

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Speers*, 2022 NSSC 12

Date: 20220118

Docket: CRH 502876

Registry: Halifax

Between:

Her Majesty the Queen

v.

Murray Speers

TRIAL DECISION

PUBLICATION BAN: s. 486.4 and s. 486.5 of the *Criminal Code*

Judge: The Honourable Justice Jamie Campbell

Heard: November 30, December 1 and 6, 2021, in Halifax, Nova Scotia

Counsel: Alicia Kennedy, for the Crown
Joel Pink, Q.C. and George Franklin, for the Defence

By the Court (Orally):

[1] Murray Speers has been charged with sexual assault. He does not deny that there was sexual contact between himself and the complainant at the time and place alleged in the indictment. He argues that the Crown has failed to prove beyond a reasonable doubt that the complainant did not consent to the sexual contact.

Evidence

[2] Mr. Speers was an airline pilot at the time of the incident. The complainant was a flight attendant with the same airline. They returned from an overseas flight with their flight crew and were to remain in Halifax for the evening to wait for their return flights to western Canada. They had flown together in the past and had spoken just a few times. They were not people who socialized with each other and had had only brief conversations.

[3] On the trip through Halifax the flight crew stayed at a downtown hotel. Several of them got together and went for lunch at a nearby restaurant, and the complainant and Mr. Speers were part of that group. They were separated by a few people at the large table and did not carry on a conversation. The complainant drank a couple glasses of wine over the course of a two-hour meal.

[4] Four of the group decided to leave the restaurant and move on to a pub. They were the complainant, a friend of hers who was a flight attendant, another flight attendant with whom she was on less familiar terms, and Mr. Speers, who was the captain of the aircraft. While at the pub they drank some more. The complainant shared a bottle of wine with her friend and then had another half glass of wine over the course of the late afternoon at the pub. She was not intoxicated and placed her own level of impairment at perhaps three or four out of ten. She was not slurring her words and she said she could walk without trouble. She had been eating as well during that time. There is no suggestion that she was significantly impaired. She said that she was not particularly tired because she had slept on the overseas flight.

[5] Each of the four people who went to the pub gave similar evidence that while they had been drinking none were showing any outward signs that they were drunk.

[6] The four people engaged in conversation over that time in the pub. The complainant said that she had spoken mostly with one of the other flight attendants. The others said that she was speaking mostly with Mr. Speers. The complainant said that at one point she and Mr. Speers got into an argument about their employer's policies. She said that their voices were raised. She felt that he was devaluing her opinion. She turned her back on him eventually. But the group seems to have remained together at the pub, at the same table. Mr. Speers did not recall any argument between himself and the complainant. Neither of the other two flight attendants could recall any argument between Mr. Speers and the complainant and even though the pub was noisy they were sitting so closely together at the same table that both would have overheard an argument had one happened.

[7] The complainant said that she went to the washroom several times during her time at the pub. She left her drink on the table when she did that. She also said that at no time was her drink left at the table when there were not at least two of the others present at the table with it. The others confirmed that while each of them went to the washroom, the drinks were not left unattended at the table. None of the witnesses were asked whether they had put anything into the complainant's drink at any time during the evening.

[8] The group left the pub at about 8:30 pm. The complainant had no memory of leaving the pub and there was a significant gap in the complainant's narrative. The other two flight attendants and Mr. Speers said that they left the pub as a group of 4 and made their way back toward the hotel. The two flight attendants were walking ahead because one of them was familiar with the city and knew the way back to the hotel. Mr. Speers and the complainant followed them. The two flight attendants walked arm in arm and the complainant and Mr. Speers walked arm in arm toward the hotel. Eventually the others lost sight of Mr. Speers and the complainant. They went to the hotel and then to their own rooms for the night. The evidence that Mr. Speers and the complainant walked arm in arm is not evidence upon which consent to any sexual activity could be inferred.

[9] Both the other flight attendants said that when they last saw the complainant there was nothing at all out of the ordinary about her behaviour, her speech, or her ability to walk. The complainant had not consumed a substantial amount of alcohol that evening. She said that she was not significantly impaired by alcohol. She said that she was an experienced drinker and was not someone who was affected by alcohol in an exceptional way. She had not previously had an extreme reaction to

alcohol that caused her to lose her memory. There was no evidence presented to indicate that the complainant was impaired by some other substance. She did not say that she had consumed anything else willingly and there was no evidence that she had been given anything surreptitiously.

