SUPREME COURT OF YUKON

Citation: *R.* v. *Hockley*, 2009 YKSC 62

Date: 20091007
S.C. No. 09-01500
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

DOUGLAS NORMAN HOCKLEY

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486.4(2) of the *Criminal Code.*

Before: Mr. Justice R.S. Veale

Appearances:

Eric Marcoux — Counsel for the Crown
André Roothman — Counsel for the accused

REASONS FOR JUDGMENT

INTRODUCTION

[1] Douglas Norman Hockley is charged with committing a sexual assault on the complainant on September 30, 2007, causing bodily harm contrary to s. 272(1)(c) of the *Criminal Code*. The complainant testified by way of closed-circuit television from a neighbouring courtroom pursuant to s. 486.2(2) of the *Criminal Code*. Pursuant to s. 486.4(2), an order was made directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way.

THE EVIDENCE

The Complainant in Direct Examination

[2] The complainant is a childcare worker and resides in the Riverdale subdivision of Whitehorse. She testified that on the evening of September 29, 2007, her spouse and his boss came home at seven o'clock. They were drinking a couple of beers when another friend and his daughter arrived from Carcross and joined them. The adults continued drinking beer and ate hamburgers for supper. She was not precise about times but stated that between 8:30 and 9 p.m. she, her spouse and his boss, drove downtown to purchase more beer at an off sales outlet. They purchased a 15-pack of beer and after stopping along the Yukon River, they returned home and continued drinking beer. They finished the 15-pack of beer and the friend and his daughter left. The complainant, her spouse and his boss decided they wanted more beer but because no one was in a condition to drive, she volunteered to walk downtown and purchase more beer. She estimated that she left her residence between 11 and 11:30 p.m. She stated that the temperature was -5°C. On her way downtown, she decided to stop at her girlfriend's residence on Nisutlin Drive to pick up a backpack containing games that had been left for her at her girlfriend’s front door. She had been somewhat emotional about her girlfriend leaving town permanently that day. She picked up a black and blue backpack containing games that the two families had enjoyed together. She put the backpack on and continued on her way downtown along Lewes Blvd. on the right-hand side of the road. She passed the traffic lights at the intersection of Lewes Blvd. and Alsek Rd. and at some point, across the street from Selkirk elementary school, she decided to return home. She is not precisely sure why she made that decision but it could have been because she concluded that the off sales outlets were closed.

[3] In any event, she walked back to the intersection, turned left on Alsek Rd., and walked a short distance to a trail between some houses. She stated that she was somewhat tearful because of the departure of her girlfriend. As she proceeded down the trail, she met a male person who asked if there was something the matter and she replied that she was fine but just upset over the departure of her girlfriend. The male person asked if she wanted a cigarette and she said she had one of her own. The male person asked if she wanted to smoke crack cocaine and she said that she did not want to as she was on a beer buzz and was feeling good. On a scale of one to ten, with ten being very intoxicated, she described herself as in a four or five condition. She stated that she drank about eight beers that evening but that she is capable of drinking 15. She advised the court that she has used crack and powder cocaine in the past on a moderate basis with friends. The male person proceeded to smoke a rock of crack cocaine using a beer can. She did not remember carrying a beer can or drinking one but it was a possibility.

[4] She described the male person as being white with sandy blonde or light hair colour. She described him as approximately 3 inches taller than her wearing a cap with the visor backwards. She could see his face in the moonlight and she had never seen him before. He did not say his name.

[5] She testified that she turned to leave and proceed down the trail towards home when she was pushed flat to the ground with her legs out and the male person on top of her. Her whole body and face were touching the ground. She was screaming and he was hitting the left side of her face with his fist five to eight times. He pulled her pants down below her knees and, using the words she used in court, “penetrated in my behind” with his penis. She said that she did not have any underwear on and he did not

wear a condom. She felt like he penetrated her for a long time but she was not positive about this and indicated it may have been a minute or two. She stated that she tried to use her hands to fight but was unable to because he was heavier and she is quite small. She did not know if he ejaculated but stated that he stopped and continued on the trail towards downtown.

[6] She states that she got up, pulled her pants up, and was still screaming at him. She walked towards the houses on Alsek Rd. and went to the first house on her left but no one was home. She then went to the house on the right and a lady answered the door. She described herself as pretty frantic and freaked out and could not remember if she rang the bell or knocked on the door. She thinks she told the woman, who was older than her, that she had been raped on the trail and that the woman called the police. She thinks the lady was talking to her. The police came and she was taken to the police station and hospital but she does not remember which was first. She remembers doing the rape test at the hospital and swabs being taken from her mouth, vagina and behind. She described herself as being in an emotional state at the hospital but telling the doctor what had happened and staying to the end of the examination when she was picked up by her grandfather.

[7] She identified photographs taken to show her injuries. She had facial bruising on her left cheek which included a cut on the inside of her mouth from being punched. She stated that the cut and lump on her cheek lasted quite a while. Both knees were badly bruised and scratched. Her anus was very sore. The blue coat that she had worn that evening was a little dirty to begin with as she used it for four wheeling. However, she described it as being in a dirtier condition with some dried blood spots. The black nylon track pants that she had worn had dirt on the knees. She was shown photographs of the

area and identified the trail and the house she went to afterwards. She did not know the lady who helped her that evening but she was grateful for her assistance and dropped flowers off at her house the next day. She did not recognize any of the items found at the scene including the beer can that was used to smoke crack cocaine. However, she could identify the can as one which could be used to smoke crack cocaine.

