Citation: *R. v. Dufresne,* 2017 YKTC 45

Date: 20170918
Docket: 14-00695
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

MATTHEW JOHN DUFRESNE

Restriction on publication: Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Leo Lane — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Matthew Dufresne has been charged with having committed the offence of sexual assault against A.P., contrary to s. 271 of the *Criminal Code*.

[2] The nature of the allegation is that, after a night of drinking together, Mr. Dufresne and A.P. returned to the apartment Mr. Dufresne shared with his girlfriend, J.W., and A.P.'s cousin, W.J. It was common for A.P. to stay at this residence, as she did on this particular weekend. No one else was present when they returned. After further drinking and some cocaine use, A.P. went to sleep in W.J.'s bedroom. She

awoke to find Mr. Dufresne having intercourse with her. This intercourse was without her consent.

[3] The date of the alleged offence is September 17-18, 2011. September 17, 2011 was a Saturday. The Information was sworn January 22, 2015.

[4] The trial took place July 4-6, 2017. Judgment was reserved until September 18, 2017.

[5] At that time, I advised counsel that I would be releasing a written decision, and read an abridged version of these reasons for judgment.

Witnesses for the Crown

Sgt. Jason Waldner

[6] Sgt. Waldner testified that he first became involved in the investigation of this alleged crime in November 2014. At that time it was brought to his attention by the exhibit custodian at the Whitehorse RCMP Detachment that, during an exhibit audit, she had noticed that there was a sexual assault kit filed “on ice”. She noted that the file was marked as being concluded, however, the sexual assault kit was still in the exhibit log system.

[7] Upon his review of the file, Sgt. Waldner felt that there were still some investigative avenues that could be pursued. He noted that a potential suspect had been identified, in particular “Matthew D” who was noted as being the boyfriend of J.W.

It appeared to Sgt. Waldner that the investigator and the supervisor at that time did not follow through on the investigation.

[8] The initial complaint was made on October 1, 2011. It appeared that the initial investigator had interviewed A.P. in the fall of 2011. The file was taken over by a second investigator, who took a second statement from A.P. in March 2012.

[9] Through checks on the RCMP computer system in 2014, Sgt. Waldner determined that there was a police file in relation to a J.W. and a complaint involving a Matthew Dufresne. Sgt. Waldner then spoke with J.W. who advised him that her boyfriend was Matthew Dufresne and provided him with information that Mr. Dufresne was currently staying at the Whitehorse Detox Centre. J.W. declined to provide a statement.

[10] Sgt. Waldner then spoke with A.P.'s cousin, W.J. He also contacted A.P. and advised her he was recommencing the investigation.

[11] He subsequently left a message at the Whitehorse Detox Centre for Mr. Dufresne to contact him. Mr. Dufresne contacted Sgt. Waldner on November 4, 2014. At that time, Sgt. Waldner informed Mr. Dufresne that he was a suspect in a sexual assault investigation and that he would be seeking a warrant to take a sample of Mr. Dufresne's DNA. He also advised Mr. Dufresne that he would like him to come in and provide a statement.

[12] During this initial phone call, Mr. Dufresne stated that he did not wish to provide a statement. Mr. Dufresne called back shortly afterwards and, in speaking with Sgt.

Waldner, stated that he did not recall much of anything other than the fact that he and A.P. had been drinking and came back to the apartment. He also stated that if he had done something then why would A.P. have asked him to go to McDonalds to get her something the next morning.

[13] In response to a question from defence counsel that Mr. Dufresne had stated to Sgt. Waldner in this phone call: “But I have been talking to her numerous times and she seems fine”, Sgt. Waldner stated: “Yes, he did mention that he was still in contact with her. Yes”. Sgt. Waldner agreed that Mr. Dufresne seemed to him to be surprised by the allegation.

[14] Sgt. Waldner obtained a DNA warrant on November 13, 2014. After obtaining a blood sample from Mr. Dufresne on November 17, 2014, Sgt. Waldner sent it off for testing. The results of the testing indicated that it was a match with the DNA obtained from the sexual assault kit. I note that much of the information in regard to the DNA testing and results was contained in an Agreed Statement of Facts filed as an exhibit at trial.

[15] Cst. Waldner was also able to get a police officer in Ontario to obtain a statement from W.J.

A.P.

[16] In September 2011, A.P. was 20 years old. She was living with her parents in a residence approximately one-half-hour outside of Whitehorse. She was employed at a downtown Whitehorse business.

[17] A.P. testified that she would stay at the apartment shared by J.W., Mr. Dufresne, and W.J. almost every weekend. She had her own key to the apartment. She stayed there so that they could go out on the weekend, usually to drink at Lizards Lounge ("Lizards") or to hang out at the apartment. At times they would just hang out and walk around downtown. She would sleep in W.J.'s room when she was there. She said that J.W. and Mr. Dufresne would either sleep in J.W.'s room or in the living room on a mattress.

[18] In cross-examination A.P. agreed that she partied pretty hard in 2011, although she qualified this by saying that she and W.J. would just go out and "not like party hard". She stated that she and W.J. would not drink to the point that they passed out.

[19] A.P. stated that J.W. and Mr. Dufresne had been dating for about a year prior to September 17, 2011. She would socialize with him when they all hung out as a group.

[20] On the day before the incident, A.P. was driven into work by her father. She stated that she had made arrangements with W.J. to stay at the apartment. W.J. was working out of town at her regular job that weekend. There was no cell phone service at her work location. A.P. stated that, sometime after she arrived in town, she found out W.J. would not be at the apartment. She did not say how she found this out. In cross-examination, when asked when she learned W.J. was not going to be at the apartment that night, A.P. stated that she thought W.J. was supposed to come back that weekend. It was only afterward that she learned W.J. was not coming back. When asked what she meant by afterwards, A.P. stated: "I think I got there after the apartment - I got to the apartment after".

[21] A.P. stated that she decided to stay at the apartment anyway as she had no ride back home. She said that she texted W.J. to let her know she would be staying at the apartment.

[22] A.P. stated that she arrived at the apartment at approximately 4:30 p.m. Mr. Dufresne was there. She said that she talked with him in the living room. They made plans to go out to Lizards and meet some others there. She thinks they had some "pre-drinks" at the apartment before they left.

[23] In cross-examination A.P. agreed that, while at the apartment before going downtown, she had asked Mr. Dufresne to go out and buy her a bottle of Wiser's Whisky. She stated that they walked to the off-sales in Riverdale to purchase it. On the way they met a "Mark" and his girlfriend, who said that they would meet up with them later at Lizards, although they did not. A.P. denied the suggestion that Mr. Dufresne went on his own to purchase the Wiser's.

[24] Subsequently, A.P. agreed with counsel's suggestion that she and Mr. Dufresne had gone to off-sales and purchased a 40 oz. bottle of Smirnoff vodka, although she later stated that she did not know if it was 40 oz. or 26 oz. She agreed that this occurred at approximately 6:00 or 7:00 p.m. She agreed that her bank card was used to purchase the liquor. She agreed that she and Mr. Dufresne were drinking from the bottle of vodka before leaving the apartment to go to Lizards.

[25] A.P. denied having consumed any drinks prior to the purchase of the bottle of vodka.

[26] A.P. stated that she and Mr. Dufresne either walked the 15 or 20 minutes from the apartment to Lizards or they took a cab. She said that they took some of the vodka with them in bottles. She agreed that these could have been pop bottles, and she recalled stashing them on Main Street. She did not recall drinking the vodka from these bottles either on the way there or on the way back, although she agreed that it was possible that she had consumed some of the vodka on the way back to the apartment.

[27] She believed that they arrived at Lizards at approximately 11:00 p.m. She and Mr. Dufresne stayed there for approximately three hours. They were both drinking, although she has no idea how much either of them drank.

[28] A.P. stated that she ran into one friend there. She and Mr. Dufresne were talking. Mr. Dufresne was acting normal with her. He was not flirting or coming on to her. She stated that she never danced at Lizards. She agreed that she offered to buy Mr. Dufresne drinks at Lizards and did not think that he refused her offers.

[29] A.P. recalls checking out Foxy's Cabaret ("Foxy's") at some point. It was located on Alexander Street. She believed that they left Lizards, went to Foxy's, and then returned to Lizards. A.P. agreed in cross-examination that she had initially told the police that they had returned to the apartment after being at Foxy's, but testified that she remembered going back to Lizards after being at Foxy's.

