

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R v. KM*, 2020 NSSC 94

**Date:** 20200205

**Docket:** Syd. No. 483534

**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

KM

*Defendant*

**Restriction on Publication: 486.4**

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

**Heard:** December 17, 18, and 19, 2019, in Sydney, Nova Scotia

**Oral Decision:** February 5, 2020

**Counsel:** Glenn Gouthro for the Crown  
Darlene McRury, for KM

**Section 486.4 - 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

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

#### **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 complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, 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.

**By the Court (Orally):**

**Introduction**

[1] KM is charged with committing a sexual assault upon MW contrary to s. 271 of the *Criminal Code*. The Crown must prove each element of the offence beyond a reasonable doubt.

[2] In these circumstances, the Complainant is a 15 year old female and the Accused is an 18 year old male. They did not know each other and had met each other for approximately 10 to 20 minutes before having this sexual encounter. The Complainant alleges the encounter was violent and without her consent. The Accused says the sexual activity was consensual and of the Complainant's free will.

[3] At the time of the incident MW, the Complainant, had been staying with her friend CK at her residence at [...].

[4] Ms. K and the Accused, knew each other and were friends. On the morning of March 31, 2018, KM and Ms. K had been texting back and forth. KM and his friend, MC(P), were at a friend's home (KC) at [...].

[5] KC had been out the night before and was asleep in her room when the girls arrived. She had told KM and MC(P) not to have anyone in the home while she was asleep.

[6] KM and Ms. K made arrangements for her to go over to the home on [...]. CK asked Ms. W to go with her, Ms. W said she was reluctant and did not want to go, but ultimately agreed to be a good friend. KM instructed the girls to go around the back of the home and enter through the basement door. KM and MC(P) were in the basement waiting for the girls to arrive.

[7] When they arrived at [...], it was the Complainant who knocked on the door, KM answered the door and let them in the basement. The Complainant, said she did not have a good feeling. The place had dog feces around outside. They were seated for a short time in the basement, with MW and CK sitting on blue milk cartons as shown in the photos in Exhibit 1.

[8] Ms. W said the meeting was silent and a bit awkward. Within a few minutes the Accused said he had a question for her and asked her to join him upstairs. She wondered what it was about and thought it was about a mutual friend, ZH. The Accused opened the door for her leading to the stairs up to the living room, half- way up she turned and asked what it was, he said, "not here" and continued up.

[9] Once upstairs, she sat on the far right of the couch in the living room and indicated that KM sat on the opposite end. KM said he sat in the middle and immediately scooted over to her placing his arm around her. It is at this point where the Complainant's and the Accused's testimony differs.

**MW – Evidence Summary**

[10] MW gave evidence that they went directly to the living room. She waited for him to be seated. She was as close to the arm of the couch as possible she said, at the total opposite arm of the couch as KM.

[11] She said as soon as she sat down he scooted really close to her, and started to kiss her neck and rub her chest area with his hands outside of her clothes. She was shoving him off her and removing his hands saying, “please don’t touch me”, she described moving his hand and putting it back on him, and saying “please don’t touch me”, she said he told her about a plan. She was asked at trial:

Q: You said a plan?

A: Yeah he said that here’s the plan and then he said my buddy [...] is gonna fuck [...] downstairs and I’m gonna fuck you. That’s what he said that he’s gonna fuck me. And then...

Q: And how did that make you feel?

A: I got, I felt terrified, I didn’t know what to do, and like I just had a feeling I didn’t know what to do, I wanted to run but I didn’t know, and he just kept like touching me, and I kept telling him no, and um, I said wanted to leave and I... he was like well they’re already downstairs and like doing stuff, and I said I didn’t care and that I really wanted to go and then like, it’s none of my business what they’re doing down stairs, I just really wanted to leave. And...

Q: Well how long, how long was this going on, on the couch?

A: Not long at all.

Q: Approximately, in terms of minutes?

A: 3 or 4 minutes.

Q: Okay. And so then, what happened, did that conclude in any way?

A: I told him that I really wanted to go and he said that I said that something about I can’t go out a front door and I couldn’t even see a front door, and I...

Q: Okay.

A: ...and he said, he said he’d go down and check and see what they’re doing.

Q: So did he go down and check?

A: Yes.

[12] The Complainant said she was terrified and sat there for 10 seconds while the Accused went down by himself to look in on MC and CK. She said he came back up and he said they’re banging and she said she didn’t want to do anything. She testified it was when she got up in an attempt to leave that he grabbed her by the left arm and then both arms and flung her to the mattress hitting her right elbow on the hardwood between the mattress and the couch and hitting her head on the hardwood above the mattress, which stunned her and caused her to be winded.