[10] Mr. Speers said that he and the complainant walked around the city for an hour or 90 minutes. He said that they talked and enjoyed the evening, walking around the downtown area. He said that he got “turned around” and could not find his way back to the hotel. He testified that he called the hotel for an address at 9:50 pm and the call was dropped. He called again at 10:02 pm. He provided a telephone record which he said was part of his bill to indicate that he had made calls at those times. While the bill does not specify the time zone used, or even the actual date, it is some evidence that Mr. Speers made calls at those times. In any event there is nothing to contradict his evidence that he and the complainant returned to the hotel after being out from about 8:30 pm until about 10 pm. Once again, evidence of walking around the city in the evening is not evidence from which consent to sexual contact can be inferred.

[11] Mr. Speers said that they returned to the hotel, went to the elevator, and went together to his room. He opened the door and the complainant followed him. They did not speak when that took place. Mr. Speers said that the complainant kissed him and said, “Don’t cum inside me.” He said that he replied that he was fixed or had a vasectomy. He said that she replied, “OK”.

[12] Mr. Speers testified that the complainant went over to the bed and began to get undressed. He went to the bathroom and when he came out the complainant was in the bed. He got undressed. He testified that when he got into bed, they discussed setting the alarm early enough to allow the complainant to get ready for the departure flight. The alarm was set for 5 am. Mr. Speers testified that they started kissing each other and fondling each other. He said that the complainant was fully awake at the time. After that they began to have sexual intercourse. Mr. Speers’ evidence was that the complainant asked him how it felt and that he replied that she was beautiful, and it felt fantastic. He said that the complainant said the words, “You feel so good. Don’t stop.” They then fell asleep in each other’s arms.

[13] The complainant said that she did not have any recollection of leaving the pub. After she had a drink of wine everything “blacked out” for her. The walk toward the hotel with the others and the walk around the downtown area with Mr. Speers were not things that she could comment upon at all. She could not comment

upon any of the interactions with Mr. Speers in getting into the hotel room. She could not comment on anything that she said or did after they got into the hotel room. She simply had no memory whatsoever of that time.

[14] The complainant had no memory of that time but there is no evidence that she was not conscious. She was conscious when she left the pub and when she walked from the pub to the hotel. The complainant has no memory of the time so she could not say at what time she lost consciousness.

[15] After consuming that drink of wine, the complainant said that the next thing she knew she was laying down. It felt like she was drowning or just could not breathe. She reached up and felt hands around her neck, choking her. She said that she opened her eyes and saw Mr. Speers on top of her, with his penis penetrating her vagina. She said that she had no idea where she was or how she had got there. She was going in and out of consciousness. She said that Mr. Speers was penetrating her with “extreme force”. She said that he was angry and was taking it out on her body.

[16] As she was lying there, she then saw the silhouette of Murray Speers’ naked body getting out of bed and realized that she was in someone else’s room. She said that she did not speak to him. She passed out again.

[17] Mr. Speers said that they woke up at some point and started kissing and fondling each other again. He said that the complainant was stroking his penis with her hand. He was touching her vagina through her panties. He could not say how or when she had put her underwear back on. He said that he kissed her stomach. The complainant lifted her hips toward him which he interpreted as a way to help him get her underwear off. He put his head between her legs. The complainant put her hand on the back of his head and pulled his head toward her vagina. While he performed oral sex she masturbated herself. Mr. Speers said that the complainant said, “I want you inside me”. They began having intercourse and his penis slipped out of her vagina. The complainant turned around and got up on her knees. He says that she then said, “Fuck me.” He continued to have sexual intercourse with her. He said that he told her how sexy it was that she was touching herself. He said that she then said, “Harder.” They then fell asleep.

[18] The complainant said that she had passed out after the first incident of vaginal penetration. The next thing she recalled was her vagina being penetrated from behind. Her hair was being pulled and she was in great pain. She said that it was the most horrible thing that she had ever experienced. She knew it was Murray

Speers but could not see whether she was being penetrated with his penis or with another object. She could feel pain all the way up to her stomach and in her neck. She said that he was mad and full of rage and was violently torturing her. When he finished she passed out again. Mr. Speers denied ever pulling the complainant's hair.

[19] When she woke up, she said that she felt a wave of nausea coming over her. She crawled over him to get to the bathroom, where she threw up. She sat on the toilet and urinated. She felt burning pain in her vagina. There was blood in the toilet and her legs were trembling and shaking. She looked in the mirror and saw that her hair was a mess, and her head was pulsating from having had her hair pulled.

