

**SUPREME COURT OF NOVA SCOTIA**

**Citation: *R. v. Ahsan*, 2021 NSSC 239**

**Date:** 20210827

**Docket:** *Halifax*, No. CRH-492202

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Shuntaro Ahsan

**Restriction on Publication: Sections 486.4, 486.5 and 539(1) of the  
*Criminal Code***

**TRIAL DECISION**

**Judge:** The Honourable Justice Kevin Coady

**Heard:** July 19, 20, and 21, 2021, in Halifax, Nova Scotia

**Decision:** August 27, 2021

**Counsel:** Constance MacIsaac and Carla Ball, for the Crown  
Brad Sarson, for Shuntaro Ahsan

**By the Court:**

Shuntaro Ahsan stands charged:

that he between the 3<sup>rd</sup> day of June and the 5<sup>th</sup> day of June, 2018 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on LC, contrary to Section 271 of the *Criminal Code*.

This trial was heard over three days in July, 2021; some three years after the alleged sexual assault. The Crown called LC, the complainant, as well as two of her closest friends. Mr. Ahsan testified as well as one of his friends. The critical issue at trial was consent and whether the Crown proved that element beyond a reasonable doubt. It is necessary to review the evidence of these witnesses.

**Witness Testimony:**

[1] The complainant LC is a 31-year old female from New York State who came to Halifax to study. She responded to a Kijiji advertisement from Mr. Ahsan who was looking for a roommate to move into his second bedroom. In July, 2017 she moved into Mr. Ahsan's apartment. She testified they struck an instant friendship and that they became "inseparable". In time LC fell behind in her rent as well as her other shared obligations. This required Mr. Ahsan to subsidize her living expenses. In an effort to find a better financial situation for both, Mr. Ahsan rented a four-bedroom apartment. He and LC, and others, moved into the larger

premises in October, 2017. Unfortunately after a couple of months LC fell behind in her financial obligations and Mr. Ahsan continued to subsidize her.

[2] LC testified that in March or April, 2018 “things started going sideways” as a result of her finances. This caused relationship difficulties that resulted in a lot of tension in the apartment. As a result she advised Mr. Ahsan that she did not want a romantic relationship but that they could remain friends.

[3] On June 4, 2018 she was invited to a friend’s BBQ and she asked Mr. Ahsan to accompany her. She testified she walked to the event at 7:30 p.m. and that he arrived later at about 8:30 p.m. She testified that she consumed 3 - 4 free pour doubles of gin and soda. She described herself at the BBQ as “buzzed but functional”. She does not think she consumed cannabis while there.

[4] LC testified she left the BBQ when it was “dark out”. She cannot recall if she left with anyone. She skate-boarded to their home. She stated that when she arrived at the residence Mr. Ahsan was there. They chatted and had a few more drinks. She described her state at that time of the evening as “not sober – not wasted”.

[5] LC testified that Mr. Ahsan left their apartment to attend a birthday party. Shortly after she skate-boarded to a friend’s arriving at 11:00 p.m. She played

some video games, listened to music, and smoked some weed. She said the weed made her sick and nauseous so she returned home arriving at 2:00 a.m. She got in her underwear and a tank top and retired to her bed.

[6] LC further testified that at 4:00 a.m. - 4:30 a.m. Mr. Ahsan stumbled into her bedroom. She states she looked at her phone and observed the time. Mr. Ahsan was obviously drunk. She testified that he asked her if she had any weed to which she replied “No”. She testified he asked for sex and she said “No” as they were too drunk to make that decision. She states that he “flopped on my body” and our “bellies were touching”. She did not want him to do that and cannot recall if there was any conversation surrounding that act.

[7] LC testified the assault occurred over the next 30 minutes but that her memory of that time is “foggy”. She stated that Mr. Ahsan put his fingers in her vagina without her consent. She states that he then put his penis in her vagina without her consent. She testified that he then asked if he could finish and he ejaculated into her vagina. She felt scared, demoralized, confused, and uncomfortable. She went to the bathroom and then back to bed. Mr. Ahsan put on his pants and went to his bedroom. She went to sleep.

[8] The next morning she called her friend Andrew and reported the assault. LC testified that, at that time, Mr. Ahsan was in the kitchen doing the dishes. She says he said “Sorry if I did anything to upset you.” She then left the apartment with Andrew. The following day she submitted to a SANE examination and in December, 2018 she gave a statement to the Police.

[9] On June 7, 2018 Mr. Ahsan sent the following message to LC:

Hey, I am sorry about what was happen (I know it sounds just like excuse and bullshit but I was so fucking drunk like I’ve never been<supposedly not true>and high from smoking a lot.) That’s why I asked you for permission before anything happened.

Anyways, I’d love to say sorry about what I did and you owe me nothing now.

LC did not reply to this message.

[10] LC testified that during the assault she did not protest because she was afraid of causing a huge scene. She said that for a period of time he restrained her hands behind her back. She stated she was awake the entire time. On cross-examination she stated she barely remembers having sex.

[11] The Crown called Andrew as its second witness. He is a 44-year old professor at Dalhousie and has known LC since 2012. He described their relationship in 2018 as “close friends”. He was also familiar with Mr. Ahsan. He testified to having a BBQ at his residence on the evening of June 4, 2018. He

testified that LC and Mr. Ahsan arrived together at 8:30 – 9:00 p.m. He has no memory of them being intoxicated and he was not intoxicated. He described their mood as “heavy”. He testified that after 1½ hours LC and Mr. Ahsan left together although he acknowledged that the recollection is a bit “fuzzy”.

[12] Andrew testified that LC texted him at 1:25 p.m. on June 5 stating something really bad happened. A telephone conversation followed in which LC was crying and panicky. He stated that LC then relayed the details of the assault and, as a result, he picked her up and took her to his home.

[13] The Crown called Andrew’s partner as its third witness. She testified that at the BBQ LC consumed alcohol and that Mr. Ahsan was also drinking. She cannot recall their arrival time and states they left when it was dark. She testified that when they left they were intoxicated.

[14] She described LC’s condition when Andrew brought her to their home. She described her as “incredibly nervous”, upset, smoking a lot and crying and laughing in turns.

[15] Mr. Ahsan elected to testify on his own behalf. He is 28-years old. He came to Halifax from Japan in 2012 so that he could study English. Presently he is a

university student and works in the hospitality industry. He does not have a criminal record.

[16] In 2017 Mr. Ahsan was looking for a roommate to share the cost of his two-bedroom apartment. He conducted four interviews and LC was the successful candidate. She moved in between May and July, 2017. Mr. Ahsan testified they got along immediately and he was of the view the feeling was mutual. He testified that he had to subsidize her expenses and that was causing him financial difficulty.

[17] In an effort to mitigate their financial difficulties, Mr. Ahsan rented a four-bedroom apartment elsewhere. He and LC moved in as well as three others. They had their own bedrooms and shared the common areas. Unfortunately, LC continued relying on Mr. Ahsan to cover her share of the household expenses. He testified that he could not afford these obligations and, as a result, their personal relationship suffered. Mr. Ahsan testified that by June, 2018 LC owed him \$4,500 - \$5,000. Approximately two weeks before June 4, 2018 Mr. Ahsan was upset over the existing situation and told LC "I can fuck you without dating you". Their

personal relationship continued to decline but they still were “hanging out” together.

[18] Mr. Ahsan testified that on June 4, 2018 he attended a BBQ at Andrew’s residence. He and LC arrived together at 7:00 – 8:00 p.m. He testified that the only people there were Andrew and his partner. He consumed three doubles. He testified he left alone 1 – 1½ hours after their arrival and took a taxi to another party. He specifically states that he did not go home as stated by LC. When asked about how he felt leaving the BBQ he stated “I was not drunk; sober enough.” He does not recall what LC was drinking and stated she was not drunk when he left her at the BBQ.

