

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Roter*, 2023 NSSC 182

Date: 20230615

Docket: CRH 516690

Registry: Halifax

Between:

His Majesty the King

v.

Zachary Solomon Roter

TRIAL DECISION

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

Judge: The Honourable Justice Jamie Campbell

Heard: May 30 and 31, and June 1, 2023, in Halifax, Nova Scotia

Oral Decision: June 15, 2023

Counsel: Steve Degen, for the Crown
Jennifer MacDonald, for the Defence

By the Court (orally):

[1] Zachary Roter has been charged with sexual assault. The circumstances that gave rise to the charge arose from an acquaintance that started on the Tinder app. The accused person in a sexual assault trial does not have the right to have their identity kept private. The complainant does. The complainant will be referred to as B.M.

[2] It is not unusual for sexual assault trials to deal with relationships of one kind or another that are formed over a dating app and have as evidence, communications through text or through social media. The terminology used, the etiquette expected and even the ethical norms that are understood to apply, have evolved rapidly. A judge, some generations removed from the other participants in the trial, must be cautious about making assumptions regarding what behaviour does or does not conform to a common sense understanding of the world.

Summary

[3] It is not disputed that Mr. Roter and B.M. “met” on Tinder. They messaged each other several times for a few weeks but did not first meet until mid-October 2021. The charge arises from their interaction on their second meeting, on the night of November 13 and morning of November 14. It is not disputed that B.M. spent that night at Mr. Roter’s condo, in his bed, with him. She says that she just wanted to spend the night with someone, cuddling. She says that while she was in the bed Mr. Roter had vaginal and anal intercourse with her about 20 times, without her consent. Mr. Roter says that on the contrary, B.M. was the one who wanted to have sex that night, got on top of him in bed and grabbed his penis. He said that he told her that he did not want to do that and there was no sexual contact initiated by him and no intercourse, either vaginal or anal.

[4] Consent is not the issue in this case. B.M. said that Mr. Roter had vaginal and anal intercourse with her without her consent. Mr. Roter said that there was no sexual intercourse, and he did not initiate any sexual contact with B.M.

Reasonable Doubt

[5] Because this is a criminal trial the Crown must prove the case against Mr. Roter beyond a reasonable doubt. It is not a matter of deciding which of Mr. Roter or B.M. is more credible or reliable as a witness. But credibility and reliability are

still central issues, especially when there are only two witnesses to what happened between them on the night of November 13 and 14, 2021.

[6] The evidence of Mr. Roter and B.M. must be assessed fairly and tested against each other. There is no starting presumption that either is telling the truth or lying. The presumption of innocence should never turn into the presumption that the complainant is for some reason not telling the truth. And there is no presumption that the complainant is telling the truth because no one who was not a victim of sexual assault would put themselves through this process.

[7] Judges are repeatedly warned against making unfounded findings of credibility based on hunches or senses or vaguely expressed resorts to common sense and human experience. While there are times when the reasons for a finding of credibility cannot be clearly articulated, the attempt to express the basis for those findings can guard against making assessments of credibility that rely on outdated or discredited assumptions.

[8] Assessments of credibility are imperfect because judges are human.

The “Relationship”

[9] It is not clear the extent to which Mr. Roter and B.M. had a relationship in any meaningful sense. They became acquainted over Tinder and contacted each other over the course of the weeks from late September or early October until November 14. Mostly those contacts were about trying to get together and they were mostly unsuccessful.

[10] There was some issue about which of the two was more interested in getting together. Neither seemed to be particularly emotionally invested in the idea of having a relationship with the other.

[11] B.M. told Mr. Roter at one point that she was looking for a relationship. She told the police that with regard to Mr. Roter she “really wasn’t feeling it”. She told them that she used her school schedule to get out of most attempts to meet in person. She agreed though that she was putting some effort into coordinating times for them to meet. On the two occasions when they did meet in person, B.M. initiated those meetings.

[12] They finally did get together on October 19.

October 19, 2021

[13] B.M. and Mr. Roter testified that they did meet once before November 13 and that was on October 19. That was initiated by B.M. who was busy at school and said that she wanted a break from it. She came to Mr. Roter's condo.