[20] The complainant said that when she came out of the bathroom, she saw her clothes on the second bed in the hotel room. As she started to put her underwear on her legs buckled. She said that Mr. Speers then grabbed her and pulled her back into the bed. Next, she said that she remembered waking up with Mr. Speers performing oral sex on her. She said that she had no strength when trying to push his head away from her. She said that he then began kissing her and for the third time penetrated her vagina with his penis. She said that she tried to block his penis from her vagina with her hand, but she was not successful. She said that she just had no strength.

[21] She said that neither of them said anything. The complainant testified that she just wanted it to be over. She passed out again.

[22] The alarm went off at about 5:15 am. The complainant's testimony was that she struggled to get her clothes back on and get out of Mr. Speers' hotel room as soon as she could. She said that Mr. Speers watched her getting dressed and said she had nice breasts. She said that he asked for her telephone number but assured her that he would not stalk her. He came over to her, while he was still naked. He hugged and told her not to tell anyone about what had happened.

[23] Mr. Speers evidence was that when the alarm went off, they both groaned about having to get up. They kissed as the complainant got up to go. He said that he did not notice the complainant going into the bathroom. He went to the bathroom and when he came out, she was dressed. He said that he told her that it was flattering that a beautiful young woman would take an almost 60-year-old man to bed with her. He said that she said, "Not bad for 60." Mr. Speers said that he did not tell her not to tell anyone what had happened.

[24] The complainant testified that she left the room and went to her own hotel room to get changed for the flight back. She ended up in the same hotel elevator with Mr. Speers and the first officer of the flight crew. They exchanged morning greetings as if nothing had happened.

[25] The complainant stopped to visit with family for a few days on her way back to her own home.

[26] She took pictures of her bruised thighs when she got back about a week after the incident. She said that she noticed the bruising a few days before that. She later made a report to the police.

Subjective Consent

[27] There are two very different narratives. In one, the complainant was a consenting participant in sexual activity. In the other, she was not conscious, could not have consented and would not have consented to sexual contact with the accused. That naturally inclines toward a choice. One is telling the truth and the other is not. That binary choice is an overly simplistic characterization of the process.

[28] An accused person can only be found guilty if their guilt is proven beyond a reasonable doubt. An accused person is not required to prove or disprove anything. A complainant's apparently credible evidence does not shift the burden to the accused to somehow displace or disprove it. In a sexual assault trial involving the issue of subjective consent, the accused is not required to prove that the complainant was not telling the truth about their own subjective state of mind. The Crown is required to prove that element beyond a reasonable doubt.

[29] The state of mind of the complainant at the moment that the sexual contact took place is for the Crown to prove beyond a reasonable doubt. That can only be done by inference. The court cannot presume to know another person's thoughts. The complainant may say what their thoughts were at that time. The surrounding circumstances, including what the complainant did and said at the time of the sexual contact may provide evidence from which the subjective thoughts of the complainant at the time may be determined. There is no nuanced consent or partial consent or grudging consent. Either the lack of consent has been proven or it has not.

[30] The circumstances that can be considered in making the determination of whether the lack of consent has been proven beyond a reasonable doubt, are limited. The consideration of a broader context can lay the groundwork for the use of improper legal reasoning. Context must be carefully circumscribed. Evidence of prior consensual sexual activity between the complainant and the accused is not evidence of consent with respect to the sexual contact that forms the basis of the charge. Evidence of intimate behaviour even very close in time before the sexual contact at issue, does not admit of the inference of consent. Evidence of consensual sexual contact close in time to the contact at issue, is not evidence of consent. Evidence of sexual contact of a kind other than that upon which the charge is based is not evidence of consent. Evidence of cordial relations or intimate behaviour between the complainant and the accused is not evidence that can be used to infer consent to sexual contact. Evidence of consensual sexual contact after the contact complained of, is not evidence from which consent can be inferred.

[31] The subjective state of mind of the complainant is what matters. The assumptions or inferences drawn by the accused are not relevant. And the subjective state of mind of the complainant must be determined by the court, by inference from the context. But that context is limited.

[32] Part of the evidence about the complainant's state of mind comes from the complainant. They can give evidence about what they thought at the time. That can be considered with other evidence to determine whether the Crown has proven that the complainant subjectively did not consent.

Reasonable Doubt

[33] The evidence of the accused is not assessed on its own, in a silo. It must be considered having regard to all the other evidence, including that of the complainant. An accused person is not acquitted simply because he is able to provide a narrative that on its own, and without consideration of the other evidence, raises a reasonable doubt. The evidence of the accused must be considered having regard to and in contrast with the other evidence. It need not be more credible or reliable than the other evidence. It need only be credible or reliable enough to raise a reasonable doubt.