[8] In her statement to the police, she made reference to two men being involved in the rape incident. In court, she stated that she was still in an emotional state at the time of the statement and that it seemed like two people at the time. She testified that there was only one person involved in the incident.

The Complainant in Cross-examination

[9] In cross-examination, the complainant could not remember when she had her first drink that day. She stated that she either had one in the afternoon or that she started to drink when her spouse returned home at 7 p.m. She stated that she drank 8 beers that day, four beers before they left the house and four beers after they returned with the 15-pack. She confirmed that she left home between 11 and 11:30 p.m. to purchase more beer from an off sales outlet. She stated that it would take 20 minutes to one-half hour to walk to the off sales outlet.

[10] She confirmed that she did not meet the accused on Lewes Blvd. but on the trail off Alsek Rd. She stated that the trail was open and straight for quite a distance and that she encountered the accused 20 to 30 feet into the trail and she did not see him before that because of a hill towards the middle of the trail. She marked the hill on an aerial photograph (Exhibit 8) to the south of the incident on the trail. She stated that he did not introduce himself. She did not remember saying that she and the accused introduced themselves in her statement to the police. She remembered stating to the police that

there were two persons involved. She said that was not correct and that it just felt like two persons holding her down. She agreed that she was wrong in stating to the police that there were two persons involved. When asked if her observations were not very clear, she answered “no they are pretty fucking clear.”

[11] She confirmed that she went to a house on Alsek Rd. immediately after the incident where an older lady helped her. She stated that she walked to the house immediately after the incident and did not crawl. She did not remember anyone else at the house. When she was challenged that her memory was not that good, she disagreed and stated “Oh, no. I know what happened to me”. She said she remembered the most important parts.

[12] With respect to the time of the departure of her friend from Carcross, she did not recall giving a different time in her police statement and at the preliminary hearing. When defence counsel suggested that this was an indication that her memory was not that good, she replied that her memory of the incident was good but not of the times involved. She did not remember telling the police that her Carcross friend departed at about 10:30 and then saying at the preliminary inquiry that the friend left at 8:30. She stated that she does not keep track of time and she was guestimating. She said she was out to have fun that evening. She was able to describe her close friend who had left that day, her name and the names of her children as well as the games they played together.

[13] She stated that the entire incident took place on the trail. The accused asked her if she wanted a smoke and she replied that she had her own and that she smoked a cigarette before she was thrown to the ground. She denied her statement to the police that she had only taken two drags of a cigarette before finding her face in the dirt. She

described the accused as being three to four inches taller than she was, 20 to 25 years old with sandy blonde hair and a black cap. She denied the suggestion that the accused was wearing a white cap. She said he was wearing jeans.

[14] She acknowledged that in her statement to the police she described another unknown male as a dark figure in black clothes and that both the males raped her. She repeated in court that there was only one person involved in the assault and that she could see his face clearly in the moonlight and would remember him if shown a photograph a day or two later. She acknowledged that she did not recognize his photograph in a police photo line-up two months later as she had blocked him out and did not want to think about it anymore. When shown a photograph of the accused, she denied that she had ever seen the person before and that she had ever smoked crack cocaine with him. With respect to the sexual act performed on her, she stated that her whole body was flat on the ground and that she was not in the doggy-style position. She could not explain the red marks on her elbows, as they were not sore. She stated that there were no scratches on her pelvic area despite the fact that she was naked from the waist down to below her knees. She described being pinned down on the ground in both the shoulder and pelvic area with quite a lot of struggling on her part. She stated that when he finished he walked down the trail towards town, she pulled her pants up and got herself together. She did not see him pull his pants up nor did she touch him after he got up. She did try to hit him while she was pinned on the ground but does not know if she made contact. She denied being involved in a fight after the assault. Although in her statement to the police she indicated running after the accused, she stated that this was incorrect and she did not run after him. She denied that the accused offered crack cocaine in exchange for sex.

[15] When asked whether she was drinking at the scene, she stated that she did not remember drinking beer or whiskey from a Wiser's bottle. She denied smoking crack cocaine at the scene. When advised that her DNA had been found on a beer can at the scene, she speculated that she may have had a beer in her pocket from home which she could have been drinking. She denied that she smoked crack cocaine that evening. In her statement to the police, she stated that the accused asked her if she had money as he was going to buy drugs. In the statement, she denied that she had money and said that she was going to a friend's house. In court, she indicated that she was not going to tell the accused that she had money and she denied that she asked for drugs.

[16] She was cross-examined on the reason that she turned around and came back to the trail on Alsek Rd. She answered that she did not know the reason but, it could have been that it was too late, she wished to return the backpack to her home or she was simply too lazy to walk anymore. She denied it was because she saw a male person and began to chat with him. She was adamant that she did not walk on the other side of Lewes Blvd. near the Selkirk school.