[19] Mr. Ahsan took a taxi to the second party arriving at 10:00 or 10:30 p.m. While there he drank 3 – 4 double mixed drinks. He left that party between 11:45 p.m. and 12:15 a.m. When asked about how he felt leaving that party he stated “I was drunk. I was not too drunk to remember everything”. He then took a taxi to a downtown tavern where he met 6 – 7 friends. While there he consumed 2 beer, 2 doubles of rum and coke, as well as 2 single rum and cokes. He testified he

consumed cannabis at the second party and outside the tavern. After 1½ - 2 hours he took a taxi to his residence arriving between 2:30 - 3:00 a.m.

[20] On arrival Mr. Ahsan went into LC's bedroom where she was asleep. He said he got into her bed and a "light" conversation ensued. He testified that LC did not seem drunk. He then kissed her and touched her breast after removing her clothing. Mr. Ahsan testified that he did not ask her permission to touch her as she was awake and engaged. He stated he asked LC for sex and she said yes. He then put his fingers in her vagina followed by sexual intercourse. Mr. Ahsan states he asked LC "Where can I finish?" and that she responded "Come in me". He then ejaculated.

[21] Once intercourse was complete, Mr. Ahsan stated that she could "pay the rent by doing this, having sex with him." LC's response was one of upset and anger. She got up and went to the bathroom. He put on his clothes and went to his room. He testified he was drunk when he went into LC's bedroom but that he has a full memory of their sexual encounter. Mr. Ahsan acknowledges that his comments

were inappropriate and hurtful and attributes them to reduced inhibitions caused by alcohol.

[22] Mr. Ahsan testified that he did not ask LC for weed on entering her room. He denies flopping on her and says she did not suggest they were too drunk to decide on sex. Mr. Ahsan says all acts were consensual.

[23] The following morning Mr. Ahsan awoke at 10 or 11 a.m. as he had to go to work. He testified that he felt bad about what he said and wanted to apologize for the remark. LC was reading on the deck. She did not reply to his apology. This was the last time he saw LC. Mr. Ahsan denies that he was washing dishes at that time. Mr. Ahsan testified that his June 7<sup>th</sup> message was an apology for his crude remarks and not for anything else.

[24] The second defence witness is a friend of Mr. Ahsan. She was one of the five tenants sharing the apartment. She testified that she got along well with LC. In June, 2018 she learned that LC had suddenly left the apartment. She was at home in the following days when LC came by to collect some of her belongings. She observed LC in her bedroom crying and with a nosebleed. She inquired what was wrong in an effort to console LC. She reports that LC told her what happened, that

she had sex with Mr. Ahsan and that she regretted it. Further, she says LC stated they were both drunk when sex occurred. That was the last time she saw LC.

**Agreed Statement Of Facts:**

[25] Initially the Crown intended to call two expert witnesses: the SANE Nurse and a DNA expert. Their evidence was provided to the Court by way of an Agreed Statement of Facts. The following evidence of the SANE Nurse pertains to the critical issue in this trial:

- (f) the SANE looks for signs of injury (intentional or otherwise) with the naked eye, on both the front and back of the body while the complainant wears a johnny shirt. Nothing was noted; and
- (g) The SANE looks for signs of injury (intentional or otherwise) with a florescent light, both front & back of body. Nothing was noted; and
- ...
- (i) Manipulation of the genital area to look for injury (intentional or otherwise). This manipulation of the genital area includes both touching the exterior vaginal area and opening labia majora to view the interior vaginal area. The purpose is to look for injuries (intentional or otherwise). An abrasion Z("AB"), tenderness ("TE"), and erthyma Z("ER") (also known as redness due to capillary dilation) was noted on the posterior fourchette which is the skin that is between the labia and anus. This is noted on the attached appendix, trauma gram- female Genitalia. Lynn Dorcas drew a circle and labeled this accordingly to demonstrate where the above noted findings were located. She indicated that this was located in the "5-6 o'clock" position noting that, for orientation purposes, the anus is 6 o'clock, and clitoris is at the 12 o'clock position; and
- (j) Lynn Dorcas, SANE opines that this abrasion, tenderness, and erthyma could be caused by: blunt force which could include fingers, a penis, a tampon, or another object hitting the posterior fourchette; and
- (k) Lynn Dorcas opines that the injuries observed could be caused by both consensual or non-consensual sexual activity;