[13] When she looked up she alleged, the Accused was on his way down with his penis sticking out through the hole in his underwear. She said he knelt on her shins with his knees and was pulling her pants and underwear down, she rebuffed him and struggled pulling her pants back up, eventually she ended up with one pant leg on and one off, same with her underwear and shoe. She said KM proceeded to have sexual intercourse with her, telling her in an aggressive and violent manner to be quiet and not make noise.

[14] When it was done she turned on her right side towards the couch. And that is when he masturbated on her body, ejaculating on her pants and hitting her in the face. Throughout this time she was pleading for him to stop, saying she would tell no one.

### **KM – Evidence Summary**

[15] KM said he put his arm around her and he did not have anything to say but wanted to hang out. She said that if CK found out she would be mad because she had feelings for him. That went on for a while and he said he stopped trying to hook up. He said she initiated a kiss and suggested they go downstairs to see what was going on. He said she got up first and he went down behind her. KM testified of her asking him doing a pinky promise that if anything happened he would not tell her friend CK.

[16] He said they went down and she peeked in, he did not. They went back up. He said, she said they were on the same couch now. He said, “and I guess in her head she thought they’d be doing something. We went back upstairs in the same position on the couch. We started kissing and stuff and went down to the mattress. She started to take off her clothes, and I started to take off mine”.

[17] He said she took off her pants on her own. He said he really didn’t take anything off. He undid his belt and stuff. He said, “I know she was wearing jogging pants, but didn’t remember anything about underwear”.

[18] He said he performed oral sex on her for a matter of 15-20 seconds. He asked her to take off her bra. He said she was self conscious. There was a blanket on the bed he put over them. She took a moment to unclasp the bra, one that unbuttoned in front, as he said in his original statement. He said he thought the bra was pink in color. From there KM said they proceeded to have intercourse, stating:

Q: ... And then the blanket went up over us and I used like, used my penis and like put it in her and stuff and I was kinda like sucking on her breasts and everything like when that was going on. I don’t really know how long this lasted for. Not long, but I remember as it was going on she was saying you can go harder than that, and everything she’s saying stuff like that and she kept on telling me that I couldn’t like ejaculate in her she said that a few times. I remember asking her where, what I was supposed to do with it and she said that I could like orally, so when I felt like I was about to finish I asked her, I said stop and she asked me why I stopped and I told her I felt like I was like gonna like ejaculate and then she started performing oral sex on me for maybe about like 20 to 30 seconds. After that I kinda just got up and did my clothes back up and everything. She stayed on the bed when she was putting her clothes back on, kinda like under the blankets.

Q: When you say the bed what do you, that's the mattress is it?

A: That was on the floor the mattress that was on the floor yeah.

[19] It became a point of contention at trial whether they both went downstairs to look in on the other two individuals, as KM testified, or whether KM did so alone, as per MW's testimony at trial. The theory of the Defence is that they both went, which allegedly supports KM's evidence that MW's only concern about participating was her friend finding out, and that once she realized that was not a concern, she was ready to participate voluntarily.

### **Crown Position**

[20] According to the Crown, KM, who was 18, had a plan to have girls over in the hope of "hooking up" with them. He texted his friend CK, who brought her friend MW with her. After meeting MW, KM took steps to carry out his plan, arranging to be alone with her in the living room upstairs, where there was a mattress. He announced the plan to her, and she refused. When she got up to leave, he flung her down onto the mattress, striking her head. MW was stunned. He then knelt on her to hold her down, removed or pulled down her pants, and had intercourse with her against her will. MW says she fought back and tried to resist. She was terrified and crying throughout. MW called the police shortly after the incident. The police took her to the hospital, where she completed a sexual assault assessment. She gave a statement to police that evening. There are photographs showing physical marks on the Complainant and evidence of DNA results which the Crown submits further supports the conclusion that KM committed sexual assault contrary to s. 271.

### **Position of the Defence**

[21] According to the Defence, KM did engage in sexual activity with the Complainant, but it was consensual. KM admitted that he hoped to "hook up" but said he would not have forced her against her will. He said she was reluctant at first because her friend CK was a close friend of the Accused and liked him. However, when discussing it they both went downstairs to see her friend engaged with MC. After that, KM said, she was less worried and more confident. They went upstairs, each undressed and had consensual intercourse and oral sex. When they finished, he said, they discussed a story they would tell MW's friend, so that she would not suspect anything.

[22] According to the Accused, KC was sleeping in a bedroom next to the living room where the sexual activity took place. She came out just after they had sex, saying she heard giggling. When she saw the Complainant and the Accused they were sitting on the couch laughing. She was not pleased that they were there, especially MW and her friend. She wanted them out of the house.

