

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Letourneau*, 2020 NSSC 302

Date: 20201016

Docket: CRAT No. 482930

Registry: Halifax

Between:

Her Majesty the Queen

v.

Luke Arthur Letourneau

<p>Decision</p>

Restriction on Publication

By court order made under subsections 486.4 and 486.5 of the *Criminal Code*, information that may identify the persons described in this decision as the complainant, victim or witnesses may not be published, broadcasted or transmitted in any manner.

Judge: The Honourable Justice Denise Boudreau

Heard: October 8, 9, 2020, in Antigonish, Nova Scotia

Oral Decision: October 16, 2020

Written Release of Decision: October 26, 2020

Counsel: Jonathan Gavel, for the Crown
Hector MacIsaac, for the Defence

By the Court (Orally):

[1] Mr. Letourneau is before the court facing a charge of sexual assault: that he, on or about the 3rd of November 2017, at or near Antigonish Nova Scotia, did commit a sexual assault on S.S. contrary to s. 271 of the *Criminal Code*.

Evidence

[2] The court heard evidence from complainant S.S. Her evidence was as follows: In the fall of 2017, she was 18 years old and a first year student at St. Francis Xavier University (StFX) in Antigonish, Nova Scotia.

[3] The complainant struck up a friendship with the accused starting the end of September / beginning of October 2017. They both lived in the same residence on campus, Riley Hall. The accused was also in his first year. After that first meeting, they would see each other often, along with a larger group of friends, as often as once per day.

[4] On November 3, 2017, during the evening, the complainant was with other friends in the accused's room. They were having a get together and drinking alcohol. In the room were herself, the accused, and friends B and E. They also shared a marijuana joint. The complainant herself drank one and a half beer.

[5] The complainant testified that the group left and went to a house party. The complainant is unsure where that party was, although she believes it was off campus. She had nothing to smoke or drink there. Then they went to Somers Hall (a residence on campus) and joined a very crowded gathering there. The complainant thinks at this point B was not there, it was only she, the accused, and E.

[6] The complainant left the party at some point (I should note that the complainant provided no times as to any of these events). She was upset because, as she described, someone had touched her inappropriately at this party. She went outside and was talking to other people.

[7] The complainant had two shots of tequila outside. The complainant indicated that she was not intoxicated, but others were. She described herself, in fact, as babysitting some of the intoxicated people outside Somers Hall.

[8] She texted the accused and said she was leaving. He decided to leave with her. They both returned to Riley Hall and went to their separate rooms. She described her room as a double, but she lived there alone. It was an L-shaped room with bed to left of room against wall.

[9] The complainant then texted the accused to say that she had forgotten her laptop charger in his room and asked if she could go to his room and retrieve it. He responded that he would bring it over, and she agreed.

[10] She said the accused came to her room and they spoke for a few minutes about the evening's events. Then the accused hugged the complainant. The complainant testified that this was okay. Then she said he "hovered" and leaned in to kiss her. The complainant described herself as confused at that point. After the kiss, she said "no" and took a step back. The accused kept trying to continue to kiss her and moved forward, and she said "no we shouldn't".

[11] She testified that she was uncomfortable at that point, and wanted him to leave. She referenced their friend E, who the accused was involved with in a sexual relationship. She said "What about E?", and "What about our friend group?". The accused responded that he had wanted to sleep with her even before E.

[12] She testified that during this time he was moving forward, so she kept moving back, he was "herding" her towards the bed. During this time his back would have been to the door, her back towards the bed.

[13] At about that point, the complainant says she had what she called a "memory gap". She testified that she has no memory of events from that point forward, for

some unknown period of time. She testified that her very next memory, is of being on her bed, naked, with the accused's penis in her vagina. The complainant has no idea how her clothes came off, or how she came to be on the bed.

[14] She described that she was then lying in the fetal position, on her side, facing the wall with her back to the door. She described her position as arms and legs out. The accused was beside her, also on his side, facing her back. She was not sure where his arms and legs were. She said the accused had no pants, but she was unsure if he had a shirt on.

[15] At that time, the complainant said "no". The accused did not remove himself from her body, so she crawled away and got up. She asked the accused to leave. He apologised, got up, put his clothes on, and left.

[16] The complainant says she did not consent to the kissing or the intercourse.