[26] The following evidence of the DNA expert pertains to the critical issues in this trial:

- (b) A swab taken from the complainant's vagina was sent to the Forensic Science and Identification Services Laboratory; and
- (c) Mr. Lett has produced two reports in relation to the examination of exhibits obtained from the complainant during the SANE exam vaginal swab; and
- (d) Report one states that the DNA typing profile obtained from exhibit A-10, (the vaginal swab obtained from the SANE exam on LC) is of mixed origin consistent with having originated from two individuals. The profile of the female component matches the known sample exhibit A-14 (LC) and the profile of the male component is that of an unknown individual. The profile has been personally designated male 1; and
- (e) Mr. Ahsan's DNA was taken via a warrant, the warrant was valid; and
- (f) Mr. Ahsan's DNA matched the male DNA found on the vaginal swab; and
- (g) Mr. Ahsan's DNA was found in the vagina of the complainant.

**Elements of the Offence:**

[27] The first two elements of sexual assault (s.271) are identity and time/place. These elements were not contested in this trial. Mr. Ahsan acknowledges that he had sexual intercourse with LC at the material time and place.

[28] The third element is that Mr. Ahsan applied force directly or indirectly to the complainant. Once again, Mr. Ahsan acknowledges touching LC sexually. He testified that he kissed her, then digitally penetrated her followed by sexual intercourse.

[29] The fourth element is that Mr. Ahsan intended to engage in these sexual relations. This is not in dispute. He fully intended his actions and has testified to that effect.

[30] The fifth element is that LC did not consent to the application of force by Mr. Ahsan. The sixth element is that Ms. Ahsan knew that the complainant did not consent. Consent is the real issue in this trial. The issue boils down to the fact that LC says she did not consent while Mr. Ahsan testified he had her consent. This is not a case where the accused advanced a defence of honest but mistaken belief in consent. In the final analysis the question will be whether the Crown has proved the fifth element beyond a reasonable doubt. Credibility is very much an issue.

**Credibility / Reliability:**

[31] Mr. Ahsan enjoys the presumption of innocence which can only be displaced if the Crown proves all elements of the offence beyond a reasonable doubt. I refer to the principles enunciated in *R. v. Lifchus*, [1997] 3 S.C.R. 320. They are as follows:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;

- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[32] In *R. v. Stanton*, 2021 NSCA 57 the Court acknowledged the challenge assessing situations where credibility is very much the critical issue. The Court stated at paragraph 67:

Before embarking on an assessment of the trial judge's reasons to determine whether he committed legal error, I set out below the legal principles relevant to appeals where credibility is pivotal:

- The focus in appellate review "must always be on whether there is reversible error in the trial judge's credibility findings". Error can be framed as "insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict" (*R. v. G.F.*, 2021 SCC 20, para. 100).
- Where the Crown's case is wholly dependent on the testimony of the complainant it is essential the credibility and reliability of the complainant's

evidence be tested in the context of all the rest of the evidence (*R. v. R.W.B.*, [1993] B.C.J. No. 758, para. 28 (C.A.)).