[17] Defence counsel suggested to her that, in contrast to her mental state immediately after the incident, she was not in a frantic state at the time of the preliminary hearing in 2009 and that her version of events at the preliminary hearing was true in all respects. She agreed. She also agreed that she had used crack cocaine for approximately 20 years but was not using it now. She acknowledged that crack cocaine can make you paranoid and hallucinate.

[18] Defence counsel asked again if she smoked crack from the beer can found at the scene. She stated that she did not remember handling it but that she could have had a sip out of it. She does not remember if there was beer in her backpack. She does not

remember whether her face was flat on the ground or sideways on the ground during the incident. She remembers being hit on the cheek while she was face down on the ground and that she was not punched in the face after the sexual incident. Defence counsel asked the complainant a series of questions setting out the defence version of the events. She denied everything in that version of events including the suggestion that after the sex, the accused offered her a drink of whiskey and smoked some more crack cocaine. She understood the crack cocaine terminology such as a 20 or 40 piece, a rock, or an eight ball, but she denied that there was any discussion of sex for drugs that night or that she agreed to anal sex stating that she would not do that with her spouse. She stated that the encounter took 10 to 15 minutes in order to smoke her cigarette. She denied that she was asked by the accused if she had a sexually transmitted disease. She denied that she consented to anal sex and pulled down her pants and got on her knees. She denied having a disagreement after the anal sex and asking the accused for more crack cocaine and threatening to have her husband beat him up. She denied that the accused punched her in the face on her left eye after their disagreement. She stated that he penetrated her anus and that it hurt. She did not recall whether he penetrated or attempted to penetrate her vagina. She did not recall telling a doctor about an attempt to penetrate her vagina. She stated that she remained at the hospital for the examination and denied that she rushed away. She stated that she left when her grandfather arrived with clothing for her. She thought that the examination at the hospital was finished. She did not remember telling a doctor that there were two people involved, although there was no affirmative evidence to that effect. She did not remember telling the doctor that she had hit and scratched the person who assaulted

her. When it was suggested to her that the assault took place in a timeframe of 30 minutes, she said she had no idea but it could have been one minute or 10 minutes.

Evidence of [the witness]

[19] [The witness] is a retired woman who was babysitting her friend's two children, a seven-year-old boy and a 12-year-old boy. She testified that she was reading a book when she heard the family dog start to bark. The 12-year-old boy said that there was a person in the driveway. [The witness] went down a set of stairs to the front door of the house and looked out the window. She saw a woman lying flat on the ground at the top of the stairs leading to the front door. She opened the door and helped the complainant into the house where [the witness] could sit on the stairs while she held the woman in her arms. The woman could not stand on her own. She was crying and repeating over and over again "I've been bumfucked". [The witness] testified that she could not imagine anyone in that state. The 12-year-old boy was nearby and [the witness] asked the complainant to stop crying but she could not. The boy called the police and handed the telephone to [the witness] who spoke to the police and they came within five minutes. [The witness] described the complainant as being in shock. She could only see part of the complainant's face. The complainant had blood around her mouth and ears and her mouth was smeared with dirt or feces, [the witness] was not sure which. She described the complainant as a tiny person. [The witness] hugged the complainant to her chest and the complainant's knees were bent towards her. [The witness] does not remember her conversation with police but she does remember that she was crying herself because she felt so badly for the complainant. [The witness] is a retired nursing counsellor and was surprised that she could not hold herself together in the circumstances. [The witness] indicated that she did not have a sense of smell and did

not detect an odour of alcohol coming from the young woman. In her statement to the police, [the witness] recalls stating that the young woman appeared to be on drugs. In her evidence at trial, she felt this was being judgmental as the young woman could have been in shock. She said that the woman came to the door with a friend the next day and gave her flowers. [The witness] was sure that this event occurred at 8 p.m. on the evening of September 29, 2007. Defence counsel advised her that the police received the phone call at 4:23 a.m. on September 30, 2007 and went to her residence at 4:32 a.m. [The witness] insisted that it occurred at 8 p.m.

Evidence of Corporal Giczi

[20] Corporal Giczi, the RCMP forensic specialist, arrived at the scene at 5:30 a.m. He took 28 photographs of the scene and identified a beer can that might have been used to smoke crack cocaine, a lighter, a blue duo tang folder, folded black jeans and a shirt, a brown book bag and another duo tang folder. He defined the trail as going slightly downwards to the scene. He was unable to take any foot impressions as the ground in the trail was hard packed and there were no tread marks. He used a crime light to determine if there were any bodily fluids that would light up. He was unable to find any. With respect to the beer can, Corporal Giczi took swabs from the rim and the hole in the mouth area that one would normally drink from.

