IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *McGinty*, 2004 YKSC 75

Date: 20041105
Docket No.: 04-01529
Registry: Whitehorse

Between

HER MAJESTY THE QUEEN

And

GORDON RICHARD CHARLES MCGINTY

Before: Mr. Justice L.F. Gower

Appearances:
Keith D. Parkkari — For the Crown
J. Robert Dick — For the Accused

ORAL
REASONS FOR JUDGMENT

INTRODUCTION

[1] Gordon Richard McGinty is charged with sexual assault on the complainant, D.L. He is also charged with having administered or distributed a substance held out by him to be Valium to D.L. and her friend T.V.B. The charges arise from a drinking party at the accused's apartment in Whitehorse during a cold evening last January. The accused is significantly older than the teenaged complainant and her friend. The young women consumed beer, prescription drugs and marijuana during the evening. They both became dizzy and unwell from their consumption of these substances. The complainant observed some kissing between the accused and her friend earlier in the evening. Later in the evening all three ended up on the bed in the accused's bedroom. Some time after

that, the complainant recalled being engaged in sexual intercourse with the accused. However, by that time her friend had left the bedroom. The complainant and her friend left the apartment late the following morning and returned to the residence of T.V.B.'s aunt, where the complainant spent most of the day resting and watching television. After returning to her mother's house, D.L. was contacted by a social worker, who had apparently received a complaint from T.V.B. or her aunt. This led to an investigation and the current charges. The accused admits having sexual intercourse with the complainant.

ISSUE

[2] At the outset of this trial, counsel for the accused indicated that there were two issues: consent and, in the alternative, the accused's mistaken belief in consent. However, the majority of the defence submissions were directed towards the issue of consent. Further, while Crown counsel concedes that consent is at issue, he says there is no basis in the evidence to support a defence of honest but mistaken belief in consent by the accused. In essence, Crown counsel says there is no "air of reality" to the accused's alternative defence, because there is little or no evidence of facts which the accused was aware of, from which he could have inferred that the complainant was consenting, if indeed she was not. I agree.

[3] The only real issue in this case is whether the complainant consented to having sexual intercourse with the accused. In considering the evidence, I must start from the position that the accused is presumed innocent. The evidence of his involvement with these two young women, not just on January 30, 2004, but on an earlier occasion in the fall of 2003, includes allegations of supplying alcohol and pills, and perhaps being a

party to smoking marijuana, as well as intimate contact with both. Given the accused's age of 24 and the comparatively younger ages of D.L., 14, and T.V.B., only slightly older, the circumstances may appear to some to be unseemly, improper and perhaps even immoral. However, it must be remembered that the accused is not charged with being a person of bad character. He is charged with sexually assaulting D.L. by having sexual intercourse with her.

THE LAW

[4] The components of this offence are clearly set out in *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330, where Major J. for the 6-3 majority of the Supreme Court of Canada said at paragraph 23:

> A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the actus reus and that he had the necessary mens rea. The actus reus of assault is unwanted sexual touching. The mens rea is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

[5] Later at paragraphs 25 to 30, Major J. continued:

> The actus reus of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any mens rea with respect to the sexual nature of his or her behaviour.
>
> The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred.

> … for the purposes of determining the absence of consent as an element of the actus reus, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective.
>
> …
>
> 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. ...
>
> 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. …

[6] In *R.* v. *Saint-Laurent* (1993), 90 C.C.C. (3d) 291 (Que.C.A.) Morris Fish J.A., said at p. 311:

> … As a matter both of language and of law, consent implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in sexual activity as a result of fraud, force, fear, or violence. Nor is the consent requirement satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, *or* of realizing that he or she may choose to decline participation. "Consent" is, thus, stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will. …

THE EVIDENCE

[7] What then is the evidence capable of raising a reasonable doubt whether D.L. did not consent to sexual intercourse by the accused?

D.L. kissing the accused

[8] In direct examination, D.L. said that the accused kissed her at some point during the evening, but she could not remember when or where that happened. She was also asked by Crown counsel whether she kissed the accused, that is, if he was kissing her did she kiss him back? She answered “yes”, but could not recall when that happened. This is significant, not necessarily because a kiss indicates consent to sexual intercourse, but rather because the evidence of both D.L. and T.V.B. indicates there was virtually no time during which the accused was alone with D.L., except during the time when she was in the bedroom on the bed having sexual intercourse with him. According to D.L.’s evidence, T.V.B. had kind of “paired off” with the accused shortly after the two young women arrived at the apartment and began drinking. T.V.B. and the accused then left the apartment for a short period to get some more alcohol. After they returned, the accused took T.V.B. into the bathroom and, while those two remained in the bathroom, D.L. went upstairs in the apartment building to the apartment of S., a friend of the accused. It was shortly after that that D.L. recalled becoming ill and dizzy from the drugs and alcohol. Her memory at that point becomes particularly problematic. Nevertheless, I was unable to discern that there was any time during which the accused was alone with D.L. and could have engaged in mutual kissing with her, except during the time that the two were in the bedroom together alone. Consistent with this finding is T.V.B.’s

evidence, which I accept, that *she* did not witness any kissing between D.L. and the accused.

D.L.'s comment about the "threesome"

[9] T.V.B. testified that D.L. said at some point during the evening "let's have a threesome". I have no reason to reject T.V.B.'s evidence on this point and I find that D.L. did make this comment. Clearly, the comment has a sexual connotation and an inference can be made, though not an inescapable one, that the comment was made by D.L. in the presence of both T.V.B., who heard it, and the accused, as the likely third party. However, D.L. said in direct examination that she never said *anything* to the accused about wanting to have sex because she was too scared to. She later confirmed that she did not at any time that evening discuss having sex with the accused. In cross examination, she denied that there was any "joking around" between her, T.V.B. and the accused about sex. Thus, I find that D.L. was inconsistent in her evidence in denying that she made any sexual comments of any kind toward the accused that evening and this undermines my ability to believe her evidence generally.

The condom

[10] In cross-examination, the complainant was asked whether her certainty about the fact that the accused did not wear a condom could be as simple as the fact that she did not see him put one on. She replied "yeah". However, only seconds later when she was again asked whether that certainty was because she saw him getting ready to have sex and he did not put a condom on, she replied "no" and maintained that the reason she knew that he did not have a condom was because of the way "it felt" during sex. This inconsistency goes against her credibility.

The extent of D.L.'s participation in the sexual intercourse

[11] D.L. