SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. JM*, 2021 NSSC 307

Date: 20211115
Docket: CRH 494685
Registry: Halifax

Between:

Her Majesty the Queen

v.

JM

Restriction on Publication of any information that could identify the victim or witnesses: s. 486.4 and s. 486.5 *C.C.*

Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 21, 22, and October 28, 2020 (Pre-trial Motion); October 25, 26 and 27, 2021 (Trial), in Halifax, Nova Scotia
Counsel:	Constance MacIsaac, for the Crown Joshua Nodelman, for the Defence

Order restricting publication - sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

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

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

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

Mandatory order on application

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

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

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

Victim under 18 — other offences

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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

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

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

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

Child pornography

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

Limitation

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

Order restricting publication — victims and witnesses

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

Justice system participants

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

Offences

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

(a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

(b) a terrorism offence;

(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

(d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

Limitation

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

Application and notice

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds

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

Hearing may be held

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

Factors to be considered

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

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

Conditions

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

Publication prohibited

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

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

By the Court:

Introduction

[1] JM is charged with having sexually assaulted KB in the early morning hours of August 6, 2018, while they were both sleeping in the living room of her mother's apartment.

[2] KB says JM had sexual intercourse with her while she was asleep, until she was awakened.

[3] JM testified and denied this. He says that he had repeatedly witnessed KB experience nightmares arising from a previous sexual assault, during which she did, for a time, not know who he was or where she was, and that she had on more than one occasion told him that it was as if the previous sexual assault was being repeated. He attributes her mistaken belief that he sexually assaulted her, to the nightmares that she herself accepts he has witnessed, and which were in relation to a previous similar sexual assault.[1]

[4] I am not satisfied beyond a reasonable doubt that JM sexually assaulted KB.

A summary of the evidence

[1] The pre-trial application decision regarding the admissibility of this evidence can be found at: 2020 NSSC 321.

[5] JM and KB had been close friends for some time. They were both approximately 20 years of age when on August 5, 2018, she invited him over to her mother's two-bedroom apartment for the night. KB testified that he would often sleep there overnight - as many as four times per week, and they usually slept together.

[6] KB's close friend BG had been staying at the apartment for approximately two months, sleeping in the larger bedroom. KB's mother slept in a smaller bedroom. There being no further bedroom available, KB and JM usually slept on an air mattress in the living room. Their location was between 5 and 10 feet from the entrances to the larger and smaller bedrooms.

[7] KB testified that typically she awoke several times a night to use the washroom. In the early morning of August 6, 2018, she was wakened by the urge to use the washroom. It took her at least a minute to come out of her slumber. She then realized she felt JM's penis inside her vagina.

[8] She testified that she froze and was scared. She got up and threw the blanket she had been using at JM. She went to the washroom to put on pants under the nightie she was wearing and returned to the living room where JM was standing.

She yelled at him repeatedly to “get out”. He tried to talk to her, but she just kept yelling over him, which woke her mother who came into the living room.

[9] Her mother testified that she was wakened by KB’s yelling “get out, I don’t care”. She found KB standing near the air mattress yelling at JM. She confirmed that JM was trying to say something, to explain something to her, but KB was telling him to “just go”. He did leave shortly thereafter.

[10] BG testified that she was a lifelong best friend of KB. On August 5, 2018, she had been residing at the apartment for several months. That night, she went to bed in the larger bedroom between 11 PM and 12 midnight. KB and JM had not yet gone to bed. She acknowledged being a “pretty heavy sleeper”. The next thing she remembers is being woken by KB’s mother between 2 and 3 AM. KB’s mother told her that something had happened to KB, and she needed to wake up.

[11] JM testified that he was sleeping beside KB on the air mattress, and only woke up as a result of KB’s repeated and loud demands that he “get out” of the apartment.

[12] He testified that given his repeated sleeping arrangement with KB, since sometime in 2015 until August 5, 2018, absent a period of one year where they did not have contact, he witnessed KB having up to 25 episodes of nightmares

associated with a previous sexual assault against her by a classmate in Grade 9 (approximately 2012).

[13] KB acknowledged that JM had been present on at least two occasions when she had such nightmares. However she said they were no longer recurring in the summer of 2018. She adamantly stated she was 100% sure it was not a nightmare that she experienced in the early morning hours of August 6, 2018.

[14] JM characterized KB's demeanour during these nightmares typically as including that she would be screaming, breathing hard, shaking, and in a fetal position. He testified that usually, for a time after she awoke from a nightmare, she did not know where she was or who he was. Early on in their friendship, on one occasion only, he tried to console her by rubbing her shoulder after such a nightmare, however that caused her to freak out and she told him never to touch her in those situations.

[15] JM testified that her reaction on August 6, 2018, was similar to her reactions when she had nightmares in the past when he was present.

The position of the parties in summary

[16] The Crown argues that KB's immediate reactions at the apartment, and her determination to attend at a hospital for a SANE (Sexual Assault Nurse Examiner)

forensic examination conducted (between approximately 3:45 AM and 7:30 AM August 6, 2018), and her agreement to ingest medications to prevent sexually transmitted diseases and pregnancy may be considered by the court as evidence that corroborates her testimony that JM's penis was inside her vagina - *R v JA*, 2011 SCC 17 At paras. 40-1 and *R v Mugabo,* 2017 ONCA 323 at paras 22-25.

[17] The Crown says KB well knew what happened to her, and testified credibly, while JM was tailoring his evidence, and that evidence was at odds with the credibly based other evidence and a common-sense view of the other credible evidence.

[18] JM's position is that KB's belief that he sexually assaulted her arises directly from her having a nightmare experience on August 6, 2018. KB may have subjectively, but mistakenly, believed that JM violated her sexual integrity, and therefore the corroborative effect of the evidence cited by the Crown is diminished.

[19] JM says he was not shaken on cross-examination. He points out that: there is no physical evidence to support KB's claims; her evidence is not consistent with that of JB (her mother), and BG (her best friend), which raises concerns about the reliability of her own testimony.

[20] He strenuously argues that his testimony is believable; and even if not, it raises reasonable doubt; and even if not, there still remains a reasonable doubt on the evidence that he committed sexual assault against KB.

A comment on the jurisprudence

[21] There is no serious disagreement that "consent" is not an issue.[2]

[22] There was no consent. If the court is satisfied beyond a reasonable doubt that JM inserted his penis into KB's vagina as she asserts, he should be found guilty.

[23] In determining whether the Crown has proved the elements of this offence beyond a reasonable doubt, the court must carefully assess the credibility of the various witnesses.

[24] To do so, I will herein consider my recitation of the legal principles and considerations set out in *R v WGL*, 2020 NSSC 144 paras. 23-33[3].

[25] In addition, I am mindful of Justice Beaton's reasons in *R v MHL,* 2021 NSCA 74 at paras. 7-15, 34, and 41-2:

---

[2] Nor are any of the other elements of the offence except the *actus reus* – i.e. the physical violation of KB's sexual integrity when JM allegedly inserted his penis into her vagina.

[3] I have taken into account the updated jurisprudence as well, including *R v GF*, 2021 SCC 20 and *R v MHL*, 2021 NSCA 74. I also note that *R v RA*, 2017 ONCA 714 was since upheld in 2018 SCC 13.

[7] The first ground of appeal relates to the judge's treatment of the well-known instruction provided in *R. v. W.(D.)*, [1991] 1 S.C.R. 742:

> [28] Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
>
> …

[8] The appellant says the judge did not properly apply the *W.(D.)* test. He says the judge erred by evaluating the credibility of the appellant and the complainant as a contest between them, rather than assessing the whole of the evidence to consider whether there existed a reasonable doubt. Specifically, the appellant maintains that because the judge found the complainant to be credible, but also found him to be credible, it was an error for the judge to then prefer the evidence of the complainant without providing any reason why the appellant's evidence, having been accepted, did not then raise a reasonable doubt.

…

[11] The appellant says the judge was clear about why she found both parties to be credible witnesses, and he does not challenge those conclusions. However, he takes umbrage with the judge's reasoning—accepting the evidence of both witnesses, but then preferring the complainant's evidence—which he says effectively shifted the burden of proof to him to explain away the complainant's evidence.

[12] The appellant submits in the absence of any reason to disbelieve either party, the judge was required to acquit him. He argues the judge did not articulate any reason to disbelieve him, yet failed to provide any reason why his evidence did not create a reasonable doubt. He maintains if the judge had no reason to discount the evidence of either of the two witnesses, it was improper to then reject his evidence in favour of that of the complainant.

[13] The sequence of the matters discussed by the judge in her decision, before reaching any conclusions about whether she had any reasonable doubt, can be broadly grouped as follows: identification of the competing positions, discussion of the principles of credibility assessment, discussion of the burden of proof, identification of the *W.(D.)* test, discussion of the dangers of impermissible reasoning, a review of the

evidence of each witness and the judge's impressions of it, discussion of the factors supporting the complainant's credibility, discussion of the argument challenging the complainant's credibility, and then her conclusions as to the appellant's credibility.

[14] The judge correctly instructed herself not to come to any conclusions concerning the "credibility, reliability, believability or acceptance" of the complainant's evidence until such time as all of the evidence had been considered. She cautioned against an analysis that amounted to a "contest" concerning credibility of the witnesses. The judge instructed herself on the relationship between credibility and reasonable doubt as follows:

> With respect to the credibility of the witnesses, the assessment of credibility is not a science, nor can it be reduced to legal rules or formula. However, proper credibility assessment is closely related to the burden of proof. For this reason an accused is to be given the benefit of reasonable doubt [in] credibility assessment. Credibility must not be assessed in a way that has the effect of ignoring, diluting, or, worse, reversing the burden of proof. **What must be avoided is an either/or approach where the trier of fact chooses between the competing versions, particularly on the basis of mere preference of one over the other.**
>
> In assessing the credibility of any witness, including the accused, the existence of evidence that contradicts the witness is obviously highly relevant. Other factors such as, demeanor, contradictions within the witness's evidence itself, potential bias, or criminal record, are other factors to be considered. No witness is entitled to an assessment of his or her credibility in isolation from the rest of the evidence. Rather, his or her evidence must be considered in the context of the evidence as a whole. [Emphasis added]

[15] In concluding whether there was any reasonable doubt, the judge said this:

> I have tested his evidence against Mrs. [L], and all other evidence, and when tested in that way it cannot be accepted as raising a reasonable doubt. It's not merely a matter of finding her version of events to be more believable, neither is it a matter of not accepting it, or just not believing his evidence when it contradicts Mrs. [L]. The circumstances surrounding her disclosure, the contents of that disclosure, the manner in which she relayed it, have given me much confidence in the reliability of her evidence. That even in the light of Mr. [L]'s denial, her evidence replaces any reasonable doubt.