[34] The standard of reasonable doubt should not lead to applying different levels of scrutiny to the evidence of the complainant and the evidence of the accused. To comply with the exacting standard of proof beyond a reasonable doubt there may in some cases appear to have been a higher level of scrutiny applied to the

evidence of the complainant than to that of the accused. But judges are required to assess all evidence in the same way and according to the same level of scrutiny. The standard of reasonable doubt applies to the consideration of all the evidence with respect to each essential element of the offence. It does not mean that some evidence is more closely examined than other evidence.

[35] The requirement for the Crown to prove beyond a reasonable doubt that the complainant did not consent to the sexual activity that forms the basis of the charge, is the foundation of the presumption of innocence. The accused person is presumed innocent. That presumption does not mean that the complainant is presumed to be not telling the truth. The presumption of innocence does not create a presumption of lying or confabulation. The evidence of the accused and the complainant are assessed and placed under equal scrutiny before a determination can be made about whether guilt has been proven.

Consent

[36] The complainant said that the sexual activity happened without her consent. She said that she did not consent and would not have consented to engage in any form of sexual activity with Murray Speers. She said that she was conscious for some of the time when sexual activity was taking place and she specifically recalled that at that time she did not want to be engaging in that activity. The issue is whether the complainant's evidence with respect to her lack of subjective consent, along with all the other evidence, was sufficient to prove beyond a reasonable doubt that at the time when the sexual activity was taking place, she was not subjectively consenting to it. What Murray Speers thought at the time is not a relevant consideration. What the complainant thought at the time that the sexual activity was taking place is all that matters.

[37] The complainant said that just after drinking a glass of wine she blacked out and had no memory of leaving the pub. She had no memory of leaving with the others in the group and heading toward the hotel. She specifically said that she was not intoxicated. She had not had enough to drink to be intoxicated and no evidence was led to explain what might have caused that condition. Neither of the other two flight attendants noticed anything unusual about her behaviour, her speech, or her ability to walk.

[38] No nonspeculative explanation was given for why the complainant's memory suddenly went blank. There was no evidence about a condition or drug or other cause for the complainant to have lost her memory of a time when she left

the pub seeming fine to those who were with her, and later to fall in and out of consciousness in the hotel room. There was no evidence about how any psychological or neurological condition that might cause the complainant to have memory blackouts covering the time when she was leaving the pub and apparently conscious, would affect her ability to accurately recount what had happened in the time following.

[39] The complainant was adamant that she and Murray Speers had an argument while at the pub with the others. This was before the period when she said her memory went blank. While it was noisy both the other flight attendants, who formed the group of four at the table with Mr. Speers and the complainant, said that they had no recollection of such an argument and would have heard it if it had taken place. One of them said that they walked together, and the complainant and Mr. Speers followed them, arm in arm. That does not provide any evidence from which consent to sexual activity could be inferred, but it does conflict with the complainant's assertion that she and Murray Speers had argued and become angry with each other.

[40] That is consistent with Mr. Speers' testimony about the walk toward the hotel. He said that he and the complainant walked together for about an hour or 90 minutes before returning to the hotel. Again, that is not evidence of consent to later sexual activity. But the complainant has no recollection whatsoever about that. There is no reason to disbelieve Mr. Speers' testimony that he and the complainant walked around Halifax that evening before going back to the hotel. Again, that is not evidence to support the inference of subjective consent to sexual activity.

[41] The complainant said that the next thing she remembered after having the drink at the pub was coming to and feeling choked with Murray Speers on top of her, engaging in sexual intercourse. She said that he was using extreme force and was angry and taking it out on her body. She did not specifically say why he was angry at that time, but did say that he had been angry with her about the argument that she says they had in the pub. She passed out again.

[42] She said that she awoke again, this time when her vagina was being penetrated from behind. She had no memory of the time leading up to that. She had a clear recollection of what the experience itself felt like and said it was the worst experience of her life. She said that she could feel pain in her neck from her hair being pulled and pain all the way up into her stomach. Again, she said that Mr. Speers was behaving violently.

[43] The complainant told the police later that Murray Speers' penis was the size of her arm. She did not acknowledge that at trial as an exaggeration. She explained that to her, her arm was her forearm and from her vantage point, his penis was the size of her forearm from her wrist to her elbow.

[44] She said that she passed out again. She woke up and went to the bathroom and while putting on her underwear beside the bed, Murray Speers pulled her into the bed. The next thing she remembered was Mr. Speers performing oral sex on her and then penetrating her vagina with his penis for a third time. She said that she tried to block his penis with her hand but lacked the strength. She said nothing and passed out again.