[30] She and Mr. Dufresne left Lizards together and went back to the apartment. She says that they walked as far as Riverside Grocery before catching a cab the rest of the way. In cross-examination, A.P. agreed that she had told the police in her statement that they had walked all the way home. She testified that she did not actually remember

if they walked or took a cab. A.P. did not recall walking all the way home and Mr. Dufresne giving her his coat to keep her warm on the walk.

[31] She could not recall whether she had any drinks once she was back at the apartment. She stated that she was pretty drunk when they got to the apartment and she was tired. She recalled that Mr. Dufresne wanted her to stay up longer and keep drinking.

[32] In cross-examination A.P. agreed she likely had some shots of vodka after returning to the apartment, premised on the fact that she and Mr. Dufresne had purchased the bottle of vodka earlier. She stated that they did not finish the bottle because she was tired.

[33] Counsel for Mr. Dufresne put the following exchange from A.P.'s first statement to her:

> Officer: Like right
>
> A.P.: Like I just wanted to have fun at the bar and stuff and go to sleep. That's it.
>
> Officer: So when you got back, how long were you up before you went to – decided to go to bed?
>
> A.P.: Well he wanted to drink more, but I was like pretty drunk and I didn't want to drink any more. Like I didn't want to black out.

[34] A.P. agreed with the question put to her by counsel that she was scared that she would black out if she had more drinks after she returned to the apartment and that she was skirting the line of blacking out. She agreed, however, that she did have more drinks. She stated that she did not have "…too much shots. Like one or two, possibly."

She further stated that she could not really remember because it had been so long ago and that she probably did not drink too much. She testified that:

> Well, it's been so long I can't actually remember exactly what happened that night. Like I remember everything like going back to Lizard's, walking back from Foxy's. I remember going back to the apartment. I remember doing that – that line of coke. I remember going to bed. Matthew shutting the door and then –

[35] A.P. stated that she could not remember whether she had any shots after the line of cocaine, but then stated that she did not, saying "I don't think so".

[36] Further in cross-examination, A.P. stated that the first time in her life that she used cocaine was at the apartment with Mr. Dufresne after they returned from drinking at Lizards. She stated that she had never done hard drugs before. She said that she snorted the cocaine but didn't think she actually did it right in order to get a high. She stated that she didn't decide to use cocaine because it was a special night, adding that it was only a regular night. She said that she decided to use cocaine because Mr. Dufresne asked her to. She said it was only half a line because she was a beginner.

[37] In cross-examination A.P. agreed that she had seen people use cocaine in the movies and that she had heard that it wakes you up. She agreed that in the movies she had seen, that people using cocaine would get into party mode. She did not agree, however, with the suggestion put to her by defence counsel that when she snorted the cocaine she thought that it would stimulate her. She said that she thought that it would do nothing to her. She agreed that using cocaine might be dangerous but said that as she did not take much she thought it wouldn't really affect her, in particular if she went

to sleep. In re-examination A.P. stated that she believed it was cocaine because Mr. Dufresne told her it was.

[38] When A.P. was questioned about her statement to the police that reads: "No, we just went out and then we went back to the apartment and he wanted to drink more but I was too tired", she agreed that she should have told the police that she actually had more drinks and cocaine when she went back to the apartment. She explained that she probably did not want to tell the police about the cocaine use because she was 20. She further stated that she did not really know whether she had more shots after getting back to the apartment. She stated that she did not really remember what happened after she got back to the apartment because she was too tired. She initially stated that it was not because she was too drunk but then agreed that she was drunk enough not to remember what happened.

[39] A.P. stated that she went to sleep in W.J.'s bedroom. She was wearing her shirt and sweater, and elastic waist pyjama bottoms belonging to W.J., when she went to sleep. She said that the bedroom door was closed when she went to sleep and Mr. Dufresne was in the living room. She said that she was sleeping facing the bedroom door with her back to the wall.

[40] In cross-examination the following comment from A.P.'s initial statement to the police was put to her:

> Well, we went out that one night and then I remember everything till everyone was sleeping and stuff, so I fell asleep and I guess my doctor says I got deep sleep, and I woke up to him already doing stuff.

[41] A.P. testified that “everyone” was just Mr. Dufresne and herself. She stated that she may have told the police this because she may have thought that he went to sleep and then she went to sleep.

[42] A.P. agreed that she told the police at the time of the statement that she didn’t remember Mr. Dufresne taking her pants off because “maybe I was sleeping”. She testified however, that she knows she was sleeping at the time because she didn’t remember anything.

[43] A.P. stated that when she woke up she was lying on her side and Mr. Dufresne was penetrating her from behind. She said that she pushed him back and he stopped, stating: “Were we having sex?” In cross-examination, A.P. at first stated that Mr. Dufresne said this, but immediately afterwards testified that Mr. Dufresne didn’t say a word. She agreed that she did not mention Mr. Dufresne saying anything to her in her first statement to the police but only in her second statement. She said this may have been because she didn’t want to go into a lot of detail with her cousin, K., present during the taking of the first statement. A.P. testified that she does not have any current recall of Mr. Dufresne saying anything afterwards.

[44] A.P. then denied telling Mr. Dufresne that they couldn’t tell J.W. and she thought that Mr. Dufresne might have said this, although she couldn’t really remember.

[45] A.P. said her underwear and pyjamas were off and lying at the bottom of the bed on the floor. She recalled that when she woke up she said: “My head hurts”. She could not remember whether Mr. Dufresne grabbed her some Motrin or Advil for her headache before he left the room, closing the door behind him. She agreed, however,

that in her statement to the police she said that Mr. Dufresne had left to get her some Advil before leaving again.

[46] A.P. stated that she was in shock, in that she was surprised that the sexual contact had happened.

[47] She stated that she did not hear Mr. Dufresne come into the bedroom, and she did not feel him taking off her pants “cause I woke up in the same position I fell asleep”.

[48] A.P. agreed in cross-examination that in order for Mr. Dufresne to have ended up behind her in the bed he would have had to crawl over her or climb onto the bed by going near to the wall that the bed was pushed up against.

[49] A.P. further agreed that she had said to the police that: “Like when we - we woke up, whatever, my head was like still spinning, whatever.” She testified that by “we” she probably meant herself or that maybe it meant that they both got up or sat up.

[50] A.P. stated that she texted W.J. and then went back to sleep. She thought that this was at approximately 6:00 a.m.

[51] A.P. stated that she woke up after a few hours, perhaps at 9:00 a.m. She was waiting for W.J. to get back to her to see what she should do. She believes that she left the residence at approximately 12:00 p.m. to go to the hospital. Between the time she woke up and left the residence she had a shower. She said that she did not see Mr. Dufresne during this time and thought that he might have been asleep. In re-examination A.P. stated that after she woke up at 9:00 a.m. she jumped into the

shower, got ready and walked over to the hospital. She was not sure how long this took her.

[52] In cross-examination A.P. agreed that in the morning she was scared of what J.W. would think and that J.W. would be mad. She agreed that this was at the forefront of her mind. When asked if it was one of her main concerns A.P. stated:

> Just a little 'cause she – she really loved Matthew, and I thought she would like – try to like hate me 'cause she might have thought like we planned it, I guess. I didn't want her to hate me 'cause she was a good friend.

[53] A.P. stated that she was not afraid that W.J. would be mad at her.

[54] A.P. said that she went to the hospital on her own as she had not heard back from W.J. She had not thought about going to the police. She did not tell her parents what she was doing.

[55] In cross-examination, A.P. agreed that she had told the police that the sexual assault had occurred on a Sunday and that she went to the hospital maybe two days after, on a Monday or Tuesday. In her testimony, however, A.P. stated that she would have gone to the hospital on the weekend as she worked Monday and Tuesday. She then testified that the incident must have happened on Friday night and she went to the hospital on Saturday.

[56] In the Agreed Statement of Facts it is established that A.P. attended at the hospital on Monday, September 19, 2011.

[57] A.P. stated that she went to the police after talking with W.J. This discussion took place probably a day after the incident. She believed that she went to the police a few days or weeks after her discussion with W.J. She said that she went to the police with her cousin K., and provided a statement. At first A.P. was not certain whether she had been raped or not. It was only after describing what had happened to her to W.J., and hearing W.J.'s response, that she thought that it had been rape.

[58] A.P. stated that after she went to the police she and W.J. spoke to J.W. about what had happened. This conversation took place in the apartment and Mr. Dufresne was present, although not in the same room at the time.