[14] That evidence was the subject of an application about its admissibility (*R. v. Roter*, 2023 NSSC 112). The evidence about the previous sexual contact between B.M. and Mr. Roter was admitted not as evidence of previously given consent, which would not be effective in any event. And it was not admitted as an attempt to show that B.M. was likely to have consented to intercourse on November 13 and 14 because she had consented on October 19. The only purpose for the evidence was to address the difference in the evidence between the two witnesses and allow for the argument directed toward B.M.'s credibility.

[15] B.M. says that they did not have intercourse. They watched a movie and kissed but nothing more than that.

[16] Mr. Roter said that they became physically intimate and had consensual sexual intercourse that night. Mr. Roter's evidence about the details of the sexual contact on the evening of October 19, 2021, was brought out on cross-examination. He said that they had vaginal intercourse, then anal intercourse and no condom was used.

The Evening of November 13, 2021

[17] B.M. was 19 years old at the time. She was a university student. She met up with two friends to get ready to go downtown on a Saturday night. She got to her friend's place at about 7 pm and they started drinking. B.M. was not used to alcohol. She grew up in a religious household where alcohol, among other things, was not approved of. She drank raspberry vodka, and several vodka shots. She agreed that she was consuming alcohol from 7 pm until they left to go to a downtown bar at around 9 pm.

[18] They kept drinking at the bar. She estimated that she had about 6 Jägerbombs, which are a mix of Jägermeister and Red Bull energy drink.

[19] On the morning of November 13, 2021, B.M. and Mr. Roter had exchanged some texts that were an extension of Mr. Roter's "Hi" at about 9 am.

[20] That evening at 9:23 pm, almost 12 hours after the previous exchange, B.M. wrote a two-word message to Mr. Roter saying, “Fuck me”. It came rather out of the blue, with no context and no other words around it. That was not admitted as a way to suggest previously given consent or a likelihood to consent later. Mr. Roter replied, 13 minutes later, saying “What.” B.M. texted, “Wanna fuck”. Mr. Roter replied “Please.”

[21] B.M. asked, “What are you up to”. The response from Mr. Roter’s phone was “My friend is insetted too”. That was amended to “interested”. B.M. then said “Only 1 at a time silly”. The response was “3 is better than 1”. That is followed by a smiley face emoji wearing what appears to be a halo. Mr. Roter testified that the texts suggesting a “threesome” were sent by one of his friends who saw the text on his phone and took it to respond.

[22] B.M. replied “Geez”. Mr. Roter’s response was to ask, “What are you up to tonight”. B.M. said that she was downtown. Mr. Roter said “Same well link later if I’m not fucked”. He explained that the text meant that they would get together later if he was not too drunk. B.M. said “I am. Link now?” She said that she was then saying that she was drunk. This was at around 10 pm. Mr. Roter did not immediately respond. B.M. texted, “Hey”. Four minutes later she texted, “Before you get drunk wanna fuck”. That was at 10:07 pm. Mr. Roter did not respond until 11:42 pm.

[23] B.M. said that while she was not “slammed or anything” she was “tipsy”. By the time she left the bar she was not “blackout” but was “quite drunk”.

B.M.’s Friend J.K.

[24] B.M. said that she walked for about a half hour to another male friend’s house. That was J.K. His name is anonymized because identifying him would likely identify the complainant. She got to meet him during her first weeks at university and while they were not in a romantic relationship, she described them as being more than friends. She said that while they did not talk about dating, she had “feelings for him”.

[25] B.M. at first said that she and J.K. had sex while on a date a couple of weeks before. Then they did not talk for a while, and she messaged J.K. when she was drunk. B.M. later said that she and J.K. had consensual sex several times or “numerous” times. Once again, the evidence was not admitted as a way to suggest that because B.M. had consensual intercourse with J.K. she was more likely to

have consented to have sexual intercourse with Mr. Roter. That would not only be an impermissible inference. It would be an unsupportable one. The purpose was once again to test B.M.'s credibility.

[26] B.M. said that she arrived at J.K.'s place sometime between 11:30 pm and midnight. He was on the phone with a friend and made her wait on the step, in just a jeans and t-shirt, for about 20 minutes. Her plan, she said, was to stay the night and have sex with J.K. She was able to remember going there. She was able to remember sitting on the step waiting for 20 minutes and she was able to remember why he had made her wait.

[27] B.M. said that she could not remember if she and J.K. had sex that night. She remembered going to his room. She said that she could remember putting her clothing back on but could not remember if they had sex. She said that she later called J.K. to clarify for her whether they had sex, and he would not say.