The Medical Examination Record

[21] The medical examination was conducted by a doctor at approximately 6:43 a.m. on September 30, 2007. The doctor did not testify as the complete medical records were filed in court. The history section of the report on whether the patient injured the assailant had the entry “? punched him in the face” followed by “she hit and scratched assailant”. The box for attempted vagina penetration was checked off with a question

mark after the box entitled “successful”. The examination of the genital and anal areas indicated that a number of swabs were taken including an anal swab and a rectal swab. The emotional state of the victim was described as “mildly intoxicated” and “alternating tearful, calm, agitated, nervous - laughing at end of exam, tearful”. The section on additional details of assault contained the following:

- He pushed me down and fucked my bum.
- My bum hurts.
- I feel violated.
- He took a few rounds at my face.
- My mouth is cut up.
- Uttered remarks about pain during rectal exam**.**

[22] The General Examination Notes indicated the location of abrasions, redness, bruises, blood smear, scratches, lacerations and dirt on diagrams of a face and body. The diagrams recorded abrasions on both knees, a redness bruise on top of the right foot, an abrasion on the left shin, blood smear and tender scratch on the right thigh, scratch on backside of right leg or knee, tender red bruising under both eyes, laceration of the inner and outer left lip and thick dirt rim around the mouth and on mouth. Dried blood was found under the fingernails of the thumb and third finger of her right hand. A blood sample for a DNA typing was not taken for the stated reason that the patient was eager to leave. Under the heading genital and anal area notes, the report stated “tender anal sphincter. Loose dirt all around anal skin”. The diagram of the anus indicated “tender ++”.

AGREED STATEMENTS OF FACTS

[23] The first Agreed statement of facts stated the following:

1. A photo-line up containing 11 photographs of young men was presented to the complainant on November 5, 2007 by Cpl. Harrison of the Whitehorse RCMP. One of those pictures was of Douglas Norman Hockley.
2. The pictures of the complainant's injuries filed as Exhibit 2 were taken by Cst. Kaytor of the Whitehorse RCMP on September 30, 2007 around 18h00.
3. The composite photo filed as Exhibit 1 was drafted by Cpl. Blackjack of the RCMP on October 2, 2007.
4. Following a 911 call received by the detachment on September 30, 2007 for a sexual assault Cst. MacDougall of the Whitehorse RCMP arrived at the Alsek Rd. residence, Whitehorse at 4h32 where he encountered the complainant and [the witness]. He was informed by the complainant that the sole suspect was Caucasian, early 20's, dressed in black, with blond hair and wearing a black toque.
5. Douglas Norman Hockley was arrested on October 23, 2007 on an unrelated matter by RCMP officer and his hair was described as being brown.
6. The complainant learned that she had hepatitis C in June of 2008.

[24] The second Agreed statement of facts stated the following:

1. Shawna Peace is a forensic specialist from the biology section of the RCMP.
2. She examined different items sent to her by Cst. MacDougall from the sexual assault examination kit performed on the complainant by Dr. A. Williams early in the morning of September 30, 2007.
3. She found the same two male DNA profiles in two different samples from the sexual assault examination kit performed on the complainant, namely an anal swab and a rectal swab.

4. She also examined a blood sample sent to her by Cpl. Gale who had executed a warrant authorizing the taking of bodily substances from Douglas Norman Hockley for forensic DNA analysis.
5. She concluded that the DNA typing profile obtained from the anal swab is of mixed origin consistent with having originated from two individuals, one male and one female.
    a) The profile of the male component matches that of the blood sample from Douglas Norman Hockley. The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile is 1 in 2.2 trillion (at 9 genetic regions).
    b) The profile of the female component matches that of the complainant.
6. She concluded that the DNA typing profile obtained from the rectal swab is of mixed origin consistent with having originated from two individuals, one male and one female.
    a) The profile of the male component matches that of the blood sample from Douglas Norman Hockley. The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile is 1 in 2.2 trillion (at 9 genetic regions).
    b) The profile of the female component matches that of the complainant.
7. Shawna Peace also examined a vaginal swab originating from the sexual assault examination kit and found that the DNA typing profile from that sample is of mixed origin consistent with having originated from three individuals, at least one of which is male and at least one of which is female.

a) The profile of the blood sample from Douglas Norman Hockley cannot be excluded as a possible contributor to the male component.

b) The profile of the female component matches that of the complainant.

8. Shawna Peace also examined a swab taken from a Canadian beer can (mouth area) located at the scene by Cpl. Giczi on September 30, 2007 and obtained a DNA typing profile of mixed origin consistent with having originated from two individuals, one male and one female.

a) The profile of the major component matches that of the complainant.

b) The profile of the blood sample from Douglas Norman Hockley cannot be excluded as a possible contributor to the profile of the minor component. The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile is 1 in 29 thousand (at 3 genetic regions).

Douglas Hockley in Direct Examination

[25] Mr. Hockley is a 25-year-old man who lived most of his life in Whitehorse. When he was 19 years old, he went to Ottawa and did not return to Whitehorse until August or September 2007.

[26] In the evening of September 29, 2007, Mr. Hockley states that he was at Fifth and Jarvis Street in downtown Whitehorse. He stated that he was going to visit a friend's house and he walked to Riverdale on the FH Collins and the Selkirk Elementary side of Lewes Blvd. He was wearing a black leather jacket and a white baseball cap. When asked approximately what time it was, he stated “I would say that would be 11 o’clock”. He testified that he was standing at the corner of Lewes Blvd. and Alsek Road near Selkirk Elementary school. Looking kitty corner and up Alsek Road he saw a