[59] In cross-examination A.P. agreed that she had a conversation with W.J. between the first statement she provided to the RCMP and the second statement. She said that she never really talked to J.W. after the incident. She did not recall having ever heard from anyone what Mr. Dufresne's version of events was.

[60] A.J. stated that she had no further face-to-face contact with Mr. Dufresne after this, although she did receive messages from him. She stated that the first message was dated March 19, 2016. The messages were filed as an exhibit at trial. The messages read as follows:

> 2016-03-19, 9:54 PM
>
> [A.] listen I don't recall that night and what happened I'm sorry for it truly Iam but these charges will ruin my plans in life and cost me a lot of money in court lots if I have to go to court I will I have saved up 10000 now but my lawyer said it will cost me around 30000 please don't make me use all this money drop the charges you and I both know it was a mistake Iam sorry [A.] so sorry I always liked you and had feelings for you and I'm truly sorry for whatever happened I wish we never drank that night please

> message me back to come to a agreement I wish you the best and a very happy life [A.] I do
>
> 2016-03-21, 12:01 AM
>
> Please read this
>
> 2016-03-28, 10:23 PM
>
> ?
>
> 2016-04-27, 12:39 AM
>
> Idk what ur thoughts are about it would like to know if u can find it in your heart to respond
>
> 2016-05-04, 6:07 AM
>
> ?
>
> 2016-06-13, 1:21 PM
>
> (Thumbs up emoji)

[61] A.P. stated that she never responded to any of these messages. She said that she never provided these screenshots to the RCMP. She explained that this was because the first RCMP she had spoken to was relocated and the new police officer had not contacted her. She thought that everything was dropped. (I note that the screenshots post-date the charge of sexual assault being laid against Mr. Dufresne and after A.P. had been informed the RCMP were re-opening the case).

[62] In cross-examination A.P. agreed that she had told the police that she had seen Mr. Dufresne a couple of days later at some point after the incident, but that she hadn't said "hi" or anything to him. She stated that she had no actual recall of seeing him. She agreed that it was possible she may have seen him on other occasions since but said she had never talked to him. She denied having any conversations with him.

[63] When she was specifically questioned about having a conversation with him about a boyfriend of hers smashing her phone, she stated “Oh, [C.]” and, while not remembering that conversation with Mr. Dufresne, testified that it was possible she did have it back then but it was hard to remember. She stated that her relationship with [C.] ended in 2009. She testified that she had a new boyfriend after 2011 who also broke a few of her phones, but she did not recall telling Mr. Dufresne about this.

W.J.

[64] W.J. was 19 years of age at the time of alleged sexual assault. She testified that she and A.P. were distant cousins, and that she and J.W. were first cousins. She and J.W. rented the apartment together in January 2011. Mr. Dufresne moved in within a month, shortly after he started dating J.W.

[65] W.J. stated that in August through October 2011 she was working out of town three weeks of the month. She and A.P. had reached an agreement that A.P. would stay at the apartment sometimes when she needed to and would pay a portion of W.J.’s rent.

[66] W.J. recalled receiving texts from A.P. about an incident with Mr. Dufresne that had occurred the night before. W.J. said that she told A.P. that what happened was not right and that she should get a rape kit done and report the incident. She said that she first saw A.P. a few days after advising her to do so.

[67] W.J. said that she spoke with J.W. about the incident a few days afterwards. She could not recall whether A.P. had already reported the incident to the police by that time. She believed A.P. had already gone to the hospital.

[68] W.J. testified that she believed that she and J.W. probably further discussed the incident after J.W. had spoken to Mr. Dufresne about it.

[69] W.J. stated that she never spoke to Mr. Dufresne about the incident.

[70] In cross-examination, W.J. stated that she went out to the work camp in August 2011. She testified that A.P. knew that she was out at the camp during the relevant time frame and that A.P. would have had no expectation that she would be in Whitehorse. There was little in the evidence to establish that W.J. was specifically referring to the weekend of September 17-18, 2011, although it appeared to me that that was inferentially the case.

[71] In re-direct, in response to a question about whether there was an occasion that she did not return to Whitehorse at an expected time due to a need to either stay at work or at her parents' house, W.J. said "At my parents' place probably, yeah, because I was still depending on rides". Again, there was no specific detail to tie it to the weekend of September 17-18, 2011.

[72] W.J. testified that she partied pretty hard in those days and probably drank a lot of alcohol, at times to the point of blacking out. She stated that she partied with A.P. and that they drank a few times. She stated that A.P. was not much of a drinker.

Matthew Dufresne

[73] Mr. Dufresne was 28 years of age at the time of the alleged sexual assault. He testified that he met J.W. shortly after coming to the Yukon in 2010. They began dating soon after he arrived and he moved in within a month of dating J.W. They continued dating until 2015. The relationship ended after Mr. Dufresne relapsed into cocaine use and the allegations of sexual assault surfaced. J.W. was previously aware of the allegation of the sexual incident involving A.P., but had chosen to remain in the relationship until 2015.

[74] Mr. Dufresne testified that A.P. was over at the apartment often with W.J., primarily on weekends. There was a lot of drinking going on and A.P. participated in this as well.

[75] He described his relationship with A.P. at the time as being good friends with her.

[76] With respect to the date of the incident, Mr. Dufresne stated that during the day he was home with J.W. Later, at approximately 5:00 or 5:30 p.m., A.P. came to the residence. He thought that J.W. was there when A.P. arrived but left because she had to go out of town.

[77] After J.W. left he and A.P. talked. They had the idea to have some drinks. A.P. said that she wanted to have a shower, so Mr. Dufresne went out and purchased a bottle of Wiser's from the Riverdale Pub off-sales and also some mix. He believed that it was a 26 oz. bottle. He said that he and A.P. drank the entire bottle, matching shots. When it was pointed out to Mr. Dufresne in cross-examination that, based on his

testimony, they would have consumed the entire bottle of Wiser's in less than two hours, Mr. Dufresne said that it finishes pretty quickly when it is being drunk shot for shot.

[78] He said that they then discussed going to Lizards together, but went first to off-sales to buy a bottle of vodka. He believed that it was a "40 pounder" (40 oz.) bottle. He said they agreed to do this because they would not have to drink as much at the bar and would have some left if they decided to go to a party later or to have drinks back at the apartment. He said they went to purchase the vodka at 7:00 or 8:00 p.m.

[79] Mr. Dufresne said that they came back to the apartment and drank some of the vodka. He then put some of it into two empty 600 ml pop bottles, one-half vodka and one-half mix. He stated that they walked downtown afterwards. Approximately one-half of the bottle of vodka was remaining in the apartment.

[80] He is unsure whether they walked past Foxy's before going to Lizards. He thinks that they may have but did not believe that they went inside, although he did not rule it out as a possibility.

[81] They finished one pop bottle of the vodka and stashed the other one in a planter on Main Street. He stated that they arrived at Lizards around 11:00 or 11:30 p.m.

[82] He testified that once they were at Lizards, A.P. purchased some drinks. He said that he told her to save her money as they had vodka outside. In cross-examination, Mr. Dufresne stated that A.P. had purchased both the Wiser's and the vodka, so he did not want her to spend any more money for alcohol on him.

[83] He said that he did not want to drink more alcohol at the bar because he was already tipsy and pretty intoxicated and they had vodka stashed outside. He said that he did not drink any alcohol at the bar.

[84] Mr. Dufresne testified that he did not know how much A.P. had to drink at the bar. He said that they danced once or twice, only because A.P. wanted to. He did not really like dancing.

[85] He stated that they were having a good time, like friends, laughing and having fun.

[86] He said that when they left Lizards at closing time, at approximately 2:15 a.m., he grabbed the pop bottle of vodka and mix and they walked home. He wanted a drink as he had not had one for a while.

[87] On the walk home A.P. was getting cold so, at the bridge into Riverdale, he gave her his jacket to wear. The walk home took almost double the time it took to get to Lizards. They finished the pop bottle of vodka on the way. He stated that they were both having fun, and that A.P. was intoxicated.

[88] Once they were at home they each had a few more shots from the bottle of vodka. He was not sure how many shots they had. He then decided to do some cocaine and put a gram on the table. He told A.P. that she could do some if she wanted to, and that A.P agreed. He said that A.P. just said not to tell W.J. He thought that this was because W.J. would bother A.P. to do it with her all the time.

[89] He set out two big “Hollywood” lines of cocaine. He said this took place in the kitchen area right beside the kitchen. He did a line first and then A.P. did hers. He does not dispute that, if A.P. said she did only one-half of the line that that is all she did. There was some cocaine left over afterwards. He could not say whether he did or did not finish this off later. He testified that he was sure it was cocaine, stating that he would know; he was in rehab for cocaine use at the time he became aware of the police investigation.

[90] He testified that A.P. had done cocaine on a number of occasions prior to the date of the incident. She used cocaine with W.J. and also when he was present. He testified as to one occasion a few weeks prior to the incident involving a third party, Joseph Cletheroe, where all of them did one-half of a pencil-sized line of cocaine.

[91] Mr. Dufresne testified that they both had a few more shots of vodka afterwards, although he could not say how many.

[92] Mr. Dufresne testified that the next thing he remembers is being woken up on the bed in W.J.’s room by A.P. shoving him and saying to wake up. She was facing him at that time. He was only wearing his boxers. His penis was not erect. He said that A.P. said: “Oh, my God, did we have sex?” to which he replied “I have no idea. Did we?” A.P. then stated: “Oh, my God, if we did, we can’t tell anybody”.

[93] Mr. Dufresne stated that he had never slept in W.J.’s bed before.

[94] He testified that he thought that what had happened is that both he and A.P. had got drunk and ended up in bed. At that time he did not even think that they had had

sex. He had no recollection of them having sex. He said that he had partied on other occasions and ended up in a bed with a woman. It was not until the DNA results came back that he accepted that they had had sex.

[95] In cross-examination, Mr. Dufresne testified that he had no idea as to whether A.P. had consented to have sex with him. He further stated that he had no idea whether he had consented to have sex with A.P.

[96] He was, however, worried that they may have had sex and that J.W. would be upset. In cross-examination, he stated that, as they woke up in the same bed, it was pretty obvious that something might have happened.

[97] He said that A.P. then got up and went to the washroom. He said that she was texting on the phone before she went to the washroom. He said that after coming back from the washroom, A.P. sat down on the bed and then went into the living room and sprawled on the couch. He said that he followed her and lay down on the floor. He put the television on and started watching a movie. He did not recall the time that this occurred. He said that he was way too hung over.

[98] The next thing Mr. Dufresne remembers is that Joseph Cletheroe came over to the residence and asked if he wanted to go to McDonalds. Mr. Dufresne threw him down the keys so that he could come up to the apartment. He said that Mr. Cletheroe would have seen A.P. when he came into the apartment, although he did not speak to her. A.P. said that she wanted some McDonalds. Mr. Cletheroe drove him over to McDonalds where they ordered food and came back to the apartment. He almost threw up on the way back because he was so hung over. He said that Mr. Cletheroe dropped

him off at the apartment and he went up with the food. A.P. ate a cheeseburger and some, but not all, of her fries. He believes that this occurred at approximately or shortly after 11:00 a.m. He based his time estimate on this knowledge that McDonalds stopped serving breakfast at 11:00 a.m. and he had grabbed burgers.

[99] He said that he and A.P. only talked about how hung over they both were. J.W. returned while he and A.P. were chilling on the couch. A.P. got up and left about 10 or 15 minutes later.

[100] In cross-examination, Mr. Dufresne summarized the event as follows:

> What I remember of that night is we had a good time, we drank, we danced, we went back to the apartment and we drank some more and we did some blow, and then we drank our faces off some more and then we woke up together. And that is my recollection.

[101] Mr. Dufresne stated that the next time he saw A.P. was the following day when she showed up with W.J. to speak with J.W. They went into W.J.'s room to have this conversation. He heard J.W. crying. He went into W.J.'s room. J.W. told him what A.P. had said. He said that he was trying to calm J.W. down and that he asked A.P. what was going on. He was upset because A.P. had woken him up to ask if they had had sex, had said they could not tell anybody and then here she was telling his girlfriend that they had and that he had done something "…so fucking disgusting like that like I'm that kind of fucking person or something".

[102] He stated that A.P. was "just kind of blank" and simply said "I don't know" in response to his asking what was going on. He said that it was W.J. and not A.P. who was saying what had happened. I understood this to be in regard to what was said

while Mr. Dufresne was in W.J.'s room and not in reference to what had occurred before he entered the room.

[103] Mr. Dufresne testified that A.P. and W.J. left shortly afterwards and went to W.J.'s boyfriends place. He said he knows that is where they went because W.J. and J.W. were texting. W.J. came back to the apartment later hung over.

[104] He said that he saw A.P. on a few occasions afterwards when she came over to the apartment. He did not talk to her on these occasions as he did not feel like he wanted to because of the situation.

[105] Mr. Dufresne stated that he saw A.P. on multiple occasions after that, in particular at the college where J.W. was a student. He said that the relationship was not the same, however, and that it was not the same friendship.

[106] He recalled one occasion on the bus when he was with J.W., and A.P. was telling them both about a boyfriend breaking her phone on multiple occasions. Mr. Dufresne said that A.P. was mostly talking to J.W. on this and other occasions when they encountered each other.

[107] Mr. Dufresne did not think that anything was happening in regard to A.P.'s allegations. He didn't understand why there would be, because of the way she woke him up and asked him about this. He thought that it was a "one-night stand or whatever" and a mistake that they drank. He did not really think anything about the incident.

[108] Mr. Dufresne stated that he was in rehab for his cocaine issue when he learned from the police that he was being investigated for sexual assault. He said that he broke down. It had been devastating at the time of the incident because of the impact upon his relationship with J.W. It was further devastating to him when he learned from the nursing staff at rehab that an RCMP officer had been there looking for him for what he understood was in connection with a sexual assault investigation. He said that he called the RCMP right away and that he voluntarily went down to the RCMP Detachment in order to provide a DNA sample.

[109] He explained that he sent A.P. the text messages because he was sorry that they drank that night and went out. He said that he had had feelings for her as a really good friend, and that he did not have many such friends. He testified that his feelings for A.P. were as a friend only and were not feelings in a romantic way.

[110] He said that he used the word “mistake” in reference to their having drank alcohol all night, and that it was not about having sex with A.P.

Joseph Cletheroe

[111] Mr. Cletheroe testified J.W. was his friend and that he knew Mr. Dufresne because she was dating him. He then became friends with Mr. Dufresne. He first became aware of the sexual assault allegation against Mr. Dufresne approximately a week before trial after speaking with counsel for Mr. Dufresne.

[112] At the time he testified at trial, Mr. Cletheroe was aware that the allegation arose from an incident that occurred in September 2011. He recalled seeing Mr. Dufresne

and A.P. together one morning when he drove his car to the apartment. He said he went there because Mr. Dufresne wanted to get some food. When he arrived Mr. Dufresne and A.P. were sitting on the couch watching a movie. He said that he picked up Mr. Dufresne and they went to McDonalds where he ordered a Double Quarter Pounder meal, because that is what he always got. He did not know what Mr. Dufresne or A.P. ordered. He did not know what movie they were watching.

[113] In cross-examination, Mr. Cletheroe stated that in 2011 he may have gone to McDonalds with Mr. Dufresne one or two other times. He agreed that there was nothing unusual about Mr. Dufresne watching a movie or A.P. being in the apartment.

[114] Mr. Cletheroe stated that he had never spoken to Mr. Dufresne about the case.

Submissions of Counsel

Counsel for Mr. Dufresne

[115] Counsel submits that A.P. is neither credible nor reliable. He submits that there are three components to her testimony.

[116] The first is the portion of her testimony in regard to what she told the police in the first interview. The second is the portion of what she told the police in the second interview she gave. The third is her testimony in court.

[117] Counsel submits that A.P. remembers little today of what occurred at the apartment at the time of the incident. At times her testimony was internally inconsistent on a point, such as whether she had more to drink once back at the apartment.

[118] Counsel pointed to a number of areas in which A.P.'s lack of memory was significant. He pointed out 17 areas in which he submits that the reliability of her testimony is suspect:

1. Uncertainty as to whether she was consuming alcohol before going to Lizards;
2. Initial uncertainty as to whether she had purchased a bottle at off-sales before going to Lizards;
3. Uncertainty as to whether she walked or took a cab to Lizards;
4. Uncertainty as to how much she had to drink at Lizards;
5. Uncertainty as to whether she had walked or taken a cab back to the apartment from Lizards;
6. Uncertainty as to whether she had consumed more alcohol on the way back from Lizards;
7. Uncertainty as to whether she consumed more alcohol once she was back at the apartment;
8. Uncertainty as to whether she or Mr. Dufresne went to bed first;
9. Uncertainty as to whether a condom was used (I note that in my review of the transcript there was no previous reference to A.P. testifying as to whether a condom was used or not. It is therefore unclear to me where this point arises);
10. Uncertainty as to whether Mr. Dufresne got her Advil or not;
11. Uncertainty as to what time she left the apartment the next morning;
12. Uncertainty as to when she first spoke with W.J.;
13. Uncertainty as to when she went to the hospital;
14. Uncertainty as to what happened to her clothing;
15. Uncertainty as to whether she had spoken to J.W. about the incident;

16. The contradiction between her testimony and her statement to the police as to whether she had seen Mr. Dufresne since the incident; and

17. Uncertainty as to when she spoke to the police about the incident.

[119] Counsel points to what he submits are contradictions between A.P.'s testimony and what she said in the two police statements, as well as to inconsistencies between the two police statements.

[120] Counsel submits that the passage of time in conjunction with the amount of alcohol A.P. had to consume that evening and morning make her evidence unreliable.

[121] He further submits that A.P.'s lack of or inconsistent memory at the time of the sexual contact is not indicative of incapacity on the part of A.P. to consent. This includes the possibility that A.P., notwithstanding her testimony otherwise, may have been in a blacked-out state at the time of the sexual contact.

[122] On the issue of credibility, counsel points to A.P.'s failure to disclose, in the two police statements, her use of cocaine after returning to the apartment and her downplaying of this use and the expected and actual impact on her.

[123] Counsel submits that A.P. also downplayed the extent to which she was intoxicated. In particular he notes that she told the police that she did not want to drink any more alcohol on the way back to the apartment because she did not want to black out, and then admits perhaps doing more drinking at the apartment.

[124] Further, counsel points to the ambiguity in regard to whether A.P. knew or should have known that W.J. was not going to be in town that night and at what point in time A.P. would have been aware of this.

[125] Counsel submits that it is clear A.P. was concerned about J.W.'s reaction if she were to learn what had occurred. It is therefore plausible that A.P. regretted the sexual contact when she woke up. Although not explicitly stated, I take it from counsel's submission that this concern and regret contributed to A.P. accusing Mr. Dufresne of having sexually assaulted her.

[126] Counsel submits that there is not necessarily an inconsistency between A.P. saying that no one should find out and still choosing to confide in her cousin and close friend, W.J. This, I assume, is a submission to counter a potential argument that A.P.'s disclosure to W.J. is inconsistent with Mr. Dufresne's testimony that A.P. said to him that no one could find out about what had occurred. This would then form a basis to question and undermine his credibility and the reliability of his evidence.

[127] Counsel submits that this is a circumstance where neither party has any accurate recollection as to the sexual contact, as both were in a state where they had memory loss, such as being in a blacked-out state. Being blacked out by intoxication does not mean that there was necessarily the incapacity on the part of A.P. to consent to sexual contact.

[128] Counsel submits that there is nothing in the evidence of Mr. Dufresne that should cause me to reject his evidence.

[129] Counsel also addresses the Crown submission that Mr. Dufresne was exaggerating his level of intoxication by pointing out, that if he intended to do so, he would not have denied drinking any alcohol at Lizards. This is a further reason to find his evidence credible.

[130] Further, if I accept Mr. Dufresne's evidence that he does not have actual recall of the sexual contact, and I do not accept, or have a reasonable doubt about A.P.'s evidence that she went to sleep alone and woke to being sexually assaulted by Mr. Dufresne, counsel submits that I am left with the possibility that both he and A.P. had consensual sex and that neither of them recalls it due to their level of intoxication.

[131] As such counsel submits that the Crown has not proven beyond a reasonable doubt that A.P. did not consent to the sexual contact.

Crown Counsel

[132] Counsel submits that A.P. was very clear in her evidence that she was not blacked out at any time, that she never consented to Mr. Dufresne having sexual contact with her and that she woke to him sexually assaulting her.

[133] Counsel submits that most of the points raised by defence counsel which question the reliability of A.P.'s evidence are really peripheral and not to be unexpected, given the passage of time and the amount of alcohol consumed that evening. Much of what A.P. was uncertain of are in areas where there is no reason to expect she would have an accurate recollection of events.

[134] Counsel submits that it is not unusual that A.P. did not tell the police that she had used cocaine, given her youth and the fact that it was illegal.

[135] Further, the fact that A.P. may have said she did not want to drink more because she did not want to black out does not lead to the conclusion being drawn that another one or two drinks would have pushed her into a blacked-out state.

[136] A.P.'s testimony that she went to the hospital the same day that the incident occurred after leaving the apartment, when in fact she did not go until later, and other inconsistencies in her testimony as to when she went to the hospital, are not fatal to her credibility, again keeping in mind the circumstances that existed at the time, including her level of intoxication and the nature of the offence she has described.

[137] Counsel submits that I should reject the evidence of Mr. Dufresne. He says that Mr. Dufresne's evidence is not reliable and that his loss of memory is convenient. Mr. Dufresne certainly would have been awake at the time of the sexual contact and, due to his "memory loss", can give no evidence as to whether A.P. was consenting to the sexual contact or not.

[138] Counsel submits that Mr. Dufresne is unable to contradict the evidence of A.P. about the sexual contact. His evidence is internally implausible in that he has testified as to his positive relationship with J.W. and as to having had no prior interest in having a sexual relationship with A.P., yet she wakes him up and suggests that they have had sex. He is in his boxers, yet doesn't dispute what she is suggesting and simply asks whether that is what happened.

[139] He points to the implausibility of Mr. Dufresne's evidence that, due to his hungover condition, after being woken up wearing his boxers in W.J.'s room, a room he had never slept in before, he did not want to deal with the situation but just wandered out into the living room to watch a movie.

[140] Counsel submits that Mr. Dufresne was evasive when trying to explain what he meant when he stated that the words that he "had feelings for A.P." in the text messages, was only in the context of being friends, using examples of others he has feelings for.

[141] Counsel also points to Mr. Dufresne's use of the word "mistake" in the text messages as being problematic, in that he testified to the drinking as being the mistake, and not the sexual contact. Counsel submits that his evidence is tailored as he cannot call the sexual contact a mistake if he does not remember it having occurred. Therefore he refers to the mistake as being the drinking.

[142] Counsel submits that Mr. Dufresne's reference to this being akin to a "one-night stand" is further reason to find his evidence not credible.

[143] Counsel submits that Mr. Dufresne is exaggerating his level of intoxication in a self-serving manner in order to create a memory gap that did not exist. He submits that it is not plausible to believe that Mr. Dufresne was blacked out at the time of the sexual contact, but even if he was, he should still be convicted because the evidence of A.P. was essentially uncontradicted in that she did not consent to the sexual contact.

Legal Framework

[144] At the outset, the legal framework within which I must work when I consider the evidence of the witnesses has been set out clearly and succinctly by Molloy J. at some length in ***R.*** v. ***Nyznik***, 2017 ONSC 4392. I consider that the comments of Molloy J. are so succinctly informative on the relevant issues that I will simply adopt and repeat them:

> **(1) The Presumption of Innocence and Proof Beyond a Reasonable Doubt**
>
> **4** Each of the three defendants is charged with sexual assault, a criminal offence under the *Criminal Code of Canada*, R.S.C., 1985, c. C-46. As such, each is presumed to be innocent unless and until the Crown has proven their guilt beyond a reasonable doubt. The presumption of innocence is a cornerstone of our criminal justice system, originally embedded in our common law tradition and now guaranteed as a fundamental legal right under our constitution.
>
> **5** The presumption of innocence, and along with it the standard of proof beyond a reasonable doubt, are important safeguards to ensure that no innocent person is convicted of an offence and deprived of his liberty. Without these protections, there would be a serious risk of wrongful convictions -- an outcome that cannot be accepted in a free and democratic society.
>
> **6** The concept of proof beyond a reasonable doubt is not an easy one to define. It is clearly more rigorous than the balance of probabilities standard applied in civil cases. The balance of probabilities requires the party bearing the onus to establish that the proposition they advance is "more likely than not" -- *i.e.* better than 50/50. In its landmark 1997 decision in *R. v. Lifchu*s, the Supreme Court of Canada held that the following definition would be an appropriate instruction for a criminal jury:
>
> > [...]
> >
> > A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
> >
> > Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must

> give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

7 This instruction, with very little modification, is now the standard instruction on reasonable doubt given to criminal juries throughout Canada. The same standard is applied by judges sitting without a jury on criminal trials. The bottom line is that probable or likely guilt is insufficient. If all I can say is that the defendants in this case are likely guilty, I must acquit. It would not be safe to convict someone of a criminal offence with only that degree of confidence. Before I can find the defendants guilty, I must be sure that they committed the offence charged.