- Assessments of credibility are questions of fact requiring an appellate court to re-examine and to some extent reweigh and consider the effects of the evidence. An appellate court cannot interfere with an assessment of credibility unless it is established that it cannot be supported on any reasonable review of the evidence (*R. v. Delmas*, 2020 ABCA 152, para. 5; upheld 2020 SCC 39).
- “Credibility findings are the province of the trial judge and attract significant deference on appeal” (G.F., para. 99). Appellate intervention will be rare (*R. v. Dinardo*, 2008 SCC 24, para. 26).
- Credibility is a factual determination. A trial judge’s findings on credibility are entitled to deference unless palpable and overriding error can be shown (*R. v. Gagnon*, 2006 SCC 17, paras. 10-11).
- Once the complainant asserts that she did not consent to the sexual activity, the question becomes one of credibility. In assessing whether the complainant consented, a trial judge “must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant...” (*R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330, para. 61).
- “Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events...” (*Gagnon*, para. 20).
  
- The exercise of articulating the reasons “for believing a witness and disbelieving another in general or on a particular point...may not be purely intellectual and may involve factors that are difficult to verbalize...In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization” (*R. v. R.E.M.*, 2008 SCC 51, para. 49).
- A trial judge does not need to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence (*R.E.M.*, at para. 56).
- “A trial judge is not required to comment specifically on every inconsistency during his or her analysis”. It is enough for the trial judge to consider the inconsistencies and determine if they “affected reliability in any substantial way” (*R. v. Kishayinew*, 2019 SKCA 127, at para. 76, Tholl, J.A. in dissent; upheld 2020 SCC 34, para. 1).

- A trial judge should address and explain how they have resolved major inconsistencies in the evidence of material witnesses (*R. v. A.M.*, 2014 ONCA 769, para. 14)

Additionally, I must remind myself that I must avoid the legal error of relying on stereotypical assumptions in assessing credibility as such would be an error in law.

I must also be alert to not overly relying on demeanour in addressing credibility.

[33] In *R. v. Percy*, 2020 NSSC 138 Justice Arnold relied on the dated case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 in his credibility analysis. The following cite appears at paragraph 100:

11 The credibility of interested witness, 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...

This approach must be applied to all witnesses including a complainant in a sexual assault prosecution.

[34] In *Percy*, Justice Arnold set forth the following questions which should be addressed when assessing credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re, supra*;

- b) Did the witness have an interest in the outcome or were they personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which they testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny*...;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

In assessing the credibility in this trial, these questions will be asked in relation to the evidence of LC and Mr. Ahsan. While the evidence of the other three witnesses provides probative context, they were not in a position to testify about the pivotal consent issue.

[35] A related principle to credibility is reliability. The relationship between the two concepts was explained in *Cameco Corporation v. The Queen*, 2018 TCC 195 (CanLII) at paragraph 11:

[11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time.[4] In *R. v. Norman*, 1993 CanLII 3387 (ON CA), [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:

. . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

Reliability is very much in play in relation to the testimony of LC.

### **The Complainant's Testimony:**

[36] Unfortunately, alcohol and the passage of time impaired the complainant's ability to accurately relay the facts surrounding the alleged assault. This trial occurred three plus years after the incident. Even if one were to remove the effect of alcohol, details fade over time. Add significant alcohol and the task becomes more difficult.

[37] The complainant LC does not dispute her level of intoxication or the impact on her memory. She offered the following during her testimony:

- Leaving the BBQ she was buzzed but functional.
- She had a foggy memory of the incident as a result of alcohol and weed.
- She testified she was drunk when skateboarding home after the BBQ.
- She acknowledged that she told the police she was drunk at the time of the incident.

- She acknowledged that she told the police that the details of the assault were not exactly clear.
- She acknowledged that she told the police it was all very blurry to her and that she does not recall much of the time at the BBQ.
- She acknowledged that she told the police that she barely remembers having sex and that she could not remember anything specific.

The complainant gave her statement to the police approximately six months after the incident.

[38] The complainant LC also testified, as follows, respecting her Preliminary Inquiry evidence:

- She then testified she had no memory of getting home that evening. At trial she recalled arriving home at 2 A.M.
- She then testified she had no recollection of taking her clothes off. At trial she recalled going to bed in underwear and a tank top.
- She then testified she had very little memory of the incident. At trial she was able to provide significant detail.

The Preliminary Inquiry occurred in September, 2019.

[39] The complainant LC's testimony is inconsistent with Andrew's testimony on the following points:

- LC testified that she arrived at the BBQ alone and that Mr. Ahsan was already there. Andrew testified they arrived together.
- LC testified she cannot recall if she left the BBQ with anyone. Andrew has a fuzzy recollection of LC and Mr. Ahsan leaving together. Andrew's partner said when they left they were intoxicated.

[40] The complainant LC's testimony is at variance with that of Mr. Ahsan on the following points:

- LC testified she and Mr. Ahsan arrived at the BBQ together. He testified he arrived about an hour after her.
- LC testified she and Mr. Ahsan left the BBQ and returned to their apartment where they shared drinks. Mr. Ahsan testified that he left the BBQ alone and went to a friend's birthday party. He testified he did not return to their apartment until much later.
- LC testified that when Mr. Ahsan entered her bedroom he asked for sex and that she said no. Mr. Ahsan testified she said yes.

- LC testified Mr. Ahsan asked her during the sexual intercourse “Where can I finish”. She stated she cannot recall any other conversation at that point in time. Mr. Ahsan testified LC replied “Come in me”.

I recognize that LC should not be expected to recall every minor detail surrounding the incident.

**The June 7<sup>th</sup> Email:**

[41] The content of Mr. Ahsan’s email is set forth at paragraph 9 of this decision. LC testified that he sent the message the following morning. She did not reply as she felt she just lost a best friend; that everything got screwed up. The Crown argues that this is evidence of remorse for committing a sexual assault. Mr. Ahsan testified he was apologizing for suggesting she could pay off her debt by having sex with him. When I consider this message in light of all the evidence, I cannot conclude that Mr. Ahsan was acknowledging a sexual assault.

**The Evidence of NN:**

[42] NN was a roommate of LC and Mr. Ahsan. A summary of her testimony appears at paragraph 24 of this decision. She did not present as favoring either LC or Mr. Ahsan and she reported getting along “well” with both. On direct she

testified she heard LC saying she had sex with Mr. Ahsan and that she regretted the contact. On cross-examination it was suggested to her that she only concluded LC was regretful and that she was not sure such was the case. NN did not accept this suggestion and stated she was not sure of LC's exact words but clearly recalls the message. I have no reason to question the credibility/reliability of NN's testimony. This evidence was not challenged by the remainder of the evidence. It must be considered when assessing the evidence of LC.

**The Testimony of Mr. Ahsan:**

[43] Mr. Ahsan consumed a great deal of alcohol and cannabis on June 4, 2018. He testified that, notwithstanding the alcohol and cannabis, he has a clear recollection of the events of that evening. Mr. Ahsan's testimony confirmed that statement. One could be sceptical about his level of detail. However, in many ways his version of events is consistent with the overall trial evidence. Putting aside the consent issue for a moment, I accept his evidence where it is at variance with the evidence of LC. The Crown argues that Mr. Ahsan created this narrative to suit his own purposes. I cannot accept that assertion. I cannot imagine crafting a story that did not clash with the remainder of the evidence. Further, Mr. Ahsan was not shaken on cross-examination. He was not evasive in his answers and he readily acknowledged poor behaviour on his own part.

**The Role of Capacity:**

[44] Intoxication played a significant role in my assessment of LC's credibility/reliability respecting the circumstances around the alleged assault. Consequently, capacity to consent must be assessed. Justice Karakatsanis in *R. v. G.F.*, 2021 SCC 20 affirmed that consent is a subjective state of mind, entirely personal to the complainant. She stated at paragraph 2:

In my view, capacity and consent are inextricably joined. Subjective consent to sexual activity requires both that the complainant be capable of consenting and does, in fact, consent.