…

[34] I agree with the Crown that while the judge found there was nothing unbelievable about the appellant's evidence, that finding alone did not demand an acquittal. The judge was entitled to reject the appellant's evidence in the same manner as was done in *J.J.R.D.* because having assessed all the evidence, the appellant's evidence, despite an absence of flaws, did not leave her with a reasonable doubt. The judge was unequivocal in

her statement that even in light of the appellant's denial, the complainant's evidence "replaces any reasonable doubt."

…

[41] The Crown submits the judge was not required to point to any particular aspect of the appellant's evidence to ground her rejection of it; rather, the judge responded directly to the defence argument the complainant was not credible in concluding beyond a reasonable doubt the truth of the complainant's evidence. The Crown maintains the appellant's insistence on a "tangible explanation" from the judge as to why his evidence was not accepted is not necessary. The judge examined all of the evidence put before her, as *W.(D.)* instructs. The judge was in the best position to assess the witnesses and draw conclusions, following a consideration of all of the evidence.

[42] Her decision satisfies me the judge correctly examined the complainant's testimony in light of the whole of the evidence, to properly attend to the burden of proof. The judge's ultimate conclusion was not reached before considering **all** the evidence. I agree with the written argument of the Crown that:

> [63] While an accused is entitled to know why the trial judge is left with no reasonable doubt, that does not require a trial judge to point to a particular aspect of the accused's evidence, find specific inconsistencies in the accused's evidence, or list some minimum number of elements of the accused's evidence that caused the evidence to be rejected and not raise a reasonable doubt. This is because of the inherent difficulty in articulating credibility assessments and the added challenge of explaining why a trial judge rejects an accused's evidence when there is nothing particularly noteworthy about it.

[Bolding in the Original]

Comments on the credibility of the witnesses

[26] Let me next examine the credibility of the witnesses.

JB

[27] JB is KB's mother.

[28] In her evidence she confirmed the KB and JM were long time friends. In the last two years he would stay over night at the house on an “off and on-again” basis a couple of days out of the week.

[29] As to the details of August 5, 2018, JB had worked an early and long shift and was quite tired when she returned home. Her recollection was not confident, but she estimated it had to be sometime after 5-6 PM. She indicated that when she got home KB, BG and JM were all present. Again, she could not say with precision when, but sometime after her return home they (JM, KB and BG and her) had supper together. They watched some TV, and then JB went to bed first. JB did not approve of her daughter or friends smoking marijuana and did not allow this inside the apartment. She realized they may have been doing so, and she accepted that, as long as it was not in the apartment.

[30] Defence Counsel put to her that KB testified that KB worked from 6 to 9:30 PM that night in the south end of Halifax as a caregiver, and that she would’ve taken the bus home and arrived between 10 and 10:30 PM. JB responded that KB therefore must’ve left after supper, and come back later.

[31] She woke up hearing KB yelling “get out - I don’t care”. JB found KB standing near the air mattress in the living room yelling at JM.

[32] JM was “trying to say something - I just told him to go, he needs to go, and he did go”.

[33] KB went to her mother’s room where her mother tried to hug her and put her hand on KB’s leg as she had done in the past when trying to console her. KB pushed her hand away and told her not to touch her. KB appeared to her to be alert as to what was going on and what she was saying. KB then went to the bathroom and curled up in a ball and was shaking. JB called 911 and the police arrived.[4]

[34] KB insisted on only talking to female police officers, consequently Constable Heather Lynch was later dispatched to the apartment. I am satisfied that EHS arrived at 2:08 AM. KB recalls the female police officer arriving at around the same time as the two female paramedics.

[35] EHS staff transferred KB to the QE2 hospital. I infer she arrived at approximately 3:20 - 3:45 AM based on the evidence of the Senior Sexual Assault Nurse Examiner (“SANE”) Ms. Carr-Rudolph, that it was about half an hour before the 4:20 AM time she recorded on the form that she first saw KB – before the formal examination began.

---

[4] Based on the credible evidence of Constable Jeff Bennett and Constable Heather Ford I am satisfied Constable Bennett was dispatched at 1:50 AM and arrived at JB’s apartment around 1:59 AM. Given BG’s evidence that she went to bed between 11 and 12 midnight, KB’s evidence that she went to bed shortly after BG, and it took her 30 minutes after waking to tell her mother what it happened, after which her mother called the police, the time of the incident it is likely to have been at approximately 1:30 AM.

[36] JB stated that she was driven by the police to the QE2 hospital where the SANE examination took place.

[37] After KB's SANE examination, she returned to the apartment, however she did not wish to stay and called her father to come and get her.

[38] JB confirmed that when KB had nightmares in the past, which most recently was twice in the last a year, she could comfort her, "but not this time".

[39] I found JB to be a generally credible witness – that is, she was testifying honestly, and regarding reliability, she acknowledged at times when she was unsure of facts.

BG

[40] Like KB, BG was 20 years old in August 2018. They were lifelong best friends. She knew JM through KB. She stated that JM was at KB's apartment "a lot – we hung out pretty frequently". She estimated that JM was present 2 to 4 times per week, and he would sleep in the living room with KB while there.

[41] On August 5, 2018, BG was working at a sandwich shop in Bayer's Lake. She didn't recall exactly when she got home or who was there, but did remember

that she smoked “weed” in the backyard of the building with KB and JM after JM arrived, somewhere between 10 and 11 PM.

[42] BG and KB shared two joints of “weed”, whereas JM had his own “weed”. She herself had smoked “weed” twice at that location on that date, and couldn’t recall if KB was present on both occasions. She indicated KB’s intoxication was that “she seemed high yes, but not extremely high… In a more relaxed mood, giggly and silly, but yet still alert as to what was going on”. She stated that after the three of them were smoking “weed” outside the building, they returned inside and began watching the movie “Finding Nemo”. She was the first of the three to go to bed and estimated it was between 11 PM and 12 midnight.