[28] B.M. said that she was "ticked off" because he made her wait on the step. He also told her that he wanted to go to sleep so she had to leave.

[29] Because B.M. could not recall having sex with J.K. she could not recall giving consent. On questioning about that she said that while she was "quite positive" they had sex, she was "100% sure" that she had been raped by Mr. Roter. She knew that she and J.K. had sex previously and she was not "going to jump on the rape wagon".

[30] At 11:42 pm Mr. Roter texted B.M. saying "Hi". That would be in response to her text sent at 10:07 pm saying "Before you get drunk wanna fuck." B.M. made no response. At 11:42 pm that would be consistent with the time when she had just arrived at J.K.'s place, between 11:30 and midnight.

Back at the Friend's Place

[31] B.M. left J.K.'s and made the short walk back to her friend's place where she had started the night. Her two friends were there with another male friend whom they had met at the bar. The two friends were drunk and throwing up.

[32] B.M. said that she wanted to "fall asleep with a guy" and planned to spend the night at Mr. Roter's place. She texted Mr. Roter at 1:37 am, saying "Hey" and asking if he was downtown. At 1:38 am she wrote, "Call me if you wanna talk cause I may be Asleep (but not opposed to spending the night at your place)." At

1:44 am he asked where she was staying. She said that she was at a friend's place and asked where he was. Mr. Roter said that he was at the Alehouse. They planned for her to come to his place. She texted "Want a cuddle buddy for the night". Mr. Roter's response was "Mhm" and she asked if that was a "yes". He said that it was.

[33] Both said that the reference to a "cuddle buddy" was not sexual. B.M. said that she was making it clear that she was not then intending to have sex with Mr. Roter. Mr. Roter said that he took the question to have no sexual overtones and only involved the two sleeping together with no expectation of sexual intercourse.

[34] Mr. Roter texted that he thought that he and his friends were going to grab some food at Pizza Corner. He said that he would meet B.M. at his condo and would text her when he got there. She asked when he would be home and he told her, about 2:45 am. She expressed some reservations about that and was no longer sure that she would be there. Three minutes later Mr. Roter texted that he was out and could be home in 10 minutes. In his evidence he said that his friends wanted to go home, and they agreed to leave earlier than they had originally planned.

Mr. Roter's Condo

[35] B.M. said that when she got to Mr. Roter's building sometime between 2 am and 2:30 am he was not yet there. At 2:14 am she sent a text saying, "Be there's in a couple." She waited in the vestibule with the concierge and Mr. Roter arrived in about 10 minutes. He hugged her and they went upstairs to his condo. She said that she was tired and just wanted to sleep. She had two glasses of water and went to bed.

[36] B.M. was sleeping on the left side of the bed and Mr. Roter on the right. She said that she was wearing a sweatshirt, shorts and underwear. She said that she fell asleep within about 10 minutes.

[37] B.M. said that she woke up with Mr. Roter's penis inside her in vagina. She said that she was paralyzed with fear and just laid there, "dead weight". She said that she did not want to confront him because although they had exchanged some information, she really did not know much about him. She said that she had heard from her parents about human traffickers in Halifax and was afraid that he might be one.

[38] B.M. said that she just kept her eyes closed and hoped that he would stop. This happened off and on through the night. She said that any movement on her

part would mean that it would start again. She said that there were about 20 times through the night that he penetrated her vaginally or anally, without her consent.

[39] B.M. said that he would manipulate her body into positions. He rolled her onto her back and onto her stomach and put her in the “downward dog” position with her head down and her hips elevated. She said that she was not resisting because that would show that she was awake. She said that while this was going on he was giving her commands or directions about how she should position her body. She agreed that she did not say anything about verbal commands in her police statement.

[40] B.M. said that he engaged in both vaginal and anal intercourse and because there was no lubrication it was very painful.

[41] They spoke only once. She said that Mr. Roter asked if he could “cum inside” her and she said no. She said that she believed he did not ejaculate inside her and there was no evidence that she could see that he had ejaculated at all.

[42] B.M. said that at one point Mr. Roter tried to force her to perform oral sex on him, but he could not manipulate her body into doing that.

