could set the boundaries of what was permissible. It seems somewhat incongruous that they would negotiate conditions of continuation after he slapped her.

[160] There is no evidence that Mr. Hunter otherwise threatened or used any threatening words or actions toward A.G. Her agreement to continue was consistent with a negotiated settlement based on her stated concerns.

[161] In summary, I am not convinced beyond a reasonable doubt that the accused slapped the complainant, and I am not satisfied beyond a reasonable doubt that A.G. was not consenting to the acts of fellatio. In reaching these conclusions I have instructed myself on the provisions of s. 273.1 (2) of the *Code* and in particular cls. (c), (d) and (e).

#### *All Sexual Activity Subsequent to Fellatio was Non-Consensual*

[162] A.G., at one point, testified that she was not consenting to any of the sexual activity that took place subsequent to the acts of fellatio. I do not accept this to be true. There is common ground that various sexual acts involving the three participants occurred for approximately 15 to 25 minutes before the last act of intercourse between Mr. Hunter and A.G. The complainant has provided little detail as to what happened during that time, or that she was not consenting to. A blanket assertion of non-consent over all things specified and unspecified is not a basis upon which to found criminal liability, in the unique context of these circumstances.

[163] I note that A.G., at times, said that she was “hesitant” to do certain things. It is evident that the requirement for proof of a lack of consent beyond a reasonable doubt cannot be met without more than an internalized and non-communicated “hesitation”.

#### *The Last Act of Intercourse*

[164] This is perhaps the most difficult allegation to parse out in the context of the current law pertaining to consent.

[165] Mr. Hunter, by his actions, applied force to A.G., directly and intentionally in circumstances of a sexual nature such that the sexual integrity of the complainant was impacted. This included the acts of intercourse, choking and pinching of her breast.

[166] I begin by finding that the act of choking and the act of pinching A.G.'s breast did not cause her "bodily harm" within the legal meaning of that term. The photos show no evidence of marks on the neck. A.G.'s air supply was not completely cut off and she was able to speak while Mr. Hunter's hand was on her neck. The photos of her breast do show some bruising. As pointed out earlier the photos that she took and which are in evidence are not very clear. I do not have evidence of the Sexual Assault Nurse Examiner's observations or photographs to identify any marks on the complainant or to what is depicted. The bruising I can see to the breast area is yellowish in color. These comments are intended only to support my conclusion that the evidence does not suggest "bodily harm" which if it had occurred impacts on the question of consent.

[167] Having regard to my earlier findings I am not satisfied, beyond a reasonable doubt, that the act of intercourse was non-consensual. I reach this conclusion on the basis of the totality of the testimony of the three witnesses as to what they said and did in the bedroom together. It shows, in my opinion, that A.G. was willing and a voluntarily consenting participant in most of the sexual activity that occurred.

[168] The complainant's subsequent text conversation with Mr. Hunter offers some insight. The texts are not evidence of what actually occurred in that bedroom – A.G., as she testified to, could have lied or cut short her answers in the texts and for good reason. However, I found her evidence that sought to minimize the otherwise plain meaning of the texts to be selective and unconvincing. In particular, her comment that she "liked the fucking" is unequivocal and consistent with her conduct on the night in question, as I found it to be. I find no evidentiary support, that I accept, for the view that she had reason to fear Mr. Hunter during that text exchange, or that she was under any other form of duress once she returned to her home that would cause her to misrepresent her views of what occurred.

[169] I add that I find that even if the complainant's direction to "stop" referred to the act of intercourse, a proposition that I have doubts about, I find that it would only have constituted a withdrawal of consent.

[170] The compliance of an accused with the withdrawal of consent must be assessed in all of the circumstances as they existed at the time. I find that the accused responded to the complainant's withdrawal of consent almost immediately, as he described.

[171] I fully appreciate the Crown's submission that a delay of up to ten seconds might call into question whether an accused was intending to ignore the withdrawal of consent. In this case I do not find that to be the case. The estimates of time that passed between the direction to stop and when he withdrew from her varied, but it was a matter of seconds. At the time of the "stop" direction, the parties were engaged in active sexual intercourse and the accused was on the verge of, if not in the act of ejaculation. It is evident that he did ejaculate and did not keep his penis in her for more than a few seconds after doing so.

[172] I am not satisfied, therefore, that the Crown has proven beyond a reasonable doubt that A.G. was not consenting to the act of intercourse.