[17] After the accused left he communicated with her by text. These are shown on Exhibit 1 (a printout of text messages between the parties). The accused texted "You okay?" and "Sorry again".

[18] In January 2018 there were more text communications between the parties, again captured in Exhibit 1.

[19] After the incident in November, the complainant testified that her relationship with the accused changed; she said she then avoided him. She avoided spots where he would be. They were no longer friends. The complainant made a complaint through the university about the incident in late January or early February of 2018, through their internal process. She later was concerned that the school was not taking it seriously enough and so she contacted the RCMP in April 2018.

[20] There were a few areas during her cross-examination that bear mentioning. It was suggested that she and the accused continued to communicate by text after November 3 and 4. She was unsure, but later seemed to agree that they might have. She also could not recall if they had spent any time together after November 4, but agreed that was possible too.

[21] She confirmed that she was not intoxicated that evening. She agreed that she had “all her faculties”. She had no memory of what she or the accused were wearing that evening.

[22] During cross-examination, it became difficult to ascertain what the complainant was saying about her consent to the first kiss (at the door). After some questioning, she seemed to eventually agree that she had essentially “let him” kiss

her; in other words, she agreed that while she didn't reciprocate, she allowed it.

When it was pointed out to her that at the preliminary inquiry, she had testified that she had in fact "kissed back" during the first kiss, she then responded "I don't remember"; thereby allowing that possibility. The complainant clearly recalls, after that first kiss, saying "no we shouldn't".

[23] The complainant is entirely unsure how she got to be on the bed. She testified that her memories end at the point when she was about half way to the bed. In her direct the complainant described the accused "herding" her towards bed; however, she agreed that at the preliminary inquiry she had not been sure of that fact. Before me, she claimed that her memory now might be clearer on that point.

[24] It was suggested to the complainant that she, in fact, remembers the entire event. She denied that. The complainant maintained that she had no recall of anything during the time of the "memory gap"; no idea what she might have done or thought, how she got on the bed, how her clothes came off, if there was anymore touching/kissing, or how intercourse started.

[25] The complainant gave a statement to StFX in late January / early February. She agreed in cross-examination that in that statement to StFX she had said, that

when she said “no” and got up off the bed, the accused then “seemed to clue in” that she had not wanted any of this activity. Before me, she could not explain that statement, except to say that he then started apologising. She testified that she believes that the accused knew she was not consenting during the entire encounter.

[26] In terms of other evidence before the court, the accused chose to testify. He indicated that in November 2017, he was a first year music studies major. He met the complainant about two weeks into the start of the school year, outside their residence Riley Hall. They shared a cigarette together and then started spending time together. He would see her once or twice a day to smoke, or to hang out in each other’s rooms with others. There were a number of people in their circle of friends. Sometimes their activities involved drinking alcohol.

[27] While at StFX the accused testified that he had very limited wardrobe. He had one pair of shoes (high top sneakers) which took a while to take off.

[28] On November 3, 2017, the accused testified that he had five beer, and shared a joint, in total. He never felt drunk or out of control at any time, and recalls the events of evening quite well. He indicated that he was involved at that time in a sexual relationship with a girl named E.

[29] On that date he was in his room at about 8:00 pm with the complainant, and their friend B, drinking beer and passing a joint. At one point the three went to residence Somers Hall, to a first party. They were there about 30 mins. Then E called him and mentioned another party at Somers, so they went there. This was a very crowded party. B decided to go home.

[30] The accused testified that the complainant became upset because someone grabbed her inappropriately, and she went outside, where she was drinking tequila.

[31] The accused then decided to leave, so he and the complainant went back to Riley Hall together, and they both went to their own room. Then the complainant contacted him looking for her laptop charger, so he brought it to her room.

[32] The accused testified that they hugged. He leaned in for a kiss and she leaned in too, and they kissed. They had their arms around each other. The accused says that the complainant fully reciprocated during that time, she was kissing him back.

[33] At that point they stopped and the complainant said “No, we shouldn’t”. They then just stood, looking at each other, still with arms around each other, and staring. Then the accused initiated kissing again, and again she kissed back.

[34] They then started moving towards the bed, he forward, she back. The accused took off her shirt and his shirt. The complainant got on the bed and the accused then noticed that her pants were off. He did not remove her pants, and he did not see her remove them either, but testified that she must have removed them.