[43] Mr. Roter denied that there was sexual intercourse of any kind or that he initiated any sexual contact. He said that when B.M. arrived he gave her a brief tour of his condo and got them both glasses of water. He went to the bathroom and B.M. went to bed. He got into the bed. He said that he was laying on his back and B.M. rolled over. He had his arm around her, and she began kissing his neck and face. He was not reciprocating. He said that she asked if he was tired and he told her that he was.

[44] Mr. Roter said that B.M. said she was hot and removed her sweatshirt. She touched his penis with her hand over his underwear. He said that she asked if he had a condom and he told her that he did not. He said that she seemed “disgruntled” and rolled back onto her side. He said that B.M. then fell asleep.

[45] Mr. Roter said that he woke up in the middle of the night with B.M. sitting astride him. His underwear was pulled down and she was grinding her vagina against his penis. He was not becoming erect. She was moaning as she moved. Mr. Roter said that when he woke up he was confused and it took a moment to process what was happening. He testified that he figured if he was not getting an erection

nothing could happen. He would just lay there. He said that he laid there for a few minutes, and she stopped.

[46] Mr. Roter said that he fell back to sleep.

[47] B.M. said that she did not sleep much at all. She was worried about what might happen next.

B.M. Leaves

[48] B.M. testified that she wanted to be sure that Mr. Roter was asleep before she escaped. She was laying on her back and rolled onto the floor. She said that Mr. Roter noticed her on the floor and asked why she was there. She said that she told him that she liked his floor and thought it was “comfy”. She said that he said she was a “weirdo”. She agreed that he might have said she was “crazy”. She was surprised that he bought that story and he fell back to sleep. She waited on the floor for about 15 minutes, got her clothes back on and left.

[49] Mr. Roter’s version of the morning was quite different. He said that he woke up at about 8am. He drank from the water glass on his bedside table. He said that he was feeling “disgusted” with her still in his bed. He said that it looked like she was on her phone. He wanted to get her out. He said that he sarcastically said words like, “I’m surprised you’re still here since I didn’t agree to your sexual advances.”

[50] Mr. Roter said that B.M. collected her things and went out into the living area of his condo. He said that she appeared to be talking to herself or muttering and said something about the floors of the condo being nice. He said that he said, under his breath, “You’re crazy”. She stared at him and then left.

[51] B.M. said that she did not get an Uber at the front door of the building because she was afraid that Mr. Roter was following her. She walked into the downtown area and texted her friend saying, “I think I was raped”. When asked at uncertainty in the phrasing fit with what she had described she said that it was “just a casual opening” to tell her friend that she had been raped.

Afterward

[52] B.M. said that she told her friends what had happened, then told her sister and on Monday went to the Sexual Assault Nurse Examiner. She said that she was

bleeding for multiple days afterward. She said that she had not felt any discomfort after being at J.K.'s place because she had sex with J.K. before and it was always consensual and never painful.

[53] An Agreed Statement of Facts was entered about the evidence from the Sexual Assault Nurse Examiner and about the DNA evidence. B.M. was examined at the QEII hospital between 3:30 pm and 7:20 pm on November 15, 2021. The Sexual Assault Nurse Examiner observed a fissure on B.M.'s anus, and abnormal redness of the skin and a break in the surface layer of the skin on the bottom part of her vagina. The statement says that these injuries could be caused by a variety of things.

[54] The nurse did not observe any active bleeding in the areas. As part of the examination, she looked for the presence of blood because that would have prompted more testing. B.M. provided the nurse with the underwear she was wearing on the night of the incident and no blood was found.

[55] The nurse reported that B.M. told her that she "possibly" had sex with her "ex", earlier in the evening.

[56] Human semen was identified on the upper rear panel of the underwear. The DNA profile of that semen matched that of J.K.

[57] Oral, vaginal and anal swabs were provided. No male DNA was detected.

R. v. W.D. Analysis

[58] There could be no more clear case for the application of the principles set out in *W.D.* There are two witnesses, and their narratives are very different. The decision does not involve picking one as being more convincing or likely.

[59] Before assessing the weight to be given to any evidence, it must be tested against all the other evidence. The accused person's evidence is not considered within an evidentiary silo so that it is tested only on its internal consistency. It must be considered having regard to all the evidence, including that of the complainant. An accused person's version of events may raise a reasonable doubt standing on its own but may not raise a reasonable doubt when tested against or contrasted with the other evidence in the case.