[23] The Defence says the Complainant acted as if nothing had happened, did not ask for help, and did not tell her friend CK that she had been assaulted until she realized that her friend may have seen her and KM having sex. KM says she was also concerned about her boyfriend knowing, but her main concern was her best friend.

[24] This is a *R v. W.D.*, [1991] 1 S.C.R. 742 situation. The Defence submits that KM gave credible evidence and was not shaken on cross-examination. His evidence should be accepted by the Court and he is entitled to be acquitted on the charge of sexual assault. The test in *WD* applies in respect of the defence evidence.

[25] The test as stated in *R v. PDB*, 2014 NBQB 213, as stated in the recent decision of Justice Chipman is as follows:

23 I agree with the appellant's view of the import of *J.H.S.*, 2008 SCC 30 at para. 11. In *R. v. P.D.B.*, 2014 NBQB 213, Justice Ferguson helpfully explains the modification of *W.(D.)*:

[66] The test outlined by Cory J. in *W. (D.)* is as follows, although I have incorporated the second assessment element arising from *J.H.S.* that was not part of the original three *W.D.* credibility evaluation guidelines:

First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.

Thirdly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.

Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused.

### **Alleged inconsistencies**

[26] Defence counsel has pointed to some alleged inconsistencies in the evidence of the Complainant. The evidence focussed somewhat on the point of whether KM, went downstairs alone to check on CK and MC, as she said at trial, or whether MW went down with him, as he stated at trial. She was challenged on her statement given to police, the Defence arguing that she said, I saw them on the couch, when we went down, or words to that effect. Having reviewed what she said in her statement, as it was read to her in Court, I conclude that she was referencing what she said was the only other time she went down, after the alleged sexual assault, when they all went down at the insistence of KC, who kicked MW and CK out of the home. MW said, what she meant, when she ended up going down after the whole situation.

[27] Another alleged inconsistency was in reference to the struggle with the pants as stated by her at trial, she rebuffed, he'd pull down she'd pull up. It was put to her at trial that in her statement she said he "ripped them off, they were easy to get off, and he put it in". The Defence submitted this is markedly different from her evidence at trial. At trial MW's direct evidence was that the Accused "yanked both down, pants and underwear", and that it happened really fast.

[28] In her direct evidence she was referred to the physical evidence in the photos. When asked about photos 59 and 60, she said "those are marks from him trying to pull pants down or me trying to pull them up." She said the same about 62 and said 65 and 66 showed a nail mark.

She stated that she could not recall whether it was caused by her trying to pull her pants up or him trying to pull them off. Photo 68 showed the same nail mark.

[29] The Defence also pointed to the evidence of the BEC shirt, submitting she said it was not pulled off but down with him touching her breasts. He said both shirt and bra were removed by her, with her bra pink and open in front. The Defence argued:

So which of those scenario's is more likely, the fact that MD says the shirt came off, not her version that the shirt was pulled down. If he had of ejaculated in her facial area then there should have been lots of semen on the shirt if, if what she says is true. But the fact that there's nothing before the court showing any dna on that shirt or any damage to that shirt that's once more consistent with Mr. M's version of the events, that the shirt and the bra were off, and he even in his statement we pointed out, he even recalled when he gave his statement to the police the color of her bra and that it was a front closing bra.

[30] Once again, the Defendant says, his evidence is the more accurate testimony according to the scientific evidence.

[31] The DNA results contained in the admissions agreed upon identify DNA from male 1, who is the Accused, KM. While there was some dispute as to what these results represented, I am satisfied that the DNA was from human semen on the crotch area of Ms. W's sweatpants. This human semen was sent for DNA analysis. The conclusion reached was that the profile of the major component of the DNA was male 1 identified as KM. The Crown says this corroborates MW's evidence stating that KM was very specific where it was he ejaculated, in her mouth. There is no dispute that sexual contact occurred.

[32] In cross-examination, Defence challenged MW about her evidence that BEC shirt not being off was not mentioned in her statement. She explained the statement was, "given a few hours after happened to me". She said she was anxious, disorganized. "I was all over the place, having just been sexually assaulted".

[33] Cst. K. Francis was asked to attend at the hospital when the Complainant was having sexual assault kit completed. She described MW as visibly upset and crying, but said she calmed down when her father was with her. The officer said she was very articulate, and well spoken. Cst. Penny confirmed in his evidence that MW was in an emotional state during his involvement.

[34] Later MW, was questioned about the 911 call and the fact that she referred to not wanting to get touched and he was trying to her get pants off, not that she had been sexually assaulted.