[35] The accused then took his shoes and jeans off, which took some time due to the sneakers. She remained on the bed during that time, over the covers, still with her pants and shirt removed. The accused then joined her on the bed, and got on top of her. He said that she then asked “What about E?” The accused told her that he had wanted to hook up with her (the complainant) for a long time.

[36] The accused testified that there was then more kissing, with both of them participating. The complainant’s arms and legs were wrapped around his body, he was touching her breasts and she was rubbing his back. He testified that they then had sexual intercourse for a very short time, he estimates 30 seconds to a minute. During the intercourse he was still on top of her.

[37] At the point, the complainant said “you have to stop”. He testified that upon hearing this he moved away from her, down to the bottom edge of bed. He then said “I’m sorry”; he says he remembers these events vividly. He testified that

because she said stop, he realized that she must have been uncomfortable; but that there had been no indication of any discomfort on her part, until she said stop.

[38] She then said, “Why does this always happen to me?”, in a laughing manner. The accused put his clothes on and went back to his room. He then sent another text around 1:30 a.m. (From Exhibit 1: “You ok?” “Sorry again”)

[39] After that event, the accused testified that he and the complainant didn’t hang out as often as before, and never alone. They continued to text message each other until January 2018, once or twice a week, to get together and smoke. In January 2018 they had the text message conversation contained in pp 2-3 of Exhibit 1, in reference to the events of Nov 3/4.

[40] The accused was asked about his comments in those messages. In reference to “almost” hooking up, he meant that they almost spent the night together. The reference to “overstepped boundaries”, was because she was a friend, and she was dating someone. The reference to the “misread situation” was, when she told him to stop during intercourse, he then thought he must have misread the situation. The reference to “escalate” meant he agreed that he tried to continue the activity, until she said stop, then he stopped and said he was sorry.

[41] The reference to “feeling shitty”, was because of their friendship and because she had a boyfriend; he knew what they had done would be bad for their friendship. The reference to his life being “ruined” was because of her comments to him; he had fear about what might happen.

[42] After these texts, the accused offered to talk with the complainant about the situation, and they met in January 2018. He then told the complainant that he thought they were friends; he didn’t want his life to be ruined; he was scared about possible consequences; he felt she was accusing him of something (he knew of others who had been similarly accused). The complainant responded that her life was already ruined; that they were not friends and did not want to see him anymore.

[43] The accused was asked specifically about the time when the complainant had said “No we shouldn’t”. He testified that he interpreted this to mean that they were both in relationships, and they were friends, so they “shouldn’t”. In response, he didn’t do any more right away, they kept looking at each other for awhile, and then he tried another kiss. The accused testified that he didn’t ask any more, since she was then kissing him back; and also when she was in the bed she had no pants on, so she must have removed them herself.

[44] The accused indicated that he felt that the complainant wanted the sexual touching and contact because of her actions, i.e. kissing him back, getting into bed and taking her clothes off, the continued mutual kissing, and wrapping her arms and legs around his body while he was touching her. The accused indicated that he had no indication that the complainant was uncomfortable, until she said stop during intercourse. He believed she was consenting until that point because of her actions.

Analysis

[45] Mr. Letourneau, as with all criminal defendants, is presumed innocent. He remains so unless and until the Crown proves each and every element of the offence beyond a reasonable doubt. There is no burden on the accused.

[46] The elements of sexual assault are: the application of force; of a sexual nature; without the consent of the complainant; and where the accused knew or was reckless or willfully blind to the fact that the complainant was not consenting.

[47] It is clear to me that the Crown have met their burden when it comes to the basic elements of identification, time and place, and jurisdiction. It is also clear to me that that elements 1 and 2 of the offence of sexual assault have been met. There was clearly the application of force upon the complainant by the accused in the

form of kissing, touching, and sexual intercourse, all of which were obviously in circumstances of a sexual nature.

[48] The issues to be determined here are the remaining elements of the offence. Did the Crown prove to the criminal standard that there was no consent on the part of the complainant? Secondly, was there an honest, but mistaken, belief in consent on the part of the accused? I note that as to both of those issues, I have extensively reviewed and taken from the SCC case *R v. Ewanchuk*, [1999] 1 S.C.R. 330.

Consent

[49] As I have already indicated, in order to obtain a conviction for sexual assault, the Crown must show beyond a reasonable doubt that the complainant did not consent to the activity that occurred. Where consent is in issue, what matters is the actual state of mind of the complainant, i.e. the approach is purely subjective.

[50] Having said that, the mere fact that a complainant testifies that she did not consent, is not the end of the matter. The Court must still assess the credibility of that assertion. Although the complainant's evidence will be the only direct evidence about actual consent, her credibility must still be assessed in light of all the evidence, including that of the accused if he testifies. I note, however, that his perception about her state of mind is not relevant to the issue of actual consent.

Such evidence would only be relevant to the analysis of his honest but mistaken belief in her consent.

[51] The case law establishes that the first step is to determine whether the evidence establishes no voluntary agreement by the complainant to engage in the sexual activity in question, including the touching, its sexual nature, and the identity of the partner. If there was consent, or if other evidence accepted by the court raises a reasonable doubt about lack of consent, then the court goes on to determine if there existed circumstances which vitiated that apparent consent (examples at 273.1 (2) and at 265(3)).

[52] In this case, I will start by saying that, in relation to the events of that evening, some facts I can easily find: I find that the complainant and the accused were together at various social events over the course of the evening of November 3 2017, involving drinking alcohol and smoking a small amount of marijuana. The complainant had one and a half beer early in the evening, plus shared a marijuana cigarette. Later she had two shots of tequila. She was not intoxicated at any point and she was in control of her faculties throughout the evening.

[53] I find that the complainant and the accused returned to their residence. The accused later attended the complainant's room to return her laptop charger. They

spoke and then the accused gave the complainant a hug, which she accepted and reciprocated.

[54] I also find that the accused then kissed the complainant, still at the door of her room. From this point going forward, the evidence before me is much less clear, and needs more consideration.

[55] The complainant's evidence was entirely unclear as to her feelings about this first kiss. In cross-examination, she seemed to agree that she "let him" kiss her. However, she also agreed that at the preliminary inquiry she said that she kissed him back. Later she said that she did not remember. That is less than clear evidence on a very crucial point. I very much have a reasonable doubt as to her lack of consent to this first kiss.

[56] In any event, the complainant says that, except for the initial hug and perhaps the first kiss, she did not consent to any further sexual contact with the accused. I have no difficulty accepting that after that first kiss, she said the words "No" and "no we shouldn't".

[57] After that point, there is an entire part of the encounter for which the complainant says she has absolutely no memory. That has been very troubling to me. It is her evidence that from approximately the time after the first kiss, when

she said “no we shouldn’t”, until the time she found herself on the bed, naked, with the accused’s penis inside her, she remembers nothing. While that may have been a short period of time in minutes, for the purposes of this trial, it was perhaps the most crucial period of the evening.

[58] In my view I need to carefully address the complainant’s stated lapse of memory for two reasons. Firstly, it must form part of my assessment of her credibility. Secondly, it means there is no direct evidence from her during that period of time as to either her actions, or her state of mind. As I already indicated, consent is a subjective test, i.e. was the complainant consenting in her mind.

[59] First, I address the credibility issues which, in my view, arise from this. It is very difficult, to say the least, to explain or reconcile the complainant’s complete lack of memory during that crucial period of time. It was entirely unexplained. The complainant, herself, offered absolutely no explanation for it. She confirmed, and I have accepted, that although she was drinking alcohol that evening she was not intoxicated and was at all times in complete control of herself, so I find that was not the reason.

[60] There is no evidence or suggestion that the complainant lost consciousness during this time, or at any relevant time. I know of no medical reason for the

complainant to have lost that period in her memory, nor did I hear any expert opinion as to how or why such a thing could happen in these circumstances.

[61] The Crown in submissions offered possible explanations (e.g. the effects of alcohol, the trauma of the incident), but those frankly are completely speculative. We have no evidence to support those in my view.

[62] I should note that the complainant had a few other failures of memory in respect of that evening (for example, the location of party #1, the clothing she and the accused were wearing), but such details are, in my view, somewhat unremarkable and typical details that might be forgotten. It does not seem unreasonable to have forgotten such details, in these circumstances.

[63] That would not be the case with this particular period of time: it was so highly significant. In my view, this “memory gap” cries out for an explanation.

[64] The gap in memory could not be due to the passage of time either. The complainant agreed that from her very first statement in January 2018, she had “no memory” of that period of time.