[60] If Mr. Roter's evidence is accepted as credible and reliable, he must be found not guilty. He must be found not guilty even if only some of his evidence is

accepted and that evidence raises a reasonable doubt as to his guilt. Even if his evidence is entirely rejected, he must be found not guilty if the other evidence in the case raises a reasonable doubt. He can only be found guilty if, having reviewed and assessed all the evidence, there remains no reasonable doubt about the essential elements of the offence.

[61] The Crown does not have to prove every fact that has been alleged. But the facts that form the essential elements of the offence must be proven to the criminal standard.

Mr. Roter's Evidence

[62] Mr. Roter offered a full denial of the essential elements of the offence of sexual assault. If his evidence were to be believed he would not be guilty.

[63] Both B.M. and Mr. Roter agreed that the use of the phrase "cuddle buddy" did not suggest activity of a sexually intimate nature. But in the context of a series of texts earlier in the evening that said, "Fuck me", "Wanna fuck", and "Before you get drunk wanna fuck", it is difficult to see how Mr. Roter would not see at least the potential for the request for a cuddle buddy even hours later, to mean that sexual contact might follow. He seemed very much to want to distance himself from any suggestion that he wanted B.M. to be in his bed.

[64] Some of his evidence supported that. He did not change his plans and rush home as soon as he got the first text saying, "fuck me". It does appear to have caught the notice of himself and perhaps his friends. Of all the many texts between Mr. Roter and B.M. only three were, he said, sent by a friend. Those were the ones at 9:38 pm on November 13, in response to the "fuck me" and "wanna fuck" texts. Mr. Roter at no time before being pressed on the issue in cross-examination said that some of the texts were not actually sent by him. He appeared to want to distance himself from the suggestion that he was suggesting a threesome with B.M. As the Crown noted it is a remarkable coincidence that a friend happened to intervene at that stage in the text exchange. And it is particularly worthy of note because Mr. Roter had himself, if only jokingly, suggested a threesome to B.M. in an earlier text.

[65] Mr. Roter wanted to suggest that he was just not that keen on seeing B.M. He said that he agreed to let her come over to his place because it was just easier. But he had several "outs" to avoid having a woman, with whom he had experienced, as he said, no "sparks", come over to spend the night to sleep with

him, in his bed. He told her that he was going to be going home at about 2:45 am. She said that she did not know if she would be there then. He clearly could have left it at that. He did not. Whether he left early for that purpose or not, he told her that he could be there earlier. He took the step to let her know that he was ready to go. That is not consistent with indifference about whether she came over or not.

[66] Mr. Roter had no reason to take the steps to allow B.M. to come to his condo in the early morning hours unless he wanted her there. For whatever reason Mr. Roter did not want to admit that he was interested, at least on some level, in B.M. Mr. Roter was not as indifferent or blasé as he claimed to have been. And that raises the important question of why he was not being entirely forthcoming and what else he might not have been forthcoming about.

[67] Mr. Roter's evidence offers an otherwise generally consistent narrative. He did not maintain that he counted his drinks that night but he was not extremely drunk. He was not confused and had no points at which his recall disappeared. On November 13 and 14, 2021, he had no reason to take note of what had happened because he was not aware that charges were being laid against him until about three weeks later.

[68] Mr. Roter's evidence must be contrasted with that of B.M.

B.M.'s Evidence

[69] There is no doubt that B.M. was an argumentative witness who bordered on being combative. Defence counsel asked appropriate questions and at times those questions were answered with arguments and rhetorical questions.

[70] B.M.'s demeanor was not that of a calm and matter of fact witness. That is not a good test of veracity in this context. A person who has been the victim of a sexual assault to whom it is being suggested that it did not happen as she recalled it or that she may have dreamt it, could reasonably be expected to respond firmly. Possessing self control or composure in that situation is not necessarily the sign of a person who is telling the truth.

[71] The texts leading up to B.M.'s arrival at Mr. Roter's condo could suggest that she was very interested in having sex with him that night. That would support Mr. Roter's narrative of B.M. being the sexual aggressor. That could not be used as the equivalent of "prior consent", in which it is improperly inferred that if a person has expressed consent that consent remains effective until it is revoked. That is not

the law. What matters, and the only consent that can matter, is consent at the time of the sexual contact. Both Mr. Roter and B.M. said that the text in which B.M. asked whether Mr. Roter wanted a “cuddle buddy” was not given or received as having any sexual component. When B.M. arrived at Mr. Roter’s condo there was, according to their evidence, no expectation of sexual contact on the part of either of them. The evidence in the text messages does not allow for the inference to be made that B.M. went to Mr. Roter’s condo with the intent of having sexual intercourse with him.

[72] B.M.’s evidence, like Mr. Roter’s must be assessed on its content.

[73] B.M. said that after the sexual assault, in which she was penetrated vaginally and anally, without her consent, about 20 times, she was bleeding for several days. She was examined by a Sexual Assault Nurse Examiner about 36 hours after the alleged assault. The nurse found no evidence of blood on her underwear. That only means that her evidence about bleeding has not been confirmed by any other evidence. The fact that no blood was found as part of the examination of her underwear is not evidence that can be used to contradict her statement that she was bleeding.

[74] B.M. appeared to want to portray an indifference toward Mr. Roter, much as he tried to suggest indifference toward her. Any evidence of her interest in him could not be used for the purpose of suggesting that she consented to sexual activity but does address the consistency and credibility of her evidence. She suggested that even on the evening of November 13, 2021, he was not her first choice. She said that when they were texting back and forth in the weeks before, she really was not “feeling it” and used her school schedule to get out of some meetings with him. Yet, on the two occasions when they did meet, in person, it was B.M. who initiated those.

[75] On November 13, 2021, she texted Mr. Roter at 9:23 pm saying “fuck me”. Two minutes later he replied “What”. And within a minute she said “wanna fuck”. B.M. said that she was drunk at the time and “I get drunk, I get horny”. At that time, she was still at her friend’s place, getting ready to go out for the evening.

[76] Even while drunk, it seems an odd thing to say to someone whom she had met only once before, with whom she says, she had never had sexual contact beyond kissing and with respect to whom she “really wasn’t feeling it”.

[77] This may be an area where it must be acknowledged that changing norms of behaviour and the culture of dating may mean that such a statement was not so surprising or odd at all. Whether there is an inconsistency amongst “not feeling it”, “fuck me” and “want a cuddle buddy”, depends on one’s understanding of the extent to which feelings are detached from the physical act of sexual contact. No inference can be drawn from what otherwise might be considered an inconsistency between B.M.’s comment that she was not “feeling it” with Mr. Roter and her later sexually explicit texts. And in no way can any of those statements be used to infer consent at the time that sexual contact is alleged to have taken place.

[78] There are internal inconsistencies in B.M.’s evidence that are cause for concern. And they seem to cluster around J.K. Her evidence at first was that she and J.K. had sex on a date, “a couple or a few weeks previously”. Later she said that they had sex several times in the past.

[79] B.M. specifically recalled going to his place and arriving between 11:30 pm and midnight. She remembered what she was wearing, jeans and a t-shirt. She remembered that he made her wait 20 minutes and why he made her wait. He was talking with a friend on the phone. She remembered being “ticked off”. She remembered going to his room. And she remembered putting on her clothes. She remembered that it was he who had asked her to leave because he was not feeling good.

[80] B.M. was able to say that she walked back to her friend’s place and that while at J.K.’s place she had nothing to drink. She remembered that when she got back to her friend’s place afterward, they were throwing up and was able to talk about someone getting her an Uber to go to Mr. Roter’s place. She was able to remember how long she was at her friend’s place before going to Mr. Roter’s place.

[81] But she could not remember whether she and J.K. had sex that night. There is an odd gap in an otherwise rather detailed narrative. She allowed that they possibly could have had sexual intercourse, but she had no memory of it whatsoever. Her lack of memory of it was so complete that she later called J.K. to ask whether they had intercourse that night and he either would not or could not say.

[82] J.K.’s semen was found on the underwear that B.M. was wearing that night. There is no evidence about how it got to be there and there could be other explanations, but it is entirely consistent with J.K. and B.M. having had sexual

intercourse on the evening on November 13, 2021. B.M. was insistent, despite having no memory of it whatsoever, that any sexual contact that she might have had with J.K. was consensual. She said that the injuries found in the examination could not possibly have come from that sexual contact because she did not feel the injuries afterward and any contact was consensual.

[83] It is reasonable to ask why B.M. had a memory gap from the time she entered J.K.'s room until she was putting on her clothing, while she had detailed recollection of what happened before and after. It is reasonable to ask why she was so insistent that the sexual contact with J.K. could not have caused the injuries to her anus and vagina, despite not remembering anything whatsoever about the nature of the sexual contact and maintaining that it was consensual. It is reasonable to ask why B.M. at first said that she and J.K. had "sex on a date" a couple or three weeks earlier and then later said that they had sex several times or numerous times.

[84] It is reasonable to infer that something has been left unsaid. And it is not possible to determine how relevant or important that "something" might be.

[85] When B.M. got to Mr. Roter's condo she said that they got into bed. She said that he began sexually assaulting her. She told the police that she kept her eyes closed the entire time. At trial she said that she opened her eyes at times to see what he was doing. She was told by the police that it was important to provide details. Yet she did not tell the police about the verbal commands that she said at trial Mr. Roter was giving her.

[86] B.M. said that she pretended to be asleep and when she moved the assaults would begin again. She said that she remained "dead weight". She did not use her muscles as Mr. Roter manipulated her body into various positions. She said that he moved her from her side to her back and onto her stomach and then into the downward dog yoga position. While doing that she said he was giving her verbal commands about how to place her body.

[87] If she was pretending to be asleep, over the course of the assaults, it would be reasonable to ask why Mr. Roter would have given verbal commands to someone whom he thought was asleep. B.M. agreed that for her to be placed in the downward dog position with her hips elevated she could not be entirely limp or dead weight. She said that she would have given her body some "structure".

[88] What B.M. described was a painful sexual assault in which her vagina and anus were penetrated about 20 times. She was injured by it. The person who did

that to her could hardly have mistaken it for consensual activity, given that she was pretending to be asleep and keeping her body unresponsive. Yet, she said that at one point, Mr. Roter asked if he could ejaculate inside her. She said that she told him no and he complied with that, as far as she knows. Regardless of what norms of sexual behaviour are applied, making that “request” does not seem to be consistent with the nature of the behaviour described by B.M.

[89] People respond to such incidents and report them in different ways. Judges must be very cautious about making inferences from those reports. In B.M.’s case her first report was to a friend immediately on leaving Mr. Roter’s condo. She said, “I think I’ve been raped.”

[90] B.M. explained that she knew she had been raped but she was “trying to make it casual” or that it was just a causal opening. It is conceivable that a person who has just been the victim of a sexual assault may not want to open a conversation with a friend with a definitive statement. But in this case, it is also relevant that when B.M. spoke to the police about what had happened she believed that Mr. Roter was “confused” when she left. The suggestion was that he might not understand that he had done anything wrong. That is hard to fit with the description that B.M had given of the incident.

The Evidence as a Whole

[91] Neither the evidence of Mr. Roter nor that of B.M. could be considered highly credible and reliable. Mr. Roter was trying to minimize his interest in having B.M. come to his condo after her “fuck me” text. He may not have seen her as someone with whom he wanted a relationship, but a relationship does not appear to have been the goal that night.

[92] B.M.’s evidence was the foundation of the Crown’s case. Her narrative contained inconsistencies that did not involve only the context of the incident but went to the central aspects of the narrative itself. The relationship with J.K. would otherwise be entirely irrelevant but there was evidence of injuries that she said were caused by Mr. Roter, and evidence of sexual contact a few hours before with J.K. B.M.’s memory gap about that is significant. Her change from saying they had sex on a date a couple or three weeks before to saying they had sex several times before came when she was talking about how she knew that the sexual contact with J.K. had been consensual, despite not remembering anything at all about it.

[93] B.M.'s narrative contained inconsistencies that were with respect to the incident itself. Her evidence about pretending to be asleep does not fit with her evidence about Mr. Roter giving her commands by voice. And those were not mentioned in her police statement.

[94] B.M.'s evidence about acting as dead weight does not fit with her body having enough "structure" to enable him to place her in a downward dog position.

[95] B.M.'s evidence about Mr. Roter asking whether he could ejaculate inside her does not fit with her evidence about what he was doing and her evidence about pretending to be asleep.

[96] Those inconsistencies could be explained. It may be possible to provide some kind of rational explanation for each of them. But when considering Mr. Roter's albeit imperfect evidence denying the sexual assault and B.M.'s evidence containing several inconsistencies going to the very core of the allegations, there remains a reasonable doubt as to Mr. Roter's guilt.

[97] I find Zachary Roter not guilty of the offence as charged.

Campbell, J.