**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. A.(B.J.)*, 2024 NSSC 201

**Date:** 20240702
**Docket:** CRH No. 510773
**Registry:** Halifax

**Between:**

His Majesty the King

v.

B.J.A.

**Restriction on Publication of any information that could identify the victim or witnesses: Sections 486.4 486.5 *Criminal Code***

**D E C I S I O N**

| | |
|---|---|
| **Judge:** | The Honourable Justice James L. Chipman |
| **Heard:** | January 2, 3, and April 23, 2024, in Halifax, Nova Scotia |
| **Written Decision:** | July 2, 2024 |
| **Counsel:** | Nicholas Comeau, for the Provincial Crown<br>Christa Thompson, for B.J.A. |

**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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

**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a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration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.

**By the Court (Orally):**

## INTRODUCTION

[1] B.J.A. stands charged:

1. That he, between the 1st day of February, 2010 and the 31st day of March, 2010 at or near Halifax, in the Province of Nova Scotia, did unlawfully commit a sexual assault on C.R., contrary to Section 271 of the *Criminal Code*.
2. AND FURTHER that he at the same time and place aforesaid, did unlawfully commit a sexual assault on C.R., contrary to Section 271 of the *Criminal Code*.

[2] Mr. A. plead not guilty to both counts of the Indictment. His trial got underway early this year and was adjourned until the spring. This was on account of applications heard pursuant to ss. 278.5(1) and (2) and 278.7(1) and (2) on March 1, 2024 and March 21, 2024 which led to my decisions; *R. v. Auld*, 2024 NSSC 199, dated March 8, 2024 and *R. v. Auld*, 2024 NSSC 200 dated March 21, 2024 respectively.

[3] During the trial the Crown called the complainant, C.R., her father and one of her best friends. The Defence called Mr. A. and the complainant's former boyfriend. One exhibit – a sketch by Mr. A. of his apartment – was entered by consent.

## GOVERNING PRINCIPLES

### Presumption of Innocence and Burden of Proof

[4] Mr. A. is presumed innocent of the charges. The Crown bears the burden of proof regarding each specific element of the charges and must prove Mr. A.'s guilt beyond a reasonable doubt. The standard of proof was summarised in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at paragraph 36:

> 36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> - the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;

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

[5] In *R. v. Starr*, 2000 SCC 40, Justice Iacobucci, for the majority, said that "an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities" (para. 242).

[6] Mr. A. does not have to prove anything. The Crown must prove each element of the offences beyond a reasonable doubt.

## EVIDENCE

### C.R.

[7] C.R. (d.o.b. redacted) was 18 years old at the time she says that she was sexually assaulted by B.J.A. She was introduced to Mr. A. in February, 2010 by her friend, K.M. She recalled that they met on a Monday between 3 p.m. and 4 p.m. at the Halifax ferry terminal. The three “hung out” on the Halifax waterfront (former) pirate ship playground until 8 p.m. or 9 p.m.

[8] On cross-examination she denied that another friend, C., was present when they were at the playground. She also denied that she got stuck underneath the play structure and that Ms. M. remarked that she (Ms. R.) was doing this for attention.

[9] After their initial meeting Ms. R. and Mr. A. exchanged phone numbers. They texted and made plans to get together the next day. On Tuesday she and Ms. M. again met up with Mr. A. at the Halifax ferry terminal. The three walked to Point Pleasant Park and back to the ferry terminal. Mr. A. then departed and the young women returned to Dartmouth. That evening Ms. R. again texted with Mr. A. and because it was snowing she altered her next day plans to return to Point Pleasant Park with Mr. A., instead agreeing to watch a movie at Mr. A.’s apartment.

[10] On cross-examination Ms. R. maintained that their first walk in Point Pleasant Park was when it was dark, noting that her photographs helped to jog her memory. She also recalled that Ms. M. was with her and Mr. A. the entire time.

[11] During the early afternoon of February 17, 2010 Ms. R. took the ferry to Halifax and Mr. A. met her at the terminal. From there, the two walked to Mr. A.'s [redacted] Street apartment, arriving at about 1:30 p.m. On cross-examination Ms. R. allowed that she was nervous while in the apartment because she had not been there before.

[12] Ms. R. described their attire. She was wearing leggings and a long shirt over her bra and underwear. She wore a winter jacket and work boots. Mr. A. wore jeans and a button-up shirt.

[13] The pair took the flights of stairs up to Mr. A.'s apartment. Mr. A. showed Ms. R. around the small one-bedroom unit. She recalled that he seemed "proud' of the bathroom heat lamp. Nobody else was present at the apartment although Ms. R. was aware that Mr. A. lived at the apartment with his girlfriend, C.M.

[14] Ms. R. described the apartment and its layout. The living room was unfurnished. The television and Xbox were located in the bedroom. She said that the apartment walls sloped inward in the bathroom and kitchen but was not certain regarding the bedroom. Ms. R. agreed that the bathroom was small, consisting of a shower, toilet and sink. The two sat on the end of the bed and began watching a movie. The bedroom light was off. After awhile Mr. A. started to kiss Ms. R. She was "okay with that". On cross-examination she agreed that this was "consensual kissing", involving "full on French kissing and coming up for air".

[15] After kissing for awhile, Mr. A. asked her to have sex in the bathroom with the heat lamp on. She replied, "no …he accepted". They continued to watch the movie and when it was over Ms. R. picked a second movie to watch. As they watched it, Mr. A. "occasionally" kissed her. At some point, "he got up, went around the bed and pulled me so my knees were on the floor and I was bent over the side of the bed. He pulled my pants and underwear down; he pulled his pants down and stuffed his penis inside my vagina. He was holding my back down with his other hand under my chin …I was leaned over the bed, gripping the comforter with both hands".

[16] To her knowledge, Mr. A. did not use a condom. She did not feel one and at that point in her life she had "only had sex a couple of times", previously with a

condom being used. After he finished, Mr. A. sat on the side of the bed and Ms. R. heard him, "wiping himself off".

[17] Ms. R. is not sure whether Mr. A. ejaculated. She thought that the incident lasted 10 to 20 minutes; "it felt like forever, so I can't say for sure". She pulled her pants up and tried to figure out a way to leave. Ms. R. told Mr. A. that she had to go to the Mooseheads game and she soon left, with Mr. A. walking with her from his apartment to the [redacted] (then named) Metro Centre.

[18] Ms. R. said that no words were exchanged immediately before or after the sexual assault. She added that she did not provide any consent.

[19] Ms. R. watched the hockey game with three girlfriends. At one point she pulled one of her girlfriends aside, "…trying to tell her what happened, it came out all jumbled because I was still trying to make sense of it myself. It didn't come out right or make any sense".

[20] A day or two later Ms. R. and Mr. A. resumed texting; she thought he initiated this. Nothing was exchanged in texts regarding the incident. They made plans to get together on the following Tuesday. They met as planned at around 4 or 5 p.m., once again at the Halifax ferry terminal. They walked to Mr. A.'s apartment where they played videogames in his bedroom.

[21] Ms. R. was wearing a dress with black lace pantyhose. She recalled this because prior to leaving she had been taking photos of herself while wearing this outfit. She wore these clothes over her bra and underwear. She wore a winter coat and boots.

[22] The two played video games for a half hour to an hour. They had their coats and boots off and sat at the end of the bed as they played on the Xbox and television. After the game was over, "…he stood up and like last time he flipped me over but on the other side of the bed. He pulled down my tights. This time I heard him put a condom on before he put his penis in my vagina. He didn't ask for consent. He moved me so quickly and held me down on the bed again. His hands were placed on my mid-torso sides. He held me down with his arm or hand …I had my arms kinda tucked under me and gripping the comforter waiting for it to stop".

[23] Ms. R. recalled that the bedroom "square ceiling light" was dimly on. She said the much larger Mr. A. pulled her underwear down and flipped her dress up. She did not provide consent. She said that the incident, "was fairly quick, maybe five

minutes, but again felt like forever". Ms. R. elaborated, "…he pulled out and I saw him drop the condom, he had ejaculated because I could see it when he dropped the condom into the bin."

[24] Ms. R. pulled up her dress and got up to leave. On the way out of the bedroom, "…he pinned me against the wall and lifted me against the wall and he said something and bit me on the neck like a vampire". On cross-examination she stated, "he grabbed me under the chin and lifted me off the ground, I could barely breathe and he bit me under his hand". She recalled that he walked her to the door and then she walked to the ferry terminal where she waited before catching the ferry at 7 or 8 p.m.

[25] On cross-examination she agreed that she could not "pinpoint a specific date but it [the second sexual assault] had to be six days later". She added that it happened on a Tuesday "because I've been in therapy for five years going over every detail". She stated that she re-attended because "he had a video game I wanted to play".

[26] Following this incident Ms. R. said that the two infrequently texted and that they saw one another "in passing" a few times. By early to mid-April, 2010, "I decided I was ready to tell someone". She confided in her friend, Ms. M. Shortly afterwards she decided to tell Mr. A.'s girlfriend about the incidents. In 2018 Ms. R. met with D/Cst. Amy MacKay and provided police with a statement.

[27] She described Ms. M. as her best friend, dating back to when they met in 2006 while in high school. When she provided her police statement on September 5, 2018, Ms. M. accompanied Ms. R. to the police station.

[28] On cross-examination Ms. R. agreed that in her statement that she made no mention of Mr. A.'s body position, i.e., that he was behind her on his knees. She agreed that for the entire incident that they were in the same position. She elaborated that they both had their knees on the floor.

[29] Ms. R. agreed on cross-examination that her testimony provided more detail of the alleged incidents than what she described in her statement to police. She said some of this came back to her after providing her statement when she looked through old Facebook pictures from February 17, 2010. D/Cst. MacKay had asked her to do this and she forwarded Facebook pictures to police.

[30] Back in February, 2010 Ms. R. estimated that she weighed 110 to 120 pounds and that she was around 5′- 5′5″. She had an "emo hair style, I wore a lot of hats, my

style now". She was 18 years old. Mr. A. was 23. He was 6′11″ and "lean with a bit of a beer belly, a normal body apart from his height." He had long brown hair, often worn in a ponytail. Mr. A. went by the nickname "[redacted]" as by times he wore [redacted]. On cross-examination she agreed that both she and Mr. A. were "into [redacted]".

[31] On cross-examination she added that she told her father "maybe eight years ago" that she was sexually assaulted by a man named [redacted]. She added that she talked to her father about it a few times, before she gave her police statement. She agreed that she told her father that she was sexually assaulted before her children were born ([redacted]). She disagreed that she told her father that she had been sexually assaulted by [redacted] after he forced himself on her in a washroom at a party.

[32] She added that she told a former boyfriend, M.S. that [redacted] had raped her. She said that it was "not correct" that she told Mr. S. that she sat outside Mr. A.'s [redacted] Street apartment to mark the anniversary of the sexual assault. She also denied telling him that Mr. A. had been her "knight in shining armour" or that she wrote poems about the assault. Ms. R. said that she never told Mr. S. that Mr. A. raped her at Point Pleasant Park, adding her view that Mr. S. is not credible. She acknowledged having a cat she named [redacted] around the time she was dating Mr. S. adding that she named the cat "to associate something other than terrible" with [redacted].

[33] She acknowledged that "to an extent, because he raped me" that she spent a lot of time drawing and writing about [redacted].

[34] Prior to appearing in Court, Ms. R. last saw Mr. A. at [redacted]. She said he sat there while she was working at [redacted]. She thought this was in December, 2018 or January, 2019. On cross-examination she had no recollection of meeting up with Mr. A. by happenstance by a store near the Celtic Corner in Dartmouth.

[35] During the first incident she said that Mr. A. bit her neck and her leg with the latter leaving a scar "for a long time". During the second incident he bit her on the other side of her neck and this left a mark for a few days.

[36] On cross-examination Ms. R. denied ever going to all-age shows at the Pavilion at the Halifax Commons.

[37] Ms. R. on cross-examination agreed that she had a Facebook account in her name "C.P." and in the name of "E.H.". She said the latter was "private, used mostly for work stuff". She denied having other Facebook accounts, including in the name of "C.M." or "C.L.M.M." to give the impression of being C.M.'s sister. Ms. R. denied that she ever referred to herself as Ms. M.'s twin sister or that Mr. A. "picked the wrong twin".

[38] Ms. R. did not agree that she had only been to Mr. A.'s apartment on one occasion. She further disagreed that she had waited at the nearby [redacted] until he got home and then asked him if she could use his washroom. She denied using his washroom or laying on his bed "and that he guided you out of the bedroom". It was put to her that Mr. A. rejected her so she fabricated a story; she responded, "completely untrue".

[39] On cross-examination Ms. R. said that over the years she spoke with her family doctors and a number of mental health professionals regarding the sexual assaults. She said group treatment sessions at the Abbie J. Lane Memorial Hospital "…gave me the strength to come forward …the group helped me to recall details …clarifying details I didn't remember".

**B.J.A.**

[40] Mr. A. (d.o.b. [redacted]) is 35 years old. He was 22 at the time of the allegations. Since he was a young teenager he has gone by the nickname of "[redacted]". On cross-examination he elaborated that he goes by "[redacted]" so as to distinguish himself on social media. He added that he used to be part of the [redacted] which involved [redacted]. He also had [redacted] which he "inserted on occasion."

[41] Mr. A. has lived in an apartment on [redacted] Street in Halifax for just over fourteen years. Initially, he lived there with his girlfriend, C.M.; however, after they broke up about four years ago, he has lived there alone. On cross-examination he agreed that during the time that they lived together Ms. M. worked at the [redacted] Street [redacted]. She normally got home around 4 to 4:30 p.m. from her usual shift.

[42] Mr. A. spent considerable time explaining the layout of his apartment, drawing the floor plan (exhibit 1). The one-bedroom unit is a relatively small apartment with walls that slant inwards. On cross-examination he said that the furniture he drew on the exhibit would have been there "within days of moving in."

[43] Owing to health issues, Mr. A. has not worked for approximately fifteen years. He has [redacted]. This means that he cannot do any heavy lifting, take any hits to the chest area or become too stressed. He occupies much of his time "socializing through online chatting" and assisting with his father, who has multiple health issues.

[44] At the time of the allegations, Mr. A. testified that he went out "a lot more." His activities included attending weekend music shows at the Halifax Commons Pavilion. Among various acquaintances, he acknowledged knowing M.S., whom he met at the skate park at the Commons.

[45] Mr. A. met C.R. through a cousin, who introduced the two one Friday or Saturday night. This was during a pre-show at the Commons. Mr. A. could not be sure of the exact date. He recalled that they "chatted and were nerding out a bit about anime and other dorky stuff." Subsequent to their initial meeting, Mr. A. said that he "hung out" with Ms. R. "three or four times".

[46] Mr. A. said that they next met at the pirate ship playground near the wave on the Halifax waterfront. He thought this was a mid-day meeting in "about 2010." Also present were K.M. and C.P. Mr. A. remembered Ms. R. becoming stuck in the playground structure and going to help her out. He formed the impression that Ms. R. was "pretending" to be stuck to attract his attention.

[47] Mr. A. recalled that he met up with Ms. R. and Ms. M. again about two or three weeks later. They initially met at the Halifax waterfront and then took the bus to Point Pleasant Park. They walked to the top of the park where Ms. M. took photos of Ms. R. At one point, Ms. M. asked Mr. A. to pose with Ms. R. and he obliged. On cross-examination he added that he put his [redacted] in, "to make it look like I was biting C." Afterwards, Mr. A. and Ms. R. walked Ms. M. to the bus stop and she left on a bus. Mr. A. and Ms. R. walked back to the park. He said that Ms. R. "got closer to me, I started to push her away …she was trying to cling to me. I said I had to go."

[48] On cross-examination he acknowledged that when posing for the photos he made it look like he was biting Ms. R. He recalled that there was no snow on the ground but that it could have been in February. Mr. A. walked Ms. R. to the bus stop and as she got on the bus, he turned and walked home. About a half hour later as Mr. A. was approaching his apartment, he encountered Ms. R. at the corner of [redacted] Streets. She told him that she needed to use the bathroom as the [redacted] personnel would not let her use their facilities. Mr. A. obliged and they went into his apartment. After Ms. R. used his washroom, Mr. A. used the facilities. When he came out of his bathroom, he saw Ms. R. in his bedroom, laying across the front of

his bed. He told her that she had to leave and when she resisted, “I took her by the arm and went to escort her out …she looked a little flustered, she was trying to be flirty …the ruffles of her skirt were lifted in the back, she was trying to be playful.” On cross-examination he estimated that she was in his apartment for five to eight minutes and that she left “with reluctance.”

[49] Mr. A. said that this was the sole occasion when Ms. R. was inside of his apartment. He added that he was one hundred percent confident about this. Mr. A. denied that the two engaged in any sexual activity. With regard to the allegation that they kissed for perhaps twenty minutes, he responded that this was “really stupid, I don’t like people up close to my face.”

[50] Mr. A. admitted on cross-examination that his girlfriend owned the movie Across the Universe, but that he and Ms. R. did not watch it. He added that if they had watched the movie that “C. would have arrived [home from work] long before the movie was over.”

[51] With respect to the allegation that he moved Ms. R. into a position and penetrated her from behind, Mr. A. responded that there was “no truth whatsoever” to this, adding (with reference to exhibit 1 and his large stature), “that would be physically impossible.”

[52] With regard to the second incident, he reiterated that “there’s no truth that she came to the apartment a second time.” He added regarding the neck biting allegation, that it would be physically impossible because of his lifting restrictions.

[53] Mr. A. specifically denied suggesting that they have sex under his bathroom heat lamp. He explained that given his height this would have placed him in near proximity to the hot bulb lamp and this was “not something I ever did.” On cross-examination Mr. A. denied walking Ms. R. to the Metro Centre.

[54] Mr. A. maintained that the only other times he had come into contact with Ms. R. were when they bumped into one another in Dartmouth. On two occasions when he was volunteering at a store, [redacted], Ms. R. approached him while he was outside having a cigarette break. The first time she told him that she was pregnant and that he was the father. He replied, “DNA test!” The second time was a week later when she told him that she had “two separate miscarriages a week apart.” This time he replied, “ah, okay”, adding “I thought she was a little crazy.”

[55] Mr. A. also described being stalked by Ms. R. He said that for a period of about two years that she sat outside of his apartment one or two times a week. Mr. A. observed her from his window, “looking up and writing in her notebook.” On cross-examination he said that he saw her sitting outside on about five occasions, “on a bench by [redacted].” He said that he did not want to “waste my time” reporting her to police.

[56] Mr. A. denied being aware that Ms. R. worked at [redacted]. He acknowledged occasionally eating in the mall food court.

**K.M.**

[57] Ms. M. has known C.R. since their high school years. Over the years she estimates that they see each other between one and at least three times a week. Ms. M. is 34, about two years older than her friend. Ms. M. knows Mr. A. whom she met through friends in 2010.

[58] Ms. M. said that Ms. R. “broke down and told me what happened” referring to being sexually assaulted by Mr. A. She said the conversation took place “a few months after the fact by our apartments on [redacted]”. Until she heard this, Ms. M. assumed that Ms. R. and Mr. A. were friends.

[59] Ms. M. accompanied Ms. R. to the police station on the day that she gave her statement. She agreed that she has “provided her with support throughout the process”.

[60] Ms. M. thought that Ms. R. “probably went to shows at the Pavilion”. She recalled an occasion when she hung out at the Halifax waterfront near the pirate ship with Ms. R., Mr. A. and another friend, C. She added that on a few occasions C.M. was there when they hung out. Ms. M. thought that “probably when we first started hanging out” that Ms. R. said she was Ms. M.’s sister. Ms. M. said that Ms. R. had a "third [redacted] account”, referring to Facebook.

**S.H.R.**

[61] Mr. R. is C.R.’s father. While he “knows very little about the incident” he said that he learned from his daughter that after a party she was “accosted in a bathroom” by a man named [redacted]. He added, “[redacted] pushed his way into the washroom and forced himself upon her sexually”. He could not say if he was told that she was sexually assaulted more than once by [redacted].

[62] On cross-examination he confirmed that he provided police an audio statement on November 22, 2018 and that his daughter disclosed the assault to him "about five years prior" to his statement.

**M.L.S.**

[63] Mr. S. (d.o.b. [redacted]) initially avoided service of a subpoena to appear in Court but ultimately attended and testified. For most of 2012 he was in a relationship with Ms. R. and he is the father of one of her daughters and now has custody of her. Over the years he and Ms. R. have been involved in family law disputes. He described their current relationship as "extremely negative" and said that he was reluctant to testify because, "if I do this, I'll be next on her hit list …I fear her, you never know what she'll say or do."

[64] Mr. S. described Mr. A. as an "acquaintance." He said that they met over ten years ago at a skateboard park. He said that he last saw Mr. A. a couple of years ago. On cross-examination he acknowledged talking to Mr. A. on Facebook messenger. He added that they spoke on the phone "at least a year ago …we talked about some of these allegations."

[65] Mr. S. said that Ms. R. told him that "[redacted] raped me at his house." He added, "she went on about how much she hates him." Mr. S. said that Ms. R. asked him to drop her off outside of Mr. A.'s residence as "she told me every year she does this on the one-year anniversary of the rape." He added that Ms. R. told him that Mr. A. had raped her twice. Mr. S. recalled that in the fall of 2012 while on the back of his motorcycle when they were by Point Pleasant Park, "she started panicking." When he parked, Ms. R. told him that Mr. A. had raped her at the park.

[66] Mr. S. recalled that Ms. R. used to draw pictures of [redacted] and write poems about him. He said that she had a cat she named [redacted] which "she named after he raped her." Mr. S. stated that in 2012 Ms. R. often asked him to drive her to [redacted]. They would eat lunch there and Mr. S. watched Ms. R. observe Mr. A. at a distance in the section where Ms. M. worked. He said that upon seeing Mr. A. she "would act scared …she let on like he was following her."

[67] Mr. S. said that Ms. R. told him that Ms. M. lived with Mr. A. She described Ms. M. as "her twin sister, they were switched at birth."

**POSITION OF THE PARTIES**

**Defence**

[68] The Defence argues that when one considers the evidence of Ms. R., Ms. M. and Mr. S. that it becomes obvious that Ms. R. is inconsistent and unreliable. Furthermore, Mr. A. points to exhibit 1 and the apartment layout as described by Mr. A. and Ms. R. Given this, the Defence says that it is "highly impractical" that the sexual assaults could have occurred. The Defence submits that Ms. R. was preoccupied with Mr. A. They argue that she must have felt slighted by his rejection beginning with the time when he put her on the bus near Point Pleasant Park.

[69] With reference to the first rung of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, the Defence argues that given the totality of the evidence that Mr. A. should be believed. Mr. A. submits that his blanket denial is entirely credible as contrasted with the evidence of Ms. R.

**Crown**

[70] The Crown submits that it has led evidence on the essential elements of the two-count Indictment. Given all of the evidence, the Crown argues that Ms. R. gave internally consistent evidence. They add that the Court should be aware of the fact that there was indeed a Moosehead home hockey game on February 17, 2010; i.e., the time when Ms. R. says Mr. A. walked her to the Metro Centre after the first sexual assault.

[71] The Crown cites *Criminal Code* s. 274 noting that corroboration is not required for the Court to convict. They add that given the historic nature of the assaults that Ms. R. provided credible and reliable evidence.

## CREDIBILITY AND RELIABILITY

[72] Given the evidence and arguments of the parties, it is apparent that credibility and reliability are key in determining the outcome in this case. Recently, Justice Bodurtha had cause to extensively review these concepts in the context of criminal charges in *R. v. Kennedy*, 2024 NSSC 155. At paras. 60 – 68, Justice Bodurtha set out a very helpful roadmap which I reference and endorse.

[73] I also refer to Justice Derrick's summary referrable to credibility in *R. v. Stanton*, 2021 NSCA 57 at para. 67, as follows:

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

- The focus in appellate review "must always be on whether there is reversible error in the trial judge's credibility findings". Error can be framed as "insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict" (R. v. G.F., 2021 SCC 20, para. 100).
- Where the Crown's case is wholly dependent on the testimony of the complainant it is essential the credibility and reliability of the complainant's evidence be tested in the context of all the rest of the evidence (R. v. R.W.B., [1993] B.C.J. No. 758, para. 28 (C.A.).
- Assessments of credibility are questions of fact requiring an appellate court to re-examine and to some extent reweigh and consider the effects of the evidence. An appellate court cannot interfere with an assessment of credibility unless it is established that it cannot be supported on any reasonable review of the evidence (R. v. Delmas, 2020 ABCA 152, para. 5; upheld 2020 SCC 39).
- "Credibility findings are the province of the trial judge and attract significant deference on appeal" (G.F., para. 99). Appellate intervention will be rare (R. v. Dinardo, 2008 SCC 24, para. 26).
- Credibility is a factual determination. A trial judge's findings on credibility are entitled to deference unless palpable and overriding error can be shown (R. v. Gagnon, 2006 SCC 17, paras. 10-11).
- Once the complainant asserts that she did not consent to the sexual activity, the question becomes one of credibility. In assessing whether the complainant consented, a trial judge "must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant ..." (R. v. Ewanchuk, [1999] 1 S.C.R. 330, para. 61).
- "Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events ..." (Gagnon, para. 20).
- The exercise of articulating the reasons "for believing a witness and disbelieving another in general or on a particular point ... may not be purely intellectual and may involve factors that are difficult to verbalize ... In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization" (R. v. R.E.M., 2008 SCC 51, para. 49).
- A trial judge does not need to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence (R.E.M., at para. 56).
- "A trial judge is not required to comment specifically on every inconsistency during his or her analysis". It is enough for the trial judge to consider the inconsistencies and determine if they "affected reliability in

any substantial way" (R. v. Kishayinew, 2019 SKCA 127, at para. 76, Tholl, J.A. in dissent; upheld 2020 SCC 34, para. 1).

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

**ANALYSIS AND DISPOSITION**

[74] In analyzing credibility, I refer to *W.(D).*, and consider credibility with this guiding case in mind. Firstly, if I believe the evidence of Mr. A., I must acquit. Secondly, if I do not believe the evidence of Mr. A., but I am left in reasonable doubt by it, I must acquit. Thirdly, even if I am not left in doubt by the evidence of Mr. A., I must ask myself, whether on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of Mr. A. If I am not convinced, I must acquit.

[75] On balance, although I cannot say that I believe all of Mr. A.'s evidence, I believe most of it. I found him to be largely reliable and credible. He gave his evidence in a forthright manner and was not seriously challenged on cross-examination.

[76] In determining whether or not Mr. A. is guilty of the offences I have considered all of the evidence together and not assessed individual items of evidence in isolation. In this case the Crown is largely dependant on the testimony of Ms. R. Accordingly, I have tested the reliability and credibility of her evidence as well as the evidence of the accused, the other witnesses and exhibit one.

[77] Having regard to all of the evidence, I found that Ms. R.'s testimony was not credible or reliable in several areas. By way of examples, I refer to the below excerpts of evidence where other witnesses backed up Mr. A.'s testimony and at the same time, exposed Ms. R.'s as lacking:

- Mr. A. recalled that during one of the first times that he and Ms. R. met, that in addition to Ms. M., another of Ms. R.'s friends was present. His evidence was consistent with Ms. M.'s, whereas Ms. R. denied that another one of her friends was present.

- Mr. A. said that he and Ms. R. had met at the Commons. Ms. R. denied that she attended any shows there, whereas Ms. M. thought that Ms. R. probably went to shows there.

- Ms. R. provided detailed evidence about being sexually assaulted by Mr. A. in his apartment bedroom. Her father said that she told him that she had been sexually assaulted by Mr. A. in a bathroom.

- Mr. S. testified that Ms. R. told him that Mr. A. had sexually assaulted her at Point Pleasant Park. Ms. R. denied ever telling him this.

[78] I would add that I found exhibit one to be an informed sketch of the apartment in question at the material time. I specifically accept Mr. A.'s recounting of the layout. Given Mr. A.'s size and the physical layout of the bedroom – inclusive of the furniture and sloped wall – I accept that it would have been very difficult, if not impossible for Mr. A. to have sexually assaulted Ms. R. in the manner that she described.

[79] In any case on all of the evidence, I have determined that the Crown has failed to meet its burden as it has not proven beyond a reasonable doubt the allegations in the two-count Indictment.

[80] Having considered all of the evidence, I must conclude that I have a reasonable doubt as to whether the sexual assaults occurred. Indeed, whereas I found much of Mr. A.'s testimony to be credible and reliable, I cannot say the same for the complainant. In the result, I find B.J.A. not guilty of the charged offences.

Chipman, J.