[43] BG recalls going to the QE2 hospital in a car, whereas KB went in an ambulance.

[44] BG had on occasion shared a bed with KB, but does not recall KB having nightmares during those times. She characterized herself as a “pretty heavy sleeper” and seemed to allow that she may not have woken up had KB’s nightmares taken place.

[45] I found BG to be a generally credible witness – that is, she was testifying honestly, and regarding reliability, acknowledged at times when she was unsure of facts.

KB

[46] KB had lived with her mother in the same two-bedroom apartment in Spryfield since she was a young child . For the last several months BG had also been living there. Typically, BG slept in the master bedroom and her mother JB slept in the smaller bedroom. KB slept on an air mattress in the living room.

[47] KB had known JM since sometime in late 2014 – early 2015.

[48] Until sometime in late 2015/early 2016 they were on good terms; however, something changed, and they did not have contact for a year. Then they resumed their close friendship – possibly as late as the latter part of 2017.

[49] Thereafter, JM regularly stayed over at KB's apartment, and occasionally she stayed over at his mother's place with him present. This arrangement endured for the two years preceding August 5, 2018. In the summer of 2018, JM would usually sleep over at KB's apartment up to four times per week. KB's evidence suggested that for the vast majority, if not all of these times, they would share a bed-space e.g. the air mattress in the living room of her mother's apartment. This

common sleeping arrangement is generally irrelevant in relation to my assessment of whether the Crown has proved the offence beyond a reasonable doubt. However, it is specifically relevant in relation to how many, and the nature of, the opportunities JM had to observe KB having the nightmares arising from the previous sexual assault.

[50] KB testified that on August 5, 2018 she worked as a caregiver in the south end of Halifax between 6 and 9:30 PM that evening. She took the bus to and from that location. She estimated the bus trips to between 45 and 60 minutes one way. She returned home between 10 and 10:30 PM. Thereafter, she says BG and she shared a joint of "weed" outside the building for approximately 30 to 60 minutes (11-11:30 pm).

[51] KB claimed the shared joint was of weak strength. She testified: "I was not intoxicated – not even high". She confirmed that she consumed "weed" daily, and that she had taken no other substances (prescription, non-prescription or over-the-counter) that evening.

[52] KB called JM to come over, and by 11 PM he had arrived. In cross-examination, she adamantly denied that she smoked "weed" in the company of JM

on August 5, 2018. BG and JM stated that she did so, and her own timeline suggested he could have been present.

[53] KB stated in her testimony that they all watched some of the movie "Finding Nemo", and that she got ready for bed shortly after BG went to bed. KB put on a nightgown – she noted normally she would've also put on a pair of shorts, but she couldn't find any. She fell asleep on the air mattress, wearing only the nightgown and covered by a blanket.

[54] The next thing she remembers after falling asleep, is waking up a few hours later as a result of an urge to use the washroom.

[55] During approximately a "one-minute" interval she came to, and realized that JM was behind her on the air mattress with his penis inside of her vagina and his torso was moving back and forth. Her nightgown was pulled up above her hip, and the blanket which had been covering her was moved and no longer covering the lower half of her body.

[56] KB testified that she was scared, and froze: "it took me a few minutes after that, and when I was fully able to move again, I threw the blanket and pushed him away". Her testimony necessarily suggests that she did so facing him, while pushing him away with her hands on his waist area.

[57] KB stated that JM was wearing ”his usual dark-clothes”. At no time that early morning, did she suggest she had seen his exposed penis.

[58] Next, KB went to the bathroom where she put on pants under her nightgown. She returned to the living room, and yelled at JM to “get out”. JM tried to say some things to her, but she kept yelling for him to “get out”.

[59] She next recalls her mother coming out into the living room. Her mother tried to touch KB and ask her what was going on, but KB panicked and went into her mother’s bedroom. From there she heard her mother say to JM words to the effect: “I think it’s best if you leave”. She heard the main door to the apartment close thereafter - and I infer that she correctly believed JM had left the apartment. Her mother came to the bedroom “to try to talk to me and I wasn’t talking to her” for approximately 30 minutes.

[60] KB told her mother what had happened, and her mother called the police. She says she was in her mother’s bedroom when the police arrived.

[61] In direct examination, KB stated that she believed there were only male police officers present then, and she panicked - “I don’t want to be around any males, because I’m scared of them” - and ran away from them into the washroom.

[62] KB stated in cross-examination that she was in her mother's room when the police arrived. She "freaked out" – "I am scared of males". She ran into the bathroom before they got near her.[5]

[63] Once in the bathroom, she told Constable Bennett that she didn't want to speak to a male officer and would only speak to a female officer.

[64] Consequently, Constable Heather Lynch was called and attended at approximately 2:08 AM, concurrently with two female paramedics. The police officers asked KB whether she wished to go for a SANE kit and examination, and although she was hesitant, she agreed to do so.

[65] KB says she and her mom went to the QE2 hospital in an ambulance, and that no one except SANE personnel were permitted to be with her during their examination of KB, which she estimated took 30 minutes.[6] Once KB returned home, she could not get back to sleep because "the image kept playing in my head".

---

[5] I have concluded that Constable Bennett arrived at approximately 1:59 AM as the first police officer on scene. I accept his testimony that KB was in the washroom upon his arrival "in the fetal position hugging her knees and sobbing". He initially entered the washroom to speak to her, however she screamed, causing him to step back out. He then spoke to BG about what had happened.