(2) Essential Elements of Sexual Assault

8 Every criminal offence consists of an *actus reus* (the physical act that constitutes the offence) and *mens rea* (the intent required to commit the offence). For sexual assault, the *actus reus* consists of three essential elements, each of which must be proven by the Crown beyond a reasonable doubt. In this case, the Crown must establish: (1) that the defendants knowingly touched the complainant; (2) that the touching was of a sexual nature; and (3) that the complainant did not consent to that sexual contact.

9 In this case, there is no issue with respect to there being sexual contact between the complainant and each of the three defendants. The sole issue in the trial is whether that contact was consensual.

10 The presumption of innocence applies to a person accused of sexual assault in the same way that it applies in any other criminal offence. The Crown must prove that this was an assault rather than consensual contact. There is no burden on the defence to prove that AB consented

to the sexual contact between them. Rather, the burden is on the Crown to prove beyond a reasonable doubt that the defendants had sexual contact with her without her consent.

(3) Application of the Reasonable Doubt Principle in Sexual Assault Cases

11 As I have stated, the presumption of innocence and the standard of proof beyond a reasonable doubt apply in a sexual assault case just the same as in any other criminal trial. However, there are aspects of sexual assault cases that can make the application of the standard a difficult one.

12 First of all, the very nature of the act underlying a sexual assault usually means that there are seldom any eye-witnesses apart from the complainant and the person or persons accused of the offence. Often, these cases come down to the word of one person against the other – the classic "he said/she said" scenario. In that situation, it would be wrong for the trial judge to decide the case based on which is the more credible version of the two. To do so would be to misapply the burden of proof on the Crown to establish guilt beyond a reasonable doubt. The correct application of the burden of proof requires the judge to acquit if the evidence of the accused, when seen in the context of all of the evidence, raises a reasonable doubt as to his guilt. It is possible that the judge might not fully believe the defendant's version of the events, and might find the complainant's version to be more credible, but still be uncertain as to what actually happened. In that situation, there is a reasonable doubt, the benefit of which must go to the defendant, even where the complainant's story is more plausible or more believable than that of the defendant.

13 To assist in the proper application of the burden of proof when there are competing versions of what happened, the Supreme Court of Canada has recommended that the issue be considered in three steps, as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

14 This instruction, commonly referred to as "the *W.(D.)* instruction," has become another standard instruction given to all criminal juries, and criminal trial judges will generally instruct themselves in the same manner. However, as was said in the *W.(D.)* case itself, and in subsequent decisions of the Supreme Court of Canada, there is no particular magic in the incantation of these three steps. It is not essential that the trial judge

rigidly follow the three steps in the *W.(D.)* instruction. What is critical is for the judge to avoid turning the fact-finding exercise into a choice as to which is the more credible version of the events. This cannot be a credibility contest, with a conviction if the complainant wins the contest and an acquittal if the defendant does. To treat it as such would be to improperly shift the burden of proof. Rather, if the defence evidence, seen in the context of all the evidence, raises a reasonable doubt, then the trial judge cannot convict. Even in a situation where the trial judge completely rejects the defence evidence and has no reasonable doubt as a result of that evidence, he or she must then assess the evidence as a whole and determine whether the Crown has discharged its burden of proving guilt beyond a reasonable doubt. In some cases, even without any evidence from the defence, it is not possible to be satisfied beyond a reasonable doubt based on the evidence of the complainant.

15 Typically, the outcome of a sexual assault trial will depend on the reliability and credibility of the evidence given by the complainant. Reliability has to do with the accuracy of a witness' evidence -- whether she has a good memory; whether she is able to recount the details of the event; and whether she is an accurate historian. Credibility has to do with whether the witness is telling the truth. A witness who is not telling the truth is by definition not providing reliable evidence. However, the reverse is not the case. Sometimes an honest witness will be trying her best to tell the truth and will fervently believe the truth of what she is relating, but nevertheless be mistaken in her recollection. Such witnesses will appear to be telling the truth and will be convinced they are right, but may still be proven wrong by incontrovertible extrinsic evidence. Although honest, their evidence is not reliable. Only evidence that is both reliable and credible can support a finding of guilt beyond a reasonable doubt.

16 It is sometimes said that the application of these principles is unfair to complainants in sexual assault cases, that judges are improperly dubious of the testimony of complainants, and that the system is tilted in favour of the accused. In my opinion, those critics fail to understand the purpose of a sexual assault trial, which is to determine whether or not a criminal offence has been committed. It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt. In many cases, the only evidence implicating a person accused of sexual assault will be the testimony of the complainant. There will usually be no other eye-witnesses. There will often be no physical or other corroborative evidence. For that reason, a judge is frequently required to scrutinize the testimony of a complainant to determine whether, based on that evidence alone, the guilt of an accused has been proven beyond a reasonable doubt. That is a

heavy burden, and one that is hard to discharge on the word of one person. However, the presumption of innocence, placing the burden of proof on the Crown, and the reasonable doubt standard are necessary protections to avoid wrongful convictions. While this may mean that sometimes a guilty person will be acquitted, that is the unavoidable consequence of ensuring that innocent people are never convicted.

17 Although the slogan "Believe the victim" has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence. That is antithetical to the fundamental principles of justice enshrined in our constitution and the values underlying our free and democratic society.

(4) *Consent* and the Interaction of Alcohol and Drugs

18 At the heart of the offence of sexual assault is the right of every person to autonomy over his or her own body. Any sexual touching without consent is a violation of that personal autonomy. The Supreme Court of Canada discussed this fundamental principle in *R. v. Ewanchuk*, as follows:

> The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": see Blackstone's *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p.120. It follows that any intentional but unwanted touching is criminal.

19 As I discussed previously, the crime of sexual assault consists of an *actus reus* and a *mens rea.* At the *actus reus* stage of the analysis, the consideration of whether there was consent relates to the subjective intent of the complainant -- whether she voluntarily and knowingly agreed to the sexual contact at issue. As stated in *Ewanchuk*:

> While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.
>
> The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

20 Consent is defined under s. 273.1(1) of the *Criminal Code* as being "the voluntary agreement of the complainant to engage in the sexual activity in question." Mere acquiescence in, or a failure to specifically object to, sexual contact does not constitute consent at this stage of the analysis. In Canada, there is no such thing as "implied consent." Rather, the question is whether, in the complainant's own mind, she was agreeing to the sexual activity in question.

21 The *Criminal Code* specifies some circumstances in which the sexual activity in question is deemed to have been without consent. For purposes of this case, the relevant provision is s. 273.1(2)(b) which states that no consent is obtained where "the complainant is incapable of consenting to the activity." Incapacity to consent is a broad term and encompasses both situations where a person is incapacitated due to mental disability and situations where a person who would otherwise be competent to consent has been rendered unable to do so, whether or not it was the defendant who caused her to be incapable. To use an obvious and extreme example, a complainant who is unconscious (whether, for example, from alcohol, drugs, or a blow to the head) lacks the capacity to consent. She has no conscious knowledge of what is happening and is not capable of directing her mind to whether she wants to engage in the activity in question. Therefore, any person who proceeds to have sexual activity with an unconscious person commits the offence of sexual assault. That is the case regardless of the defendant's involvement, or lack of involvement, in

how the complainant came to be unconscious. As stated by McLachlin C.J. in *R. v. J.A.*:

> The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code.*

22 Although an unconscious person is by definition incapable of consenting to sexual activity, the same is not the case for a person who is intoxicated by alcohol or drugs. There will be times when a person is so impaired by alcohol and/or drugs that he or she is incapable of consenting. Whether or not that state of incapacity has been reached is a factual finding to be made in the circumstances of each case. The fact that a complainant does not remember engaging in sexual acts, or has a complete blackout of the time in question, is not the same thing as lacking mental capacity to consent.

23 In *R. v. J.R. Ducharme* J. noted:

> ...The question is whether or not the complainant was able to make a voluntary and informed decision, not whether she later regretted her decision or whether she would not have made the same decision if she had been sober. Thus, an obvious example of incapacity would be the complainant who was unconscious or in a coma at the relevant time. As I have already explained, memory loss, without more, is not sufficient proof of incapacity. Similarly, while intoxication, self-induced or otherwise, might rob a complainant of capacity, this is only a possible, not a necessary result...