*The Choking and the Pinching of the Breast*

[173] Both of these actions occurred and would be included in the range of acceptable actions within the BDSM culture. That range would seem quite broad. I am satisfied that the evidence of what occurred in this case places them at the lower end of what may be deemed to be permissible BDSM conduct. It depends upon what is agreed to. That prior discussion did not take place in this case because none of the three participants appear to have addressed the issue. The inference I am left with is that there was a common understanding that if Mr. Hunter as the Dom, did something that either of S.D. or A.G. was uncomfortable with they were to tell him so, and he was to stop.

[174] The parties had been engaged in their sexual activities for the better part of an hour before Mr. Hunter and A.G. began to engage in the final act of sexual intercourse.

[175] The fondling of the complainant's breasts would not be unique to BDSM sexual activities. Pinching of the breasts to cause A.G. to say "ow" would also be within the scope of BDSM activities. I note that the complainant did not protest to Mr. Hunter to stop that conduct. He says that he saw no indication that the complainant was either not consenting or wanting to withdraw consent to this type of conduct. S.D.'s observations of A.G. support this conclusion. I am not satisfied

that the Crown has proven beyond a reasonable doubt that A.G. did not consent to the fondling and pinch of her breasts.

[176] It was the first and only time that a choking action was attempted. It was an escalation of what was seen by Mr. Hunter as within the range of permissible BDSM conduct. I accept that it could be within the range of such conduct as the infliction of pain or other forms of discomfort are implied by the BDSM construct. In this case the action did not cause any significant discomfort. A.G. confirms this, but she did not like it or want him to do this. She was clear in communicating that to the accused.

[177] There is no question that A.G. had the capacity throughout the entire evening to refuse or to withdraw consent and that she did not consent to Mr. Hunter having his hand on her throat, so when he did that she told him to stop. As I set out previously I am satisfied that he did so virtually immediately. That is how the relationship of dominant and submissive is supposed to work, from the evidence I have before me.

[178] I am satisfied that the placement of the hand did cause some discomfort to the complainant, but not sufficiently to leave a mark or to cut off her ability to breath or talk.

[179] I am satisfied that Mr. Hunter honestly and reasonably believed that his conduct in putting his hand on A.G.'s throat, in the way that he did, was within the bounds of permissible conduct contemplated by the mutual agreement that the activities that night were to be governed by the BDSM parameters of conduct. This was a defined context for the activities that night.

[180] Turning to an overview of his beliefs in relation to the events of that evening, it is necessary to ask: Were reasonable steps taken to ascertain A.G.'s consent to each of the activities that night?

[181] It is important to remember how this began. It was a plan that had been discussed previously and one that A.G. appeared to be interested in pursuing. She knew and agreed to participate in a BDSM governed sexual experience with two persons, in a place she had never been and with one person she had never met. She showed considerable determination to make her way to Cow Bay to participate. Mr. Hunter on meeting her inquired about her feelings to which she indicated that she was excited to participate in the experience.



[182] When they arrived at S.D.'s, A.G. undressed and began to engage in a variety of consensual sexual acts with both of them, beginning almost immediately upon arrival.

[183] This was the context in which Mr. Hunter and S.D. saw the complainant's willingness to participate. Her words and conduct were unambiguous. Her consensual participation in the very intimate act of sexual intercourse and her participation with S.D. in Mr. Hunter's presence in a variety of sexual acts renders the belief in her consent to be objectively reasonable.

[184] It is also common ground that they were aware of the rule that saying "stop" was intended to be sufficient to end an activity that was unwanted.

[185] All three of the participants were unwise to not set more specific boundaries of permissible conduct – had they done so, we might not be here. However, that mutual failure to do so did not leave the three of them, in these particular circumstances, without a governor on their conduct – that governor was to be a communicated withdrawal of consent by the submissive and the discontinuance of that activity by the dominant.

[186] I would think that this approach to controlling conduct would not be adequate for all BDSM activities. For example, actions that are intended to cause significant hurt such as whipping would need a more clearly defined agreement in advance. A failure to make adequate inquiry can result in the failure of the mistaken belief in consent defence. These events, however, did not approach that level.

[187] My reasons explain how I saw that agreement fulfilled on those instances when the complainant did express her reluctance or lack of agreement to a specific activity.

[188] I do not find the accused to have been wilfully blind to, or reckless of any lack of consent to the sexual activities of that evening.

[189] I find there is an air of reality to this defence which shifts the onus to the Crown to negative. The Crown has not succeeded in meeting its burden in this regard.

## **Conclusion**

[190] For these reasons, I find the accused not guilty.

Duncan, J.