[6] SANE Susan Carr-Rudolph testified, after being qualified to give expert opinion evidence, that KB was in contact with SANE staff from approximately 3:50 AM to 7:20 AM on August 6, 2018. Exhibit 3 shows the time the examination started as 5:30 AM. JB testified that she was driven to the hospital in a police car.

[66] In cross-examination KB testified that “I had woken up to go to the bathroom, and that’s when I realized what was happening”. It took a few minutes for her to gather her senses and when she did, “I pushed him away with my hands” on his waist area and asked him - “what are you doing?”. She only raised her voice after she returned from the bathroom.

[67] KB stated that she did not smoke “weed” with JM that evening – and confirmed that only she and BG had smoked “weed” together that evening and that she and BG shared a joint which was not particularly strong. She testified that she wasn’t “even high”.

[68] KB was not directly asked, nor did she say that she saw JM in a state of undress, or that she saw his exposed penis after she woke up to go to the bathroom. I infer that she did not see it. I bear in mind that she said she felt it, and believed his torso was moving towards and away from her backside.

[69] It was suggested to KB in cross-examination that when she had been sleeping with JM in the past, she had “recurring nightmares” from a previous sexual assault. She answered: “that’s not correct”. When it was suggested to her that these woke JM up as well as her, she answered: “I don’t remember, I‘ve had maybe one or two around him.”

[70] JM's counsel further suggested to KB in cross-examination that:

> "some years before this incident you had been the victim of another sexual assault?"; she answered: "correct". (Counsel went on to say): "What I'm going to suggest is that JM was woken by you having nightmares, where you would say, the nightmare was about reliving this other incident?"; she answered: "I have told him that yes"; (JM's Counsel suggested to KB) that she had told JM she "felt like it was happening again"?; she answered: "*I don't remember* saying that, no".

[71] When Defence counsel asked KB whether it is possible that she said something to that effect, she stated: "No, because that assault I only had a weapon pulled on me, there was no physical contact of that nature."

[72] KB went on to say that: "I barely had nightmares of it, and when I did, it was mostly when I was alone."

[73] When JM's counsel suggested to KB that JM may have tried to console her by touching her physically after such a nightmare and that she told him not to touch her, she responded: "I don't like being touched".

[74] When it was suggested to KB that she was having recurring nightmares up until August 2018, she responded that "they were getting better… *I stopped having them years ago.* I had one or two around the time me and him became friends, which was a few years after the original assault [i.e. 2012-2015 or between the ages of 14 to 16 years old she testified]."

[75] I point out here JB testified that KB had such nightmares in the past, which JB stated in her experience occurred twice a year during the year preceding August 6, 2018. JB also testified that although "I could comfort her [then], but not this time".

[76] When Defence Counsel put to her that JM did not touch her physically at all on August 6, 2018, KB responded:

> "that would be wrong…;
>
> I'm going to suggest that was another occurrence of your recurring nightmares from your trauma history?
>
> "that would be wrong"…;
>
> How sure are you that this is not in fact what has happened?
>
> "I'm 100% sure"… "It's 100% likely that it happened".

[77] Defence Counsel further suggested to KB that JM would've had to pull the knee-length nightgown up to her waist and remove the blanket that was covering her, "while you are on your side sleeping, without you noticing?" She answered: "I'm a heavy sleeper…" - when counsel interjected: "Except for the several times a night you get up?" - "I get up to pee, and even then, I'm not normally fully awake."

[78] Defence Counsel suggested to KB: “and then he would have had to penetrate you without your initially noticing, such that the only thing that got you up was the need to go to the washroom – indeed is it not likely that this whole thing was a nightmare?”

[79] She answered: “that’s not possible”.

[80] Defence Counsel asked: “To do this, JM had to penetrate your anatomy without any physical preparation or foreplay – you’re aware of the Sexual Assault Nurse Examiner is going to testify that there was no tearing, bleeding or other signs of physical contact? Again, how sure are you that this wasn’t a product of a nightmare?

[81] KB responded: “I’m 100% sure it was not a nightmare.”

[82] In redirect, KB stated that JM was present when she had nightmares on two occasions, and that her reaction then was “normal when I woke up”; and she was able to tell the difference between the nightmare and reality. KB says that she always recognized who JM was, and was able to speak to him thereafter without difficulty.

[83] I found KB to be a generally credible witness – that is, she was attempting to testify honestly, although I did detect some tailoring of her evidence.

[84] Regarding her reliability, I had concerns because her evidence of the night's events and her experience and effects of nightmares from the previous sexual assault, was at odds with that of JB and BG (and JM insofar as I accepted his testimony) in a number of respects, including regarding the events that preceded the time of the alleged sexual assault, and afterwards.

[85] Regarding the moments of the alleged assault, her own evidence suggests that she was groggy for a period of time. She initially thought she had awoken because she needed to go to the bathroom.

[86] KB testified that:

- On August 6, 2018, she awoke with the urge to use the bathroom;
- During the night sometime several times, "I get up to pee, and even then, I'm not normally fully awake";
- She was groggy for "a minute", and then sensed that JM was penetrating her with his penis from behind her and it took her a "few minutes" to react;
- Her initial reaction was limited according to her own testimony, to throwing the blanket at him, pushing him away, asking him – "what are you doing?" [added in cross-examination] and going to the bathroom to put on pants. She did not immediately censor him;
- After her return from the bathroom, she did not say anything to JM that was directly accusatory, with specificity and certainty- only the words: "get out!";

- For 30 minutes after JM had quickly left the premises upon request of JB, KB did not disclose to her mother what she alleges against JM – and once she did, her mother called the police.