24 Similarly, in *Meikle*, Trotter J. (as he then was) adopted the following observations of Duncan J. in *R. v. Cedeno* as follows:

> Cases where the complainant is said to be incapable [due to] consumption of alcohol or drugs are less clear-cut. Mere drunkenness is not the equivalent of incapacity. Nor is alcohol-induced imprudent decision-making, memory loss,

> loss or inhibition or self-control. A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at time[s].

[all footnotes omitted]

Application of Law to the Facts

[145] This, as are many sexual assault trials, is a difficult case. The events took place close to six years prior to the date of trial. Both A.P. and Mr. Dufresne had been consuming a significant amount of alcohol. There are no independent witnesses that were able to testify as to what took place that evening and in the early hours of the following morning.

[146] This is essentially a “she said, he said” situation.

[147] There is no question as to whether there was sexual contact between Mr. Dufresne and A.P. Clearly there was, as evidenced by the results of the DNA testing.

[148] This is also not a case where the question of Mr. Dufresne having an honest but mistaken belief in consent is at issue, as he testified that he has no recollection of the sexual contact due to his level of intoxication and his use of cocaine.

[149] The issue is consent and, in particular whether A.P. did or did not provide her consent to the sexual contact.

[150] The evidence at the heart of the issue is A.P.’s testimony that she, being tired after an evening and morning of drinking and at one point using cocaine, went to sleep

alone in W.J.'s bedroom, and awoke to Mr. Dufresne penetrating her vaginally from behind.

[151] There is no question that, if I accept A.P.'s evidence on this point, the offence of sexual assault is made out and Mr. Dufresne must be convicted. The sexual contact clearly would have been without the consent of A.P.

[152] Crown counsel submits that the evidence of A.P. is uncontradicted on this point.

[153] However, Mr. Dufresne testified that he was awakened in W.J.'s bed by A.P., who asked him if they had had sex. He testified that he was in his underwear and that he did not have an erection.

[154] This is evidence that stands in direct contradiction to the evidence of A.P. If Mr. Dufresne was penetrating her vaginally from behind, he obviously would have had to have an erection and it is also unlikely that his underwear would have been on, although I accept not necessarily impossible.

[155] I note that there is nothing in the evidence that was elicited that would point to the possibility that perhaps Mr. Dufresne had an erection when A.P. woke up, but simply had no recollection of this, and that, when his recollection first occurred, it may have been seconds after he had been woken up and when his penis was no longer erect. This could to some extent place the two versions of events somewhat less in opposition to each other.

[156] For me to entertain this possibility, however, would be to embark down the road of speculation and would constitute an error.

[157] If I accept the evidence of Mr. Dufresne about A.P. awaking him, I would be required to reject the evidence of A.P. as to her recollection about the circumstances surrounding the sexual contact. I would then be left with a situation that would not allow for me to find beyond a reasonable doubt that Mr. Dufresne had non-consensual sex with A.P.

[158] While sexual contact clearly occurred, on Mr. Dufresne's testimony I cannot determine with the requisite amount of certainty when and how this sexual contact happened. It would have to have been before he was awakened, and the fact that he has no recollection of the circumstances around the sexual contact would not allow for the Crown to meet its burden of proving a lack of consent beyond a reasonable doubt.

[159] If I do not know whose evidence to accept as to what happened or was happening at the time A.P. woke up, I would find myself in the same situation, in that the Crown would be unable to satisfy me beyond a reasonable doubt that the sexual contact was non-consensual.

[160] The law is clear on these points; it is the facts that are not.

[161] The first question for me in this case is whether, on a consideration of the whole of the evidence, I am able to accept or reject the evidence of A.P. that she woke up to find Mr. Dufresne sexually assaulting her, or accept or reject the evidence of Mr. Dufresne that he was woken up by A.P. with his underwear on and his penis flaccid, with A.P. asking him if they had had sex.

[162] If I accept the evidence of Mr. Dufresne, I must acquit him because his evidence will have raised a reasonable doubt as to nature of the sexual contact. If I do not know beyond a reasonable doubt as to when and how the sexual contact occurred, I cannot find that it was non-consensual and I must acquit him.

[163] Even if I have concerns about Mr. Dufresane's recollection overall, if I cannot reject his evidence, I am in the same situation.

[164] If I reject the evidence of Mr. Dufresne, I must then determine whether, on the whole of the evidence, the evidence of A.P. is sufficiently reliable to establish beyond a reasonable doubt that Mr. Dufresne had sexual contact with her without her consent.

[165] If I am so satisfied, I must convict Mr. Dufresne of the offence of sexual assault. If not I must acquit him.

[166] In deciding how to consider and assess the evidence before me in order to reach a decision, I must not engage in impermissible stereotyping or reasoning. I must not presume that A.P. was consenting to some form of sexual contact with Mr. Dufresne simply because she chose to drink and use cocaine with him in the absence of W.J. and knowing that J.W. was away for that evening.

[167] A.P. was certainly able to make these choices without there being any intent on her part that she and Mr. Dufresne engage in sexual contact. There are no inferences against the credibility of A.P. or the reliability of her evidence that can be drawn from her actions in this regard.

[168] I also do not consider the lack of follow-up by A.P. with the RCMP with respect to the allegations, after she had provided her second statement to the police, to be problematic. While she could have done so, there was no such requirement upon her and therefore no basis upon which to question whether she was in fact sexually assaulted as she claimed.

[169] Victims of sexual assault may react in vastly different ways, whether immediately afterwards or in the months and years to follow. There is no right way for a victim of sexual assault to act. Delay in reporting a sexual assault or, as in this case, a "failure" to make inquiries as to the progress of a police investigation, does not mean that the sexual assault did not occur or that the complainant is less credible and his or her testimony less reliable.

[170] Conversely, and by logical necessity, neither does the immediate reporting of a sexual assault by a complainant mean the complainant is therefore more credible and his or her testimony more reliable.

[171] Similarly, I must not fall into impermissible thinking that would have me accept A.P.'s testimony as to the non-consensual contact having occurred on the basis that I should "believe complainants or victims", simply because A.P., as a complainant, says Mr. Dufresne sexually assaulted her. That would be falling into the error of stereotypical thinking that sexual assault complainants are always truthful. It would also improperly shift the burden to Mr. Dufresne to prove that he did not sexually assault A.P., which would be contrary to law.

[172] Neither can I assume that Mr. Dufresne is fabricating his testimony because, as an accused individual, he has a motive to do so, or that he has conveniently chosen to have a lack of recollection of certain events in order to hope to avoid being found criminally culpable. While either of these may in fact be true, I must be satisfied on the evidence before me that this is in fact the case, and must not engage in impermissible speculation or reasoning in order to reach such conclusions.

[173] I must follow a principled approach to decision-making and cannot take shortcuts in order to reach a conclusion. There must be an evidentiary bridge or pathway to get from A to B to C and so on in order to reach a conclusion with the requisite degree of certainty. As the presumption of innocence can only be displaced by proof beyond a reasonable doubt that an accused committed the offence with which he or she is charged, the burden remains with the Crown to connect the dots, so to speak, that lead to a conviction. The burden does not rest with an accused to prove his or her innocence. And if the dots cannot be connected, following the principled approach, then a finding of guilt cannot be sustained.

[174] There can be no difference between offences with respect to the requirement than an accused be found guilty beyond a reasonable doubt. The rules of evidence cannot be twisted or manipulated in order to make convictions easier to obtain with respect to certain offences that are being prosecuted than others. The rule of law must be equally and consistently applied to all accused individuals without deviation, and without bowing to external pressures. Only then can our system of laws be considered fair and just.

[175] The law is clear that cases that turn primarily on the evidence of a complainant and an accused are not to be turned into credibility contests where the court must choose between one or the other or, in finding one witness credible, then necessarily move to finding the other not credible. While it is possible to move from a finding of credibility in respect of a complainant to therefore finding an accused not credible based solely upon acceptance of the testimony of the complainant, this can only be done after a careful and fair consideration of all of the evidence, including the evidence of the accused.