[65] So, what am I left with? I have thought about this many different ways, but I simply cannot conceive of any reasonable explanation for this “memory gap” that is supported by any evidence whatsoever. The complainant was not unconscious,

she was not intoxicated, she has no relevant medical condition; she offers no explanation at all. I can think of none that is supported by the evidence.

[66] At the end of the analysis, I find that I am left with only one explanation, that comes from my own plain common sense. My conclusion is the simplest: that the complainant, in fact, has not forgotten. She remembers the entire evening. She has chosen, in her testimony, to say she has forgotten. The only reasonable inference I can draw from that, is that she does not want to share with the Court what she remembers. And that conclusion leads me to having serious doubts as to the complainant's credibility regarding the events of that evening, including her testimony that she did not consent.

[67] I must say as well that there were other areas of her evidence that caused me to have concerns about her credibility. The difficulty she had being forthright about the circumstances of the first kiss: in her direct evidence she said very little about consent; she then acknowledged that yes, she had perhaps acquiesced or even consented to it; she then agreed that she, at other times under oath, had said that she kissed back. Finally she professed a lack of memory about it.

[68] I also noted her evidence as to further contact with the accused after this evening. In her direct evidence she indicated that she avoided the accused

afterwards, and she made no mention of further contact. On cross-examination, she seemed to acknowledge further contact. Let me be very clear, in respect of this issue, that it makes absolutely no difference whether the parties, in fact, did/did not continue to have contact after November 4th; that is entirely irrelevant to the question of whether a sexual assault took place on that date.

[69] What is relevant about this issue, is my impression that the complainant was being less than truthful with the court at certain times.

[70] Quite apart from the assessment of credibility, there is another very significant issue raised by the complainant's "memory gap". The complainant simply cannot say what she did, from the point of saying "no we shouldn't" and moving towards the bed, until sexual intercourse has already started. She also cannot say what her thoughts were during that crucial time; more precisely, she cannot say whether she, in her mind, decided to consent to the activity during this time. Of course, she did testify that she did not consent, but the fact is that she has no memory. How could she know?

[71] The Crown submits that while we have no direct evidence from the complainant as to her actions or state of mind during the missing period of time, evidence of her lack of consent can and should be inferred by the facts we do

know: that she first said “no we shouldn’t”, then there is the memory gap, and then she says “no” again. The Crown submits that one could infer from those pieces of evidence that the complainant was saying “no” all along.

[72] I accept that this suggestion is one possible inference that could be drawn, however, it is also true to say that that is not the only inference that could be drawn. There remains the very real possibility that the complainant said “no, we shouldn’t”, in reference to the fact that sexual contact was a bad idea given their friendship and relationships with others, but then changed her mind and consented, and later withdrew that consent. Nothing before me removes that possible inference.

[73] The accused testified as to the complainant’s actions during this “memory gap” missing period. I have considered his evidence by going through the classic requirements of the W.D. case. I ask myself: do I believe him? Alternatively, does his evidence raise a reasonable doubt?

[74] I have considered the evidence of the accused, and I find no reason to reject it. I found the accused to have been forthright, he had good recall of events, he was not embellishing, and he was willing to acknowledge facts that were not entirely favourable to him. I accept the accused’s evidence about what took place during

the period of the complainant's "memory gap". I repeat that the accused's evidence cannot and could not assist with the complainant's state of mind, and whether she was in fact consenting. However, his evidence is helpful to the Court in assessing her testimony that she did not consent, given my serious and significant issues with her credibility, particularly in that period of the "memory gap".

[75] The accused's description of the complainant's actions during the period of the "memory gap" certainly contain some behaviour consistent with consent on her part. I accept that, after she said "no, we shouldn't", the parties continued kissing and touching. I accept that they moved towards the bed. I accept that the accused removed both of their shirts. I accept that the complainant then got on her bed, having herself removed some more of her clothing, including her pants. I accept that the accused removed the rest of his clothing, joined the complainant in the bed, and that they continued mutually kissing and touching. I accept that she wrapped her limbs around his body, and that she was rubbing his back. I accept that intercourse started and lasted a very short time.

[76] I further find that the complainant said "stop" or "no" during intercourse, and that the accused then stopped. I accept his evidence that when he was told that she was no longer consenting, he ceased the activity.