[87] Was she then in doubt about what had awoken her, and what had actually happened?; and to what use should I put her actual behaviour immediately thereafter?

[88] KB's actions are consistent with her believing JM had violated her body and trust - but they are arguably also consistent with JM's position that KB mistakenly believed JM had sexually assaulted her.

[89] I should not place undue weight on what I may see as "expected" immediate responses from an individual in KB's situation in these specific circumstances, however KB's actual behaviour is still something that can be considered. I noted in footnote 27 in *WGL*:

> As Chief Justice McLachlin stated in *R. v. A.R.J.D.,* 2018 SCC 6 (S.C.C.) at para. 2: "In considering the lack of *evidence of the complainant's avoidance of the [convicted accused]*, the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant's credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law." Interestingly, the Supreme Court decision also included the statement: "We do not read the majority reasons, including paragraph 39 and 41 highlighted by the defence, as suggesting otherwise." The Alberta Court of Appeal majority gave its answers at paragraphs 39 - 48 to the question: *What can lack of avoidant behaviour tell a trier of fact?". In part they stated "Stereotypicality is never a legitimate anchor on which to tie crucial credibility assessments in the context of sexual assaults. And, counter-stereotypicality must never translate to less credibility... We agree that an evaluation of the 'actual evidence' in a given case is the proper means to assess*

> *whether the Crown has met its burden of proof beyond a reasonable doubt*. Where however, that evidence and its relevance is not clearly identified by the trial judge, and the complainant's credibility is instead assessed solely in comparison to what the trial judge concludes would be 'expected' post — sexual assault behaviour by a complainant, in our view that evaluation is fully rooted in reliance on impermissible reasoning based on myths and stereotypes." In an interesting twist, **Justice Beveridge had this to say in** *R. v. W.J.M.***, 2018 NSCA 54 (N.S. C.A.) relying upon the reasoning in *R. v. A.R.J.D.*, regarding an argument by the defence on appeal that the trial judge had used stereotypical reasoning to discount the** *accused's* **exculpatory police statement: "I do not read those reasons as suggesting it is an error to rely on** *the actual conduct of an adult complainant***, witness or accused in the context of the case being heard.** [My italicization added in the original]
>
> [My bolding added]

[90] Moreover, inferences based on evidence can be relied upon for making credibility assessments - however there are associated pitfalls that I keep in mind- see for example: *R v Pastro*, 2021 BCCA 149 and *R v JC*, 2021 ONCA 131.

[91] Both of those decisions speak of two specific prohibitions or rules: firstly, against reliance upon (ungrounded) “common-sense assumptions” leading to case specific generalizations about “expected” human behaviour unsupported by evidence; and secondly, about stereotypic reasoning and inferences. Courts must base their reasoning on factual conclusions sourced in the evidence or by taking judicial notice of facts where that is permissible.

[92] KB also testified that “I don’t like being touched”, in relation to her mother touching her, as well as when JM tried to console her after a nightmare early on in their relationship. She added that regarding her insistence on having female police

officer and EHS staff interact with her this was because: “I don’t want to be around any males, because I’m scared of them”.

[93] These statements by her and the other evidence that I accept suggest that the previous sexual assault trauma remained a significant factor on August 6, 2018.

[94] JM’s evidence supports my concerns about KB’s evidence.

JM

[95] In many respects the evidence of JM and KB was consistent – for example, about their relationship over the previous 3 to 5 years, his frequent presence at her home and that they routinely slept together. The differences in their testimony are evident when they speak about the nature, duration and frequency of the nightmares KB experienced as a result of the previous assault, and what happened in the early morning hours of August 6, 2018.

[96] JM estimated that KB had nightmares approximately 25 times before and after the one-year hiatus whereafter they resumed their relationship.

[97] They certainly spent enough time together that there was an opportunity for him to observe her over many more than 25 nights. They both agreed that she had

made it clear to him that in such situations he was not to touch her, and it appears he respected her wishes.

[98] He testified that when KB had nightmares in the past, she said to him that the nightmares "at times seemed real" and that he observed sometimes it took her up to half an hour to realize that in fact it was a nightmare. He said that initially she did not know where she was, or who he was. He characterized her response to the nightmares generally as she would be: screaming, breathing hard, shaking, in a fetal position, and freaking out generally.

[99] JM testified that on August 5, 2018, he had been sleeping until approximately 5-6 PM at his mother's house in the area of Gottingen Street, Halifax.[7]

[100] He received a message from KB to come to her place and after taking a 30-minute bus drive he arrived there at approximately 7:30 PM, where he recalls walking to the side of the building and smoking 2 shared joints with BG and KB. They spent about an hour outside and then went into the apartment.

[7] He noted he was keeping track of time because he had with him a fourth-generation iPod which could not be used as a phone, however it permitted text messaging, and had a visible clock feature.

[101] Notably, BG also places JM there with them smoking “weed”, although he was smoking his own “weed”, and she estimates this at some time between 10 and 11 PM.

[102] It is difficult to reconcile when and where KB, BG and JM were during the evening before the time of the incident.

[103] I have JB’s evidence that JM was present for supper after she got back from work (6 pm-ish) and his evidence that he arrived at about 7:30 PM and made supper for them - he also recalls that BG, KB and he were smoking marijuana outside the building thereafter before they went to bed. BG testified that, after her shift at a sandwich shop in Bayer’s Lake, she got home sometime in evening after which she smoked marijuana with KB and JM between 10 and 11 PM. KB says she was not at the apartment between 6 and 10 PM because she was working in the south end of Halifax between 6:30 and 9:30 PM that night.