woman yelling and screaming at the door of the residence at […] Alsek Rd. He stated that when the woman saw him she walked kitty corner across the intersection to him and asked for a cigarette. He stated that she was wearing dark pants and a hoody. He gave her a cigarette and as he was looking for fun, he asked her if she wanted a drink. He stated that they went into the woods beside Selkirk and walked, talked and drank for 20 to 30 minutes. Prior to meeting her he had been drinking from a mickey of Wiser's and smoking a Peter Jackson cigarette. Mr. Hockley stated that he asked her if she smoked “hard food” which is a drug terminology for cooked cocaine or crack cocaine. She said she did and asked if he knew where to get some and would buy some. He testified that he indicated to her that he had several grams on him which he used as a tool “to get in her pants”. He stated that he asked her if she would take a 20 to 40 piece of cocaine in exchange for oral sex. He stated that she refused and he upped the offer to an eight ball “if I could fuck her ass”. He stated that she agreed to it and asked him if he wanted to go somewhere that suited her better. He stated that they walked across the intersection to an alley beside the house at […] Alsek Rd. He said that he thought it was a driveway. He testified that he dropped his backpack and they sat on the grass. He stated that he took a beer can from his backpack and made a can pipe for her to smoke some crack cocaine. As he did not have a condom, he asked her if she was clean meaning that she had no sexually transmitted diseases. She said she did not. He said that she had a toke and they were ready to have sex and she dropped her pants and went down on her knees doggy-style. He stated that he had anal sex with her for 10 to 15 minutes. At no time did she have pain or say stop.

[27] Mr. Hockley stated that after he finished, he smoked crack cocaine from a glass pipe he had been using. The woman got up off her knees and he offered her a drink. He

stated that she asked for more crack cocaine as she had not received a full eight ball from him. He stated that she became very aggressive and belligerent and threatened to get her husband. She began screaming and said that she had AIDS. He stated that he lost his temper and hit her with a closed right hand on her right cheek knocking her to the ground. He threw his bottle of Wiser's against a fence, grabbed his backpack and casually walked away. As his friend in Riverdale did not smoke drugs, he decided he wanted to smoke and headed back to the residence at Jarvis St. and Fifth.

[28] Mr. Hockley stated that he was pretty good with time and that the whole event with the complainant took 45 minutes, give or take 10 minutes. He stated that there was no other person involved.

Douglas Hockley on Cross-Examination

[29] Mr. Hockley described the house at Fifth and Jarvis St. as a crack house where he associated with other people using and distributing crack cocaine. He said it was hard to say when he arrived at the crack house and spent several hours there. He said that he was there more than six hours before he left to Riverdale. He said he consumed possibly a 40 or 60 piece of crack and two to three shots of whiskey. He confirmed that he brought 11 to 14 grams of crack cocaine with him from Ottawa. He also brought speed, ecstasy, ketamine and acid from Ottawa. He stated that he could afford to purchase these drugs as he had been trafficking drugs for five years in addition to working in waste management. He stated that when he left the crack house he had 11 to 14 grams of crack cocaine, a mickey of Wiser's and 26 ounces of Crown Royal. He said that he was drinking the Wiser's as he walked to Riverdale and had 2 - 3 shots. He also stated that he had a can of Canadian beer which may have been there from a

fishing or hiking trip. He also had a glass crack pipe and a package of Peter Jackson cigarettes.

[30] He identified the house that he first saw the complainant at but he did not know what she was doing although he could hear her screaming and banging. He said that his friend in Riverdale was not expecting him and he was looking for a good time either drinking or at a bush party. He claimed that he had seen the complainant before at the crack house but he did not know her name. He said that they introduced themselves that evening and he stated her name in court. They drank about three maybe four shots each on the trail beside the Selkirk Elementary school where they talked for 20 to 30 minutes. He said that when he offered drugs for sex, he had already told her that he had 12 to 14 grams of crack cocaine. He stated that he did not notice her backpack until they reached the trail at Alsek Road. He stated that she picked a spot on the trail. He stated that he did not share his glass crack pipe with her because he tends to use his own material. He described in detail how he prepared the beer can pipe for her. He stated that they smoked two 10-piece rocks before having sex. He did not drink from the mickey of Wiser's as it was almost finished but she had a shot. He stated that she was wearing underpants and pulled her pants down to her knees, leaving her knees covered. She did not ask for lubrication.

[31] He described himself as 5'10" in height weighing170 pounds and being very athletic. He described the complainant as being small. He stated that he “hit her good” with a closed fist and she fell on her back. He did not think that he knocked her out. She was moving in a way that she had just got hit from a hard blow to the head. He said she did not blackout but looked dazed from the hard blow to her head. After he walked back to the crack house, he said that he sat on the couch and smoked crack cocaine and

drank. When asked about his state of intoxication during the incident, he stated that he was not drunk as he smoked crack and drank alcohol which puts you at a level where you can be quite normal or “levelled out”.

[32] When cross-examined on the timing of his departure from the crack house, he said that 11 p.m. was a guesstimate and it was possible that it could have been 2 a.m. but he remembers that it was 11 p.m. He did not have a watch on. When asked how he knew it was not 12, one or two, he said “I don’t know”. Mr. Hockley said that maybe the complainant had the time and that is how he knew but he admitted that was only an assumption. When the Crown attorney stated that he wanted the truth and suggested either Mr. Hockley knew the time or he did not know the time, Mr. Hockley said “I don’t know, Your Honour”. Mr. Hockley then agreed it could have been two o’clock or three o’clock.

[33] When questioned why the sexual act took place on the trail, as opposed to the more secluded wooded area they were in, he said it was her idea to leave the wooded area. When asked why he had no condoms, he said that if he had thought about sex he would have had condoms but they were not part of “the party pack”.

[34] When asked whether he possessed a dark ball cap, he stated that he did not. He denied that he had been arrested with a black ball cap. But when shown a photograph of a dark ball cap he was wearing at the time of his arrest, he acknowledged that he was possibly wearing a dark ball cap. He also acknowledged that he had a black coat with a hoody. But he stated that it was a warm night and he was wearing his leather jacket. He described the temperature as being between -5° and plus 5°.

[35] He admitted his criminal record, all of which occurred in Ottawa, except for an offence in Edmonton. In July 2004, he was convicted of possession of stolen property

over $5,000 and a failure to comply with the conditions of his undertaking. In March 2005, he was convicted of theft under $5,000 and failure to comply with a probation order. In May 2005, he was convicted of mischief under $5,000, causing a disturbance and failing to comply with his recognizance. In January 2006, he was convicted on two counts of theft under $5,000. In October 2006, in Edmonton, Alberta, he was convicted of theft under $5,000 and failure to attend court. In June 2007, in Ottawa, he was convicted of failure to comply with a probation order and theft under $5,000. He agreed that at the time of this incident he was still on probation.

[36] The Crown was permitted to cross-examine Mr. Hockley on a statement given to the police on April 24, 2008. The police advised Mr. Hockley that his DNA was found in the anus of the complainant from an incident on September 30, 2007. He agreed that he told the police that he could not remember anything about the incident. He acknowledged that he lied to the police but said that he was doing so to protect the information that he had. He acknowledged that he knew the difference between saying he did not know something and saying he did not wish to talk about it. The Crown asked Mr. Hockley if he made the following statement to the police:

> I mean, that's what I'll say in court, I don't remember, and I honestly don't. If I did, I would say something. You know I'm not sitting here, hiding here, behind the puppet.

[37] Mr. Hockley admitted that he said it and that it was not the truth. With respect to the same incident, the Crown asked Mr. Hockley if he made this statement to the police:

> I've been here in jail for almost six months now. ... and I tried to think, to think about what happened. I can't get anywhere, you know. I don't know what -- what would happen, what I was doing, but I can't, I don't have the answers and for some, ah, I'll leave it at that. I just don't.

[38] Mr. Hockley answered that he was scared to talk and that he was lying to the police then. Mr. Hockley also stated that he did not remember being on the Riverdale trail and pushing someone to the ground in his statement to the police. In court, he could not exactly remember saying that but said that he did mistake Riverdale for a different part of the community because “I didn't know Riverdale was Riverdale at the time”. The Crown suggested that he had lived in Whitehorse all his life and he explained that he had been in Ottawa for several years and repeated in court that “I had no clue what Riverdale was”. He thought that Riverdale was called Vanier which is a school in Riverdale. He said that in his mind he was up in the airport not down in Riverdale. He agreed that his misunderstanding did not make any sense.

[39] The Crown was permitted to cross-examine Mr. Hockley with respect to statements he made to Dr. Lohrasbe, a forensic psychiatrist, who examined Mr. Hockley at Mr. Hockley’s request on May 28 and 29, 2008. Mr. Hockley stated that he vaguely remembered talking to Dr. Lohrasbe and being warned that he did not have to say anything. The Crown asked Mr. Hockley if he told Dr. Lohrasbe that he had a memory of the incident and the victim on September30, 2007 of consensual sex. It was put to Mr. Hockley that he stated to Dr. Lohrasbe:

> I can’t see her. It was thrown at me like a flashback, not really a memory.

[40] Mr. Hockley remembers saying this but by flashback he meant that he did not want to tell the doctor the whole story.

[41] The Crown asked whether he told Dr. Lohrasbe that: “I don’t really have a memory and I would not lie about things.”

[42] Mr. Hockley remembered saying that and admitted that he was lying to Dr. Lohrasbe again.

[43] Mr. Hockley agreed that when Dr. Lohrasbe asked for more detail, he said there was nothing more to report. The Crown asked Mr. Hockley if he said the following to Dr. Lohrasbe:

> I'm in a lose-lose situation for me. I could have said I don't recall any of it, but I'm not here to lie. Not to lie, but to get the truth. I cannot lie anymore… I can't explain why they say I raped anybody and why they say my DNA's in people.

[44] Mr. Hockley admitted that he remembered the question and he replied in court that the statement related to something else.

[45] When the Crown concluded his cross-examination, Mr. Hockley's lawyer was permitted to talk to Mr. Hockley privately. The Crown consented to Mr. Hockley returning to the stand. Mr. Hockley gave further testimony on how he knew the time when he crossed the bridge on entering Riverdale. Mr. Hockley stated that when he crossed the bridge into Riverdale, his hat flew off and when he scooped it up he opened his cell phone and saw the time. He stated that his cell phone was not in service but he used it for keeping phone numbers that he could access.

[46] The Crown cross-examined Mr. Hockley about his earlier evidence that he did not know the time. Mr. Hockley answered:

> Q You provided the Court with an answer, and you didn't know then, so was that the truth?
> A No
> Q So, what happened? What happened during the break? You're thinking about it –
> A Well, I was – I was flabbergasted by the question when I went down for lunch, and as I sat there, I knew that I knew the time. I mean, her statement says the same and so does mine.
> Q Okay, what – what – I'm –

A And I knew – I knew the time was around 11 o'clock. It was no later than 11:30, and that is how I knew the time. I had the phone on me; otherwise I wouldn't – I would have said it was –
Q Well, why didn't you just say that when I asked you the question the first time?
A I did not think about it and it was not in my mind at the time.
Q You never mentioned a cell phone.
A I didn't
Q You didn't even try to allude to one.
A I've been in jail for two years.
Q yes, but you told us, you're doing some –
A I don't carry a cell phone on me.
Q --thinking for this. You've been – you've been think – you've been doing some thinking for this file?
A That's true, yeah.
Q That's what you said to the Court.
A That's right.
Q So how could you have missed that?
A I forgot my phone.
Q You mentioned something to – you said that you knew the time because you looked at her statement. Do you mean [the complainant]'s statement?
A Pardon me?
Q You said that you knew the time because you looked at her statement. You just said that.
A My statement that was written down a long time ago.
Q You said "her" statement
A Oh, I did?
Q Yes, you said that.
A My mistake, Your Honour.
Q You didn't mean that?
A I did not mean that.
Q Okay, So which statement were you referring to?
A The statement that I had written on, I think it would be, March 4th. Is that correct?
Q You wrote a statement on March 4th, okay, and what was – a written statement or a – what kind of statement?
A It was – it was a letter.
Q A letter? A letter. And who did you write that letter to?
A I wrote it to my lawyer
Q Your lawyer?
A That's right. André Roothman.
Q On March 4th of which year?
A Of this year.

Q Of this year?
A That's correct
Q 2009?
A That is correct.
Q So almost a year and a half after the events?
A That is correct
Q It came back to you while you – on the lunch break?
A That is what I said, yes. That's correct, Your Honour.

ANALYSIS

[47] Mr. Hockley is charged with sexual assault causing bodily harm contrary to s. 272 (1)(c) of the *Criminal Code*. The submission of Mr. Hockley's counsel is that the anal intercourse performed by Mr. Hockley upon the complainant was a consensual exchange of sex for an eight ball of crack cocaine and that his closed fist punch to her face occurred after the consensual intercourse and it was provoked by the complainant's allegation that she had AIDS. He submitted that on the evidence of both the complainant and Mr. Hockley, the anal intercourse occurred around midnight and had no connection to the trauma exhibited by complainant after 4 a.m. the next morning. He submitted that the trauma of the complainant could be explained by her previous crack cocaine use over 20 years and that evening, which could also affect the complainant's memory. For these reasons, and other inconsistencies in the evidence, defence counsel submits that the Crown has failed to prove its case beyond a reasonable doubt.

[48] Section 272(1)(c) reads:

> Every person commits an offence who, in committing a sexual assault,
>
> ...
>
> (c) causes bodily harm to the complainant; or
>
> ...

[49] In s. 2 of the *Criminal Code*, “bodily harm” means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

[50] This is a case that turns on credibility and the Crown's ultimate burden to prove the guilt of the accused beyond a reasonable doubt. The direction given in *R.* v. *W.(D)*, [1991] 1 S.C.R. 742, is that if I believe the evidence of the accused I must acquit; even if I do not believe the evidence of the accused but I am left in a reasonable doubt by it I must acquit; and even if I am not left in doubt by the evidence of the accused, I must ask whether on the basis of evidence I do believe that the accused person is guilty beyond a reasonable doubt. It is trite law to say that a judge may believe some, none, or all of the testimony of any witness, including that of an accused. But a lack of credibility on the part of the accused does not equate to proof of guilt beyond a reasonable doubt. If I do not know who to believe, I must acquit. As stated in *R*. v. *J.H.S*., [2008] 2 S.C.R. 152, the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt. In this case, that means that the Crown must prove beyond a reasonable doubt that Mr. Hockley intentionally applied force causing bodily harm in circumstances of a sexual nature. There is no doubt about the sexual nature of the circumstances in this case.

[51] Mr. Hockley presented his evidence in a very calm and confident manner. He is undoubtedly a very intelligent young man. His evidence appeared to be seamless in that it provided a complete explanation of his story. But there are many reasons that I cannot accept and do not believe the majority of his evidence. Firstly, his criminal record is not insignificant for a young man. His five theft offences and one offence for possession of stolen property indicate a lack of honesty. Secondly, his statements to the police

indicating that he did not remember the incident of September 30, 2007, in which his DNA was found in the anus of the complainant, suggests either that he had no memory of the incident or that he was lying to the police. Again, this suggests a lack of credibility. And thirdly, his statements to Dr. Lohrasbe in an interview that he requested, suggest that he did not really have a memory of the incident on September 30, 2007. Mr. Hockley admitted that he was lying to Dr. Lohrasbe. I take it from the statements to the police and to Dr. Lohrasbe that Mr. Hockley is prepared to lie when it suits his purposes.