[35] Once again, MW, said, "I had a lot going on in my head, I'm sorry if I didn't get it right, I wanted them (the police) here asap". She said, "I didn't get to the parts to what he did, but I'm sorry those should have been my words".



[36] So in respect of these differences or inconsistencies or parts left out, MW, basically said everything was “hitting her at once”, she was blurting everything out at once. I note she said in the call that she “kept telling him don’t touch.”

[37] Similarly, she was challenged that there was nothing in the statement about KM taking shirt down and kissing breasts or touching breasts. She responded, “sorry if I left that out, there was a lot to talk about that day”.

[38] In direct, MW, was asked about photos 55 -58, and in her evidence she referred to bruises which she said were from KM trying to take her shirt off, and pulling on her shirt, when on the mattress. She said he pulled the neck down and tried sucking her breast and she grabbed his head, and that he did not try that again.

[39] In terms of credibility, MW, readily acknowledged even apologized for her statement not being totally complete, with some things sounding a little different or being left out. It is not for the Court to parse the evidence, but to consider the evidence as a whole.

### **Analysis**

[40] I am satisfied that KM had a plan, and that he was intent on carrying it out. In cross-examination he said he was intent on having sex, only if she agreed, and that he would not force her. He admitted that he deceived MW in order to be alone with her. He said it was possible he told her about the plan.

[41] KM had been drinking. MW said he and MC chugged a bottle of fireball until it was almost gone. He said he had “little drinks” as he had to work. He said he may have smoked some weed, but was not 100% sure.

[42] In terms of consent, KM said MW was reluctant at first, but that once she saw what CK and MC were doing she consented to have sex.

[43] KM’s statement given to police leaves some questions. KM said he did not remember small details but did remember big ones, such as the sexual activity. He said, for example, that it was 45 minutes, as opposed to 10 to 20 minutes, before they went upstairs. He was asked in cross-examination which was more accurate. He said his memory after the event would have been more accurate, so that the statement would be more accurate. There is also the question of his statement, which does not state that they both went downstairs. The Defence suggested he did mention it when he told police that she said “go peek, go peek”.

[44] The photographs are compelling evidence in view of the Complainant’s evidence about hitting her right elbow and being flung. They also show bruises on her shins consistent with her evidence of him kneeling on them, and there are the marks on her chest and elbow.

### Consensual vs. non consensual

[45] The central issue is whether the Complainant consented to the sexual contact that occurred. There are differences between the meaning of consent under the *actus reus* and *mens rea* of the offence. With respect to *mens rea*, the issue is whether the Accused believed that the Complainant communicated consent. Under the *actus reus*, the only question is whether the Complainant was subjectively consenting in her mind. The Complainant is not required to communicate her lack of consent or her revocation of consent for the *actus reus* to be established.

[46] The focus of the consent under the *actus reus* is the subjective internal state of mind of the Complainant. While there were details raised that allegedly undermined her account, such as petting dogs or going back to see the Accused after the alleged assault, the Court cannot or should not apply any myths or stereotypes about how a person should behave in such circumstances. This also applies to questions about why the Complainant would not have called someone, or why she did not leave.

[47] In *R v Al-Rawi*, 2018 NSCA 10, the court stated that a judge must not start with any presumptions, with the following comments:

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.

72. There is, of course, the legal presumption that any accused is innocent of the accusation that he or she faces. This legal presumption can only be displaced by reliable and credible evidence that establishes beyond a reasonable doubt all of the essential elements of the offence or offences charged.

[48] In *Al-Rawi*, the court of appeal stated at paragraph 94:

94. There was ample circumstantial evidence that would permit the inference to be drawn that either the Complainant did not voluntarily agree or lacked the capacity to do so. Either would suffice to establish the *actus reus*.

[49] To this I would add Justice Duncan's words in *R v. Smalley*, 2019 NSSC 32.

242. Each case presents its own unique challenges to assessments of credibility and reliability. While there may often be common features such as the involvement of alcohol and relative youth, it would be wrong to generalize when sorting through the details of testimony taken years later, about events that take far shorter time to occur than is present questioning about them. In particular, it is not permissible to make assumptions based on what might be the societal expectations of behavior – each person's conduct must be assessed on the basis of what they did during the events that constitute the subject matter of the alleged offences. This case exemplifies the importance of these core principles.

[50] There is a wide discrepancy in the evidence given by MW and KM. The Defence submits that the Accused does not dispute having sex with MW, and that his evidence was given in a straightforward and non-combative manner. The Defence submits that MW was combative and challenging in her demeanour; that she tried to bolster her own evidence and to justify discrepancies; and that she tried to place the Accused in a bad light, referring to his ankle bracelet, for example.