Current jurisprudence makes it clear that an incapacitated complainant cannot be taken to have consented to sexual activity.

[45] The issue of capacity was not an issue in this trial. Everything was focused on whether LC said yes or no to the requested sexual activity. Capacity was not part of the Crown's theory of the case. It was not the subject of argument.

[46] I am satisfied that LC was awake and aware at the time of the alleged assault. LC testified she was awake the whole time. Mr. Ahsan testified that she was awake. In a pre-trial conference, when the trial was to be before a jury, the Crown requested the Court to instruct the jury they were not seeking a conviction on the "kiss" contact. On July 7, 2021 the Crown wrote the Court as follows:

On the second point, I stand to be corrected by Mr. Sarson but I believe we had discussed that the Crown would not seek a conviction on a non-consensual kiss which Mr. Ahsan will testify occurred while the complainant was asleep; which standing alone constitutes a sexual assault. The Crown's position is that none of the sexual activity is consensual.

At trial Mr. Ahsan did not testify LC was asleep when he kissed LC and touched her breast rather she was awake. LC testified that Mr. Ahsan stumbled into her bedroom between 4:00 and 4:30 A.M. and that she noted the time on her phone. She testified he "flopped on my body" and that the sexual activity followed. This testimony satisfies me that LC was awake when the sexual contact commenced.

[47] In *G.F.* the debate was whether incapacity prevents subjective consent or vitiates consent. The Court concluded that the capacity to consent is a precondition to subjective consent. The Court stated at paragraph 47:

For these reasons, it must be that the capacity to consent is a precondition to subjective consent. It is not a matter of vitiation. If the Crown proves beyond a reasonable doubt that the complainant did not have an operating mind capable of consenting, or did not agree to the sexual activity in question, then the Crown has proven a lack of subjective consent and the *actus reus* is established.

The Court further stated at paragraph 57 that for a complainant to be capable of providing subjective consent they must be capable of understanding 4 things:

- 1.the physical act;
- 2.that the act is sexual in nature;
- 3.the specific identity of the complainant's partner or partners; and
- 4.that they have the choice to refuse to participate in the sexual activity.

[48] LC testified that she retired to her bed at 2:00 A.M. and that Mr. Ahsan entered her room at between 4:00 and 4:30 A.M. She testified she was asleep during that time. I conclude that her level of intoxication would be reduced from where it was earlier in the evening. On the totality of the evidence I conclude that LC had an operating mind at the material time and knew she could refuse to participate if that was her wish.

[49] On the basis of all the evidence, I am not satisfied that LC lacked the capacity to consent. I have reconciled my reliance on intoxication on the issue of credibility with my finding she had the capacity to consent later that night. Consequently, that brings me back to the issue of whether the Crown has proven the consent element of the offence beyond a reasonable doubt.

### **Conclusion**

[50] LC testified that when Mr. Ahsan asked for sex, she said no. Mr. Ahsan testified she said yes. A resolution of the consent issue is determinative of whether the Crown has proven guilt beyond a reasonable doubt. Mr. Ahsan testified that he kissed and digitally penetrated LC without first asking. Given the totality of the evidence, I am not convinced the Crown has proven these were assaults. LC did not satisfy me they were assaults.

[51] In *R. v. W(D)*, [1991] 1 S.C.R. 742 the Supreme Court of Canada provided triers of fact with an approach that avoided the danger of shifting the onus to the accused. In a case that turns on credibility, such as this one, a Trial Judge must direct his/her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to guilt. (*R. v. Dinardo*, [2008] 1 S.C.R. 788). The sequence of questions is as follows:

- If you believe the evidence of the accused, obviously you must acquit.
- If you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
- Even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Mr. Ahsan's testimony leaves me in a state of reasonable doubt. Consequently, I must acquit him of the charge of sexual assault. I can add that even if Mr. Ahsan had not called evidence, I would be left in reasonable doubt based only on the Crown's case.

Coady, J.