[52] His evidence in court was contradictory on the evidence of the time of the incident. I find his evidence about the time the incident took place incredible. He had no watch. He had been in the crack house by his calculation for six hours, had consumed a 40 or 60 piece of crack cocaine and two or three shots of whiskey. He said that he was standing on the corner of Lewes Blvd. and Alsek Road on the Selkirk elementary school side at 11 p.m. In cross-examination, when questioned about his departure from the crack house, he guesstimated that it was 11 o'clock. When asked how he knew it was not 12, one or two, he stated that he did not know. He agreed that it was possible that it was two o'clock in the morning but he did not think it was that late. He then speculated that maybe the complainant had the time and that is how he knew what the time was. When the Crown attorney said that we want the truth here, either you know or you don't know, Mr. Hockley stated that he didn't know. Then, in a curious turn of events, after his cross-examination was completed, Mr. Hockley was permitted to consult with his lawyer and he returned to the witness box. He had a new explanation for knowing the time based on his cell phone. He had never previously mentioned that he had a cell phone

that evening. His evidence that “her statement says the same and so does mine” suggests fabrication.

[53] The most incredible part about Mr. Hockley's evidence was a statement that he did not know that Riverdale was Riverdale and he thought that Riverdale was called Vanier which is a school in Riverdale. Even he admitted that it did not make sense.

[54] Mr. Hockley was also caught in a flat-out contradiction such as when he said he did not possess a dark ball cap. When shown the photograph of a dark ball cap that he had at the time of his arrest, he was forced to admit that he possessed one. Although there was some reference in the Crown’s cross-examination to a black ball cap, I am satisfied that Mr. Hockley understood that it was in reference to a dark ball cap.

[55] To summarize, on the vital issue of consent, I reject Mr. Hockley's evidence as incredible and unreliable and therefore it does not leave me in a reasonable doubt. I should say that I do not reject all the evidence of Mr. Hockley. He did perform anal intercourse upon the complainant and this was established by the DNA evidence. I also accept that he is a drug trafficker and consumes drugs as well. I also accept that he assaulted her physically.

[56] The burden still remains on the Crown to prove beyond a reasonable doubt that Mr. Hockley sexually assaulted the complainant causing bodily harm. I turn now to the evidence of the complainant. She testified by closed-circuit television. She appeared at times to be a very tough person but broke down once during her evidence. My impression is that she gave her evidence in a very matter-of-fact way showing as little emotion as possible in order that she could complete her evidence. Nevertheless, there were inconsistencies in her evidence relating to the details surrounding the incident.

The question is whether these inconsistencies leave me with a reasonable doubt about the guilt of Mr. Hockley.

[57] I do not accept her evidence about the timing of events that evening. She had consumed eight bottles of beer and although described as moderately intoxicated, her evidence as to time could only be described as speculative. I do not find that she was lying about the time of departing from her house between 11 and 11:30 p.m. but simply that her statements of the time are unreliable because she was “guestimating” and did not keep track of time. She was also inconsistent in describing two assailants in a statement to the police. However, in her evidence in court, she was very clear that there was only one person that attacked her. She explained this inconsistency by saying that it felt like two persons holding her down. She also stated to the police at the house of [the witness] that there was one person and the medical report indicated one person as well. This latter evidence, which I do not use for proof of the truth of the statements, tends to rebut the submission that her evidence is incredible.

[58] Defence counsel made a great deal about her statement that she did not see her assailant at first because of a hill. I am satisfied that the hill that she referred to on the trail was to the south of the incident and was not between her and the accused. Defence counsel also submitted that her injuries were more consistent with the complainant being on her hands and knees in doggy-style rather than held flat on the ground. I do not accept Mr. Hockley's evidence on this point nor do I find the complainant's evidence or the physical evidence of her clothing and her injuries to be inconsistent with her evidence that she was held flat on the ground. There was one major discrepancy in her evidence in that she stated that she did not smoke crack cocaine from the beer can pipe. The DNA evidence indicated that she did come into

contact with the beer can pipe. In response to this evidence, she could only speculate that she might have had the beer can in her possession or drank from it before the incident.

[59] While there are some inconsistencies from the evidence of the complainant about the details of the incident, I do accept her evidence about the actual incident and the events that followed based on other independent evidence. The complainant testified that she was thrown to the ground and anally penetrated and that she was pretty frantic and freaked out. She stated that she was able to walk to the residence on Alsek Rd. The evidence of [the witness], which I find to be a very credible description of the complainant, was that she was not able to stand, was crying and stating “I’ve been bumfucked” and had her mouth smeared with dirt. The description that [the witness] gave of the complainant indicated that the complainant was in very bad shape and completely traumatized by the assault. This event clearly occurred after 4 a.m. as the police records indicate. I do not find [the witness]’s discrepancy with respect to time or the minor discrepancy in terms of who came to the door to deliver flowers the next day to be significant. Further, the evidence of [the witness] confirms the physical and mental state of the complainant at the time. The DNA evidence establishes that there was only one person who had anal sex with the complainant and that was Mr. Hockley. Finally, based on all the evidence, I find that the anal sex was without the complainant’s consent.

[60] I conclude that I am satisfied beyond a reasonable doubt that Douglas Hockley sexually assaulted the complainant causing bodily harm to her on September 30, 2007.

VEALE J.