[104] JM recalls he made supper for them that night. Notably, KB’s mother also testified he was present for supper.

[105] In cross-examination, in response to suggestions by Counsel that JB was wrong about when they all shared supper on August 5, 2018, JB stated that BG and KB must’ve gone out of the apartment after supper if they didn’t come home until

approximately 10 o'clock at night, although she has no distinct memory of KB coming back inside.

[106] JM testified he was not intoxicated and had only consumed the shared portion of the two joints with the two girls, whereas BG said he did not share their joints but had his own.

[107] I find it more likely than not, that KB, BG and JM were all present and smoked "weed" together outside KB's apartment building residence sometime in the later evening August 5, 2018. I accept BG's evidence about KB's consumption, and the effects thereof.

[108] Thereafter, they all watched the movie "Finding Nemo" until approximately 11 PM when BG went to bed. Shortly thereafter, KB laid down on the mattress and JM continued watching the movie. At some point, as was KB's expectation, JM laid down on the mattress beside KB who was asleep. I accept that JM was taking melatonin at the time to help him sleep, and he fell asleep quickly.

[109] JM did concede that he's "not good with dates" and that he has consumed marijuana daily for some time. He noted that he had his iPod with him that day and that he therefore knew, by his repeated references to it, roughly the timeline of when BG went to bed for example - 11 PM ish, etc.

[110] He testified that the next thing he remembered was being startled awake and being screamed at by KB to "get out".

[111] JM was wearing jogging pants and a T-shirt. Later in his testimony he clarified that had a habit of double knotting the string inside the waistband of his jogging pants.[8]

[112] JM testified that all of KB's screaming caused her mother to awaken and when KB requested that he leave, he did.

[113] In spite of KB's attendance for a SANE kit and examination, no helpful direct evidence arose from that process.

---

[8] JM also testified in support of his application to adduce evidence of prior sexual history conducted in October 2020. My decision, 2020 NSSC 321, at para. 11 outlines the areas of evidence I permitted him to present at trial: "when the purported sexual activity that caused KB's nightmares to occur happened, the general frequency of nightmares in relation thereto, and whether she had such a nightmare and August 5/6th 2018 while in bed with JM, including the surrounding circumstances." At trial the Crown put paraphrased propositions to him that were said to represent his testimony at the October 2020 hearing. The Crown did not have a transcript thereof, and therefore were not able to identify his specific wording when referencing his testimony from October 2020. The Crown did not have a transcript of JM's testimony in order to properly cross-examine him in accordance with section 10 of the *Canada Evidence Act* and relevant jurisprudence. Since a transcript was not available, I did not permit the Crown to further put propositions to JM as to what his testimony was of the October 2020 hearing. I note the Crown did have a significant period of time since then, to obtain the disc required for transcription. Although there was no objection by JM's counsel to the questions so paraphrased, and to the extent that their content was adopted by JM, I could arguably consider them in assessing his credibility. However, I am reluctant to place much weight on those answers given fairness concerns, such as his counsel not having the ability to contextualize his answers with a transcript, and where that previous hearing was a year ago. JM testified at trial that in October 2020 he had "a lot going on" including that he was "focused on getting my daughter back in my life". Post-trial, the court requested and is now in possession of the written requests made by the Crown to the court for copies of those audio recordings. The first one was sent on or about January 5, 2021, and requested recordings from October 28, 2020 – JM was the only witness that testified. The court staff created a disc thereof which was left for pick up by the Crown on February 9, 2021. Court staff added in their email to the Crown: "Let me know if there are any difficulties listening to it." For unknown reasons, on March 26, 2021 the Crown submitted a second request. Then on October 19, 2021, the Crown made another such request. On October 25, 2021 the Court had that disc ready for pick up.

[114] Nevertheless, the Crown relied upon *R v Mugabo,* 2017 ONCA 323 as support for its argument that KB's post-event demeanour is admissible and powerful evidence - specifically that her immediate emotional reaction in the apartment and her willingness to go for a SANE kit examination should support her evidence that she experienced a sexual assault, rather than that she may have been in a semi-sleep state at the time and was confused. The facts of the *Mugabo* case are similar, however they also have some significant differences as demonstrated by the following paragraphs:

> 24 On a fair reading of the trial judge's reasons, the Impugned Comment simply reflects his view that **the presence of the injuries on the complainant's genitals and the fact that she submitted to a sexual assault examination made it unlikely that the complainant had imagined being sexually assaulted. He found that a sexual assault had taken place, in part because of the complainant's physical injuries**, as documented through the sexual assault examination. It was clearly open to the trial judge to rely on the nurse's evidence as being supportive of the complainant's version of events: *R. v. Dunchie*, 2007 ONCA 887 (Ont. C.A.) (CanLII), at para. 9.
>
> 25 It is well-established that this court owes deference to a trial judge's findings of fact, including credibility findings. In the present case**, the trial judge's credibility assessment of the complainant was informed by a number of factors, including the complainant's observed physical injuries** by a **trained sexual assault nurse which corroborated the complainant's version of events, the complainant's willingness to undergo the invasive sexual assault examination, and the complainant's demeanour immediately after the assault (crying "hysterically" and shouting that the appellant had had sex with her without her consent). It has long been held that post-event demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events**: *R. v. A. (J.)*, 2011 SCC 17, [2011] 1 S.C.R. 628 (S.C.C.), at paras. 40-41.
>
> [My bolding added]