[176] In the present case, there were clearly some areas of conflict, inconsistency and uncertainty in the evidence of A.P. I agree with Crown counsel, however, that with respect to many of these areas, these issues should not be perceived as being particularly problematic. A.P. had consumed a considerable amount of alcohol and there was not a particularly compelling reason for her to have paid much attention to whether she and Mr. Dufresne walked or took a cab, whether they danced at Lizards or not, whether Mr. Dufresne had any drinks at Lizards and so on. Given A.P.'s youth at the time, her level of intoxication and the passage of time between the date of the incident and her testimony at trial, I would be surprised if she had complete recall of every detail.

[177] In saying this I recognize that A.P. gave two statements to the police relatively close in time to the date of the incident, and that these statements are not necessarily entirely consistent with each other and with her present recollection.

[178] I do not, however, find any of these inconsistencies necessarily fatal to her credibility and to the reliability of her testimony. They are factors I am aware of and that I consider as part of the entirety of A.P.'s evidence.

[179] To the extent that the testimony of Mr. Dufresne differs in areas such as whether he and A.P. took a taxi or walked, and his testimony may, in fact, reflect what actually happened, I nonetheless do not consider them to be particularly probative with respect to the critical issue, which is whether Mr. Dufresne sexually assaulted A.P. as she testified he did.

[180] This said, there are three areas of A.P.'s testimony that have the potential to be more probative as to her credibility and/or the reliability of her evidence.

[181] One is when she went to the hospital. A.P. is inconsistent on this point, saying that she went directly from the apartment that morning, or it was Sunday or it was a couple of days after the incident. There is a considerable difference here. We know from the evidence that A.P. went to the hospital on the Monday after the incident occurred.

[182] Secondly, tied into this is whether A.P. woke up, showered and left the apartment to go to the hospital without seeing Mr. Dufresne.

[183] Mr. Dufresne's testimony is very different as to what occurred later in the morning, and includes the presence of Mr. Cletheroe in the apartment and the trip to McDonalds. Mr. Cletheroe's testimony supports that of Mr. Dufresne. I accept that there was an element of vagueness in Mr. Cletheroe's testimony as to the exact date

that he was in the apartment with A.P. and Mr. Dufresne and this leaves open the possibility that it was a different day in September. Certainly I cannot be satisfied that it was clearly the same day but nor can I be satisfied that it was not.

[184] With respect to Mr. Dufresne's testimony that J.W. had also returned to the apartment that morning when he and A.P. were still there, this evidence is of no assistance as J.W. was not called as a witness in the trial. While her testimony may have been helpful, I do not draw any negative inference as against either party from her failure to be called as a witness.

[185] To some extent the issue of whether or not there was contact between Mr. Dufresne and A.P. at times when J.W. was present, such as on the bus after the date of the incident, would perhaps have been helped by the testimony of J.W., I am left without her testimony in order to resolve that issue.

[186] Thirdly, there is also a question with respect to A.P.'s testimony that she only learned after she arrived at the apartment that W.J. would not be at the apartment that night. This would seem to perhaps be inconsistent with W.J.'s testimony as to her out of town work obligations and A.P.'s knowledge of these, and in particular for that weekend.

[187] However, again, the evidence was not entirely clear. I have no idea how A.P. found out W.J. would not be there, and the evidence of W.J. was ambiguous enough to allow for the possibility A.P. may not have had advance knowledge of W.J.'s absence on the particular weekend of the incident.

[188] Again, while all of this is evidence that I am aware of and must consider, it is not evidence from which I can form a strong opinion as to A.P.'s credibility and the reliability of her evidence.

[189] In the end, I am satisfied that, in the absence of the testimony of Mr. Dufresne, the evidence of A.P. standing alone with the DNA results, would have satisfied me beyond a reasonable doubt of the guilt of Mr. Dufresne, notwithstanding the frailties in some areas of A.P.'s testimony.

[190] But the evidence of A.P. does not stand alone. The testimony of Mr. Dufresne challenges that of A.P. on the critical point of sexual contact.

[191] In order to assess Mr. Dufresne's credibility and the reliability of his evidence on this point, I must turn to a consideration of the whole of his evidence, alongside the other evidence before me.

[192] Unlike A.P., Mr. Dufresne did not provide any statements to the RCMP at or near the time of the incident. The only prior comments that he made were in the context of speaking with Sgt. Waldner at the time the investigation was re-commenced.

[193] I find that the limited detail Mr. Dufresne provided Sgt. Waldner, and his failure to provide more, was not unexpected in the circumstances, in particular as he had been advised by legal counsel not to provide a statement. Mr. Dufresne testified that, in saying even as much as he did, he felt that he had said more than he should have, based upon the advice he had received.

[194] The fact that an individual who has been told he is a suspect in a criminal investigation chooses to seek legal advice and then chooses to follow that advice is not, of course, a reason to draw a negative inference about that individual's guilt in respect of the offence being investigated.

[195] The lack of prior statements places Mr. Dufresne in a different position than A.P. with respect to finding inconsistencies in his evidence. His testimony at trial and his version of events cannot be compared to a version of events he may have provided at an earlier time. Had Mr. Dufresne provided an earlier statement, perhaps, given the passage of time, his testimony at trial may have been subject to a different form of scrutiny and a greater revealing of inconsistencies. That is not the case, however, and Mr. Dufrense's testimony at trial must be weighed against itself to look for internal inconsistencies, and against the testimony of other witnesses to see whether there are other inconsistencies.

[196] There is little in the testimony of Mr. Dufresne that is internally inconsistent. Neither was there anything in the way that he testified and in his demeanour that would cause me to have particular concerns about his credibility and the reliability of his evidence. There was nothing remarkable one way or the other in his manner of testifying. I would say the same about A.P.'s manner of testifying and demeanour.

[197] I note that Mr. Dufresne did not attempt in his testimony to indicate in any way that, while they were drinking and out together, A.P. was flirting with him or trying to initiate any romantic or sexual contact between them. This is something accused

individuals at times do in order to provide a foundation or context to justify their actions or to attempt to cast doubt on the testimony of a complainant.

[198] Simply because Mr. Dufresne did not do so does not, however, mean he is therefore more credible and I should find his evidence more reliable as a result. It simply remains one aspect of his evidence that is factored into the whole of the evidence.

[199] There is a difference in Mr. Dufresne's testimony from that of Mr. Cletheroe as to how Mr. Cletheroe showed up at the residence. Mr. Dufresne said that Mr. Cletheroe showed up because he wanted Mr. Dufresne to go to McDonalds with him. Mr. Cletheroe says that Mr. Dufresne called him because he wanted Mr. Cletheroe to drive him to McDonalds.

[200] However, as is the case with many of A.P.'s inconsistencies, I can understand how, given the passage of time and the circumstances existing at the time of the events in question, such an inconsistency can arise without meaning that Mr. Dufresne is not credible and the evidence he proffered unreliable.

[201] This evidence exists for consideration in the entirety of the evidence, but is not so probative that a determination of credibility and reliability should turn on it.

[202] In the end, the only evidence that actually contradicts that of Mr. Dufresne, and in particular as regards the sexual contact, is that of A.P.

[203] When I consider the whole of A.P.'s evidence, I cannot find that it is sufficiently reliable that it would cause me to reject Mr. Dufresne's evidence. I say this in consideration of all the evidence, not just that of A.P. and Mr. Dufresne.

[204] I am not saying that I disbelieve A.P.; she may be entirely truthful in her testimony as to the occurrence of the sexual contact. But it is not enough that she may be truthful; indeed, it would not even be sufficient to allow for a conviction if I were to accept her version as being the likely version of what occurred with respect to the sexual contact, which is not a finding I am making in any event.

[205] The reality is that when I consider the whole of the evidence, I simply cannot say that I know with the requisite amount of certainty what happened that morning. While A.P.'s version of events is plausible and capable of belief, Mr. Dufresne's is also plausible and is also capable of belief. At a minimum, it is capable of raising a reasonable doubt.

[206] Mr. Dufresne's version of events allows for the possibility of sexual contact between A.P. and Mr. Dufresne at a time when it cannot be proven beyond a reasonable doubt that it was non-consensual contact. As stated earlier, the law is clear that even individuals who are unable to remember events due to being in a blacked-out state or without any recollection of events, may nonetheless have been able to consent at the time of sexual contact occurring.

[207] I am not saying that I am finding that A.P. was in a blacked-out state and may have consented to the sexual contact; I am saying that I cannot find beyond a reasonable doubt that she was not consenting.

[208] As I have a reasonable doubt as to whether the sexual contact was non-consensual, I cannot find Mr. Dufresne to be guilty of having committed the offence of sexual assault and he is acquitted of the charge.

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COZENS T.C.J.