[77] In conclusion, I do accept that after the first kiss the complainant said “no, we shouldn’t”. I also acknowledge that she says she did not consent to the intimate or sexual contact after that point. But her “memory gap”, along with other parts of her evidence where I found her less than forthcoming, has greatly affected my impression of her credibility, as I have described. I very much have a reasonable doubt as to whether I accept her denial of consent. Furthermore, her “memory gap” means that I have no direct evidence of consent on her part, during this crucial time.

[78] As to part two of the test (whether there existed circumstances which vitiated any apparent consent), I see none here. Nothing found in 273.1(2) and 265(3) of the *Code* applies, with the possible exception of 273.1(2)(d), which says that “no consent is obtained where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity”.

[79] I do not find that section to have application here. While the complainant did express “no, we shouldn’t”, I have a significant reasonable doubt as to whether after that point she reconsidered and decided to consent to further contact. That reasonable doubt comes from all I have already expressed.

[80] In the final analysis, I find that the Crown has not proven one of the essential elements of sexual assault beyond reasonable doubt, i.e. the lack of consent of the complainant. Therefore, the accused is entitled to an acquittal.

Mistaken belief

[81] I also think it wise to provide my conclusions about the last element and second defense advanced, the issue of honest but mistaken belief in consent. Such a defense is a denial of *mens rea* (*R. v. Pappajohn*, [1980] CarswellBC 446, [1980] 2 SCR 120).

[82] There is, again, no legal burden on the accused. It is the Crown who must persuade the trier of fact beyond a reasonable doubt that the accused knew that the complainant was not consenting. It is more properly phrased as a belief in communicated consent, i.e. the accused must have believed that the complainant communicated consent to engage in the sexual activity by way of words and / or actions.

[83] I note s. 273.2 of the *Code*, which provides that such is not a defence if the belief arises from self induced intoxication, recklessness, or willful blindness, or if the accused did not take reasonable steps in the circumstances to ascertain that the complainant was consenting. I note, as have other courts, that the section does not

require the accused to take “all reasonable steps”, just “reasonable steps”. This is a significant difference which we can assume the legislator meant as written.

[84] It is accepted in the caselaw that such “steps” do not necessarily include a requirement for an explicit inquiry/agreement; consent may be communicated through words or conduct. It is quasi-objective test.

[85] There is some evidence here that the accused honestly, but mistakenly, believed that the complainant was consenting. He testified that the complainant’s actions led him to believe that she was consenting, and that when she said “no” during intercourse he immediately stopped and apologised. This evidence is consistent with an honest, but mistaken, belief in consent.

[86] Exhibit 1 contains comments from the accused in the nature of an apology. There is reference to the accused having “misread the situation”.

[87] The complainant agreed that she had typed a statement to StFX, within which she stated that when she got off the bed and looked at the accused, he appeared to “clue in” that she was not consenting. That, again, would be supportive of the accused’s claim that he did not realize the complainant’s discomfort until that very moment.

[88] Of course, the complainant's expressed "No, we shouldn't", after the first kiss, is an important part of this analysis. In *Ewanchuk (supra)* the Supreme Court noted:

52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable.

[89] In the case before the Court the complainant did express "no" after the first kiss, although I note that it was somewhat equivocal: "No, we shouldn't". Having said that, it seems clear that after that point it was incumbent upon the accused to make sure she was consenting before proceeding further.

[90] I have accepted the accused's evidence about events after that point. He testified that they continued to look at each other for a few moments, then started kissing again. The complainant was participating. They went to the bed. He removed her shirt and his shirt. She went to the bed and laid down. He removed the rest of his clothing and found that she had as well, including her pants. He got on top of her and they continued kissing. She wrapped her limbs around his body and was stroking his back.

[91] This is not ambiguous or equivocal conduct on the part of the complainant.

All of it seems to me, in good common sense, to demonstrate her decision to participate in and consent to the activity, despite her initial “no, we shouldn’t”. Her behaviour was not ambiguous, nor was it silence or passivity. Nor could her behaviour be subject to multiple interpretations.

[92] There, of course, did come a time where the complainant withdrew her consent, and the sexual activity stopped. But until then, in my view the applicant would have been justified in his belief that the complainant was consenting, and that she was communicating that to him. I find that he was not reckless, nor willfully blind, as defined in the *Code*, given the situation before him. I further find that the situation before me does not demonstrate beyond a reasonable doubt that the accused had the requisite *mens rea* for the offence of sexual assault.

[93] For all of the reasons I have provided, I find the accused not guilty.

Boudreau, J.