[115] The Crown argues that KB's mere attendance at the SANE kit examination, and preparedness to take suggested medications which have significant side effects, is corroborative of her credibility, and a reflection of her certainty that JM did penetrate her vagina with his penis. I also remain mindful of Justice Charron's comments for the majority in *R v JA*, 2011 SCC 17:

> 14 In my respectful view, it would be unsafe to uphold the convictions on the strength of the other factors which the trial judge considered supportive of his conclusion. The majority in the Court of Appeal found two of these factors to be "particularly powerful": "the complainant's physical and emotional state in the minutes and hours after the event" and "the logic of the complainant's testimony", as opposed to the appellant's version of consensual sex (para. 38). I agree with counsel for the appellant that it would be dangerous for this Court to uphold the convictions and thus resolve the credibility issue in this case on the strength of demeanour evidence, or on the basis that one party's version was less plausible than the other's. While one may reasonably view the appellant's version of consensual sex implausible in the circumstances outlined by the majority (para. 38), counsel aptly points out that the same could be said about the complainant's version.

[116] The Crown in the case at Bar relies upon the dissenting reasons of Justice Rothstein and Deschamps in *JA*:

> 40 I agree with the majority of the Court of Appeal that this post-event demeanour evidence was "strong evidence indeed" (para. 38). This Court has long held that evidence of the demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events. In *R. v. Murphy* (1976), [1977] 2 S.C.R. 603 (S.C.C.), Spence J., writing for the majority and the unanimous Court on this point, found (at pp. 612-13):
>
> > The respondent's factum, I believe, sets out the proper view as follows:
> >
> > Independent testimony of a rape complainant's emotional condition is capable at law of corroboration where it is sufficiently damning that it may be considered by a jury to be more consistent with her denial of consent than with the existence of consent, or, to put it another way, where a reasonable inference can be drawn by a jury,

> considering all the circumstances, that there is a causal relationship between the assault and the complainant's distraught emotional condition.
>
> ... Her mental condition was most marked and very convincing evidence thereof was given by both the cousin and the policeman. I am of the opinion that such evidence could qualify as corroboration within the provisions of s. 142 of the *Criminal Code*. The weight which should be given to such evidence was, of course, a matter for the jury and it must be presumed that the jurors did assess its weight in accordance with their sworn duty.

[117] Each case depends on its specific facts. I must decide this case on its specific facts.

[118] Standing on its own, KB's immediate emotional response to what she perceived as a sexual assault could be compelling evidence. However, in the case at Bar, JM raises legitimate concerns about what weight that evidence should be given.

[119] JM testified about KB having experienced a previous similar traumatic event, and that she had nightmares arising therefrom, which KB herself acknowledges. JM acknowledged that KB had never before claimed he was assaulting her after such nightmares. However, Defence Counsel argues that the brazenness of JM's alleged actions strains credulity (i.e. moving the blanket, KB's nightgown and inserting his penis into KB's vagina and having sexual intercourse with her in a manner that could easily have wakened her, in her home with her mother and BG just 10 feet away) in relation to a long-time friend whose company

he valued. I conclude that it is safely within the realm of possibility that KB did have a nightmare in the early morning of August 6, 2018.

[120] There is no physical evidence to corroborate any sexual activity as claimed by KB. She testified that she was awoken because of an urge to use the bathroom, rather than the sexual assault activity she ascribes to JM. KB testified that she could feel JM's penis inside her and his body swaying back and forth towards and away from her body. However, she did not testify that she saw his penis at any time, nor that his pants were down or even loosened, bearing in mind she must've turned around when she says she pushed him away with her hands on his waist area. Immediately upon KB's screaming for JM to "get out" (she did not specify *why* she wished him to leave) JM was attempting to make some explanation in the apartment, but neither KB or her mother heard him out.

[121] KB may have been mistaken about what, if anything, took place. If she honestly believed JM sexually assaulted her, this could also explain why she was prepared to become involved with a SANE kit examination.

[122] I found JM to be a generally credible witness. He testified honestly, and regarding reliability, acknowledged at times when he was unsure of facts. His evidence at times was at odds with that of BG and KB in a number of respects, and

I did have concerns regarding some of his testimony. He was calm, thoughtful, and deliberate in his responses. He was not argumentative or evasive. He was not shaken on cross-examination.

Conclusion

[123] I have carefully reviewed the evidence of the witnesses, including listening to the tape recordings thereof.

[124] JM entered the trial with the presumption of innocence in his favour.

[125] The Crown has the burden to prove beyond a reasonable doubt that JM sexually assaulted KB.

[126] A reasonable doubt is not an imaginary or frivolous doubt and must not be based on sympathy or prejudice. Rather it must be based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[127] If I believe JM is likely guilty, that is not sufficient. I keep in mind as well however that, it is virtually impossible to prove anything to an absolute certainty - and the Crown is not required to do so.

[128] In short, if I am sure that JM committed the offences, then I should convict him because I am satisfied of his guilt beyond a reasonable doubt.

[129] I have attempted to highlight concerns that I have in relation to the evidence presented by the Crown. Many courts have commented that it is difficult to articulate with precision all the reasons why a court concludes that a reasonable doubt exists. I agree.

[130] While I found the Crown case somewhat compelling, in the context of all the evidence I accept, and the absence of evidence, I am satisfied the Crown has not proved JM guilty beyond a reasonable doubt. I therefore acquit him of the offence charged.

Rosinski, J.