[45] In assessing the circumstances to make an inference as to whether the complainant subjectively consented or did not, considerable caution is required about making assumptions. Different people react differently when experiencing the extreme trauma of sexual assault. A person may be too scared to say anything. A person may be too frightened or disoriented to just get up and leave. Remaining in the hotel room with a person for several hours is not evidence from which consent can be inferred. The same would apply to walking around the city for an hour and returning to the person's hotel room. Coming into the room is not evidence of consent to sexual activity.

[46] The proof of the absence of consent in this case would have to come from the complainant's testimony. To establish that lack of consent her testimony must be sufficiently reliable to form the basis of a criminal conviction. Her statements that she did not consent must be enough to prove beyond a reasonable doubt that she did not consent. Her testimony regarding her total lack of memory from the time before her departure from the pub until she was in Murray Speers' hotel room, was unexplained.

[47] It is theoretically possible that her drink was spiked with a drug that caused her to behave normally for some time and to appear to be processing things normally, then to have episodes of memory loss. There was no evidence to indicate how any drug was placed in her drink, who might have done it, or why they might have done it. There was no evidence about what drugs might have had the effect of creating a black out effect while allowing her to function normally for some time, and no evidence of whether any such drug would at first cause her to have no memory of events and then cause her to go in and out of consciousness. There was no evidence about whether any drug or medical condition that would cause

temporary memory backouts, would have otherwise affected the complainant's ability to accurately recall or remember the other events of that night.

[48] The complainant left the pub and appeared to the others to have been fine. She was not severely or substantially intoxicated. There is no evidence that after leaving the pub she consumed anything else. Yet, she was not able to remember anything at all about that period of time. Her memory was not just patchy or vague. She had no memory of it at all. Yet she was not intoxicated and was behaving normally. Yet she did say that she was able to remember the circumstances of the sexual activity to which she had not consented.

[49] When the complainant began to say what happened in the hotel room, she seemed to have little difficulty in recalling details, despite whatever it was that caused her memory to fail for the time previously and whatever caused her to pass in and out of consciousness. She was able to say that Murray Speers was behaving angrily and violently, which would make his behaviour consistent with what she reported as an earlier argument. She told the police that his penis was the size of her arm, which she said meant her forearm.

[50] The complainant said that the next day, at the airport, one of the other flight attendants seemed to sense that something was wrong and was trying to protect her from Murray Speers. The flight attendant had no recollection of feeling that something was wrong or acting to protect the complainant.

[51] The complainant's narrative was of a horrific sexual assault. Nothing about the way in which she gave her evidence suggested that she was anything other than sincere in what she said. Evidence can be given sincerely and may be sincerely believed by the person giving it, yet it may not be accurate or reliable.

[52] The gaps in the complainant's memory are entirely unexplained. A person may be intoxicated and unable to give consent. That person cannot be expected to have a detailed recollection of the time before and after the sexual contact. In that case there is an explanation. The memory gap in this case is a mystery. It was sporadic. The complainant could remember parts but not other parts. There is no way to know whether the parts that she could recall can be relied upon.

[53] Mr. Speers gave evidence. He told a version of events that was consistent with what the other two witnesses said. He denied having any argument with the complainant. He walked with her up the hill toward the hotel with the others until

they went their own way. Then, the only evidence of what took place was his, up to the time when the complainant said that she woke up in his bed.

[54] Mr. Speers' version of events was highly detailed. It had the appearance of a carefully curated narrative. He could recall the details of the restaurant meal with the crew. It was one of very many very similar events. Yet it was the only one he could remember. He retained a high level of detail and remembered the exact words that the complainant spoke to him to signify her consent and the exact time she uttered them, in advance of each time a sexual activity took place. He was not aware that he would be called upon to account for his behaviour until a few months later. These events happened in October 2019. Mr. Speers was not made aware of any investigation until early the next year. Yet he was able to recall in detail what he said took place in Halifax a few months before.

[55] Murray Speers gave his evidence in a way that appeared studied and practiced. But his evidence was also consistent with the evidence of the other two witnesses with respect to the time at the pub and leaving the pub to head toward the hotel. They too were able to remember details of conversations that happened what is now years ago. Mr. Speers was not caught in any internal contradictions.

[56] The issue is not which of the witnesses is more believable or even which one is telling the truth or something closest to the truth. It is whether on the evidence, considered as a whole, there is a reasonable doubt with respect to any one of the essential elements of the offence. The lack of consent is an essential element of sexual assault. The Crown must prove that lack of consent. The evidence does not prove that lack of consent beyond a reasonable doubt.

[57] I find the accused Murray Speers not guilty of sexual assault.

Campbell, J.