[51] On cross-examination KM was asked to explain some discrepancies of his own. In one response he said the better recollection would have been at the time his statement was given to police.

[52] KM maintained throughout that the Complainant agreed to the sexual activity, with her main concern being the worry about CK finding out. MW later confronting him after she learned CK said she saw them, appears to support his evidence. The difference however, was that he said MW asked him to tell her friend CK that nothing happened, while MW's evidence was that she told him to tell her friend CK that KM had sexually assaulted her.

[53] According to her evidence, MW made several phone calls after the alleged incident. She phoned to her friend [...], her boyfriend (no answer) and then 911. After that she called her boyfriend again, and her brother. Her Dad had called back just as the police arrived. Cst. Penny stated when he arrived at [...], MW was on her phone.

[54] The Defence also called KC as a witness. KC apparently did not hear MW being flung down on the mattress, hitting her head and elbow such that she was stunned, nor did she hear MW say "fuck me harder". KC testified that she had heard a female voice giggling and when she entered the living room the Complainant and KM were sitting on the couch, smiling at her, and talking and laughing. She said they were both dressed and there appeared to be nothing of concern, "not at all". In cross-examination she was questioned on a series of posts/messages she sent about MW.

[55] KC said she was intent on having the girls leave and they all headed downstairs. She said that MW's demeanour when she said they had to go showed nothing of concern. She appeared normal like everyone else, she said. KC said she gave a statement to the police, who came to her house to take pictures that day. Once again, her evidence was that "it didn't seem like anything happened to her", referring to the Complainant.

[56] The Crown put the posts/messages to KC in cross-examination. The messages themselves were graphic and referenced the Complainant's boyfriend. In response to the Crown's questions, she admitted she really did not hear those things on the date of the alleged offence as the messages indicated, but heard them from KM.

[57] It is my clear impression from her evidence that KC was aligned with the Accused. KC admitted to sending messages to MW that were not true, stating for example, she heard her moaning and saying "fuck me harder".

[58] At trial she admitted she did not hear this, but was told this by KM and others who she talked to about the incident. In effect, she admitted to repeating what she said KM told her. She is a friend of KM and obviously held a deep animosity for the Complainant.

[59] I reject the evidence of KC in its entirety. I do not find it credible or reliable.

### **Decision**

[60] On the whole of the evidence, I find that the Accused flung MW to the mattress and had sexual intercourse with her in the manner she described, pulling down her pants, kneeling on her and ejaculating on her. The Complainant's evidence was clear as to detail and given in a straightforward manner. At times, she apologized for some aspects not being complete, but overall her evidence was credible. There was no alcohol or drugs involved on her part. Her evidence was given in a forthright manner without embellishment. I concluded that she was attempting to be honest with the Court. When she did not recall, she said so. Her evidence held up well in cross-examination by experienced Defence counsel. The evidence in respect of the 911 call was compelling.

[61] I conclude that MW was credible, in that her evidence was genuine, accurate and consistent with what is understandable in all of the circumstances.

[62] I acknowledge KM's evidence, that he would not force her to do anything but in all of the circumstances, I do not accept his evidence. I do not believe it, nor does it leave me with a reasonable doubt. I conclude that KM's evidence is simply not plausible when the entire evidence is considered.

[63] I find it was him that went downstairs for 10 seconds, not both of them.

[64] The law of sexual assault requires only an unwanted sexual touching for the *actus reus* to be completed. I find the Complainant's evidence to be both credible and reliable. I accept her evidence that KM told her in a violent manner to be quiet and not make noise. I did not find her to be combative.

[65] Turning to the *mens rea*, I am satisfied that Mr. M knew that MW was not communicating consent and further, was reckless or willfully blind to her lack of consent in forcing himself upon her.

[66] This is not a situation of picking a version of which theory is better. KM has no burden at any point. The burden of proof rests with the Crown and never shifts. I have applied and considered **WD**, I do not accept his evidence, nor does it leave me with a reasonable doubt.

[67] I am satisfied beyond a reasonable doubt that the Complainant, MW, did not consent to the sexual activity. I concur with the Crown that while there were a few frailties in her evidence, the evidence as a whole establishes beyond a reasonable doubt that she did not consent to the sexual touching that occurred within the meaning of consent as defined in the *Criminal Code*, s. 273.1.

[68] In summary, I am satisfied that the Crown has proven beyond a reasonable doubt the essential elements of the offence of sexual assault and I find KM guilty of that charge contrary to s. 271 of the *Criminal Code*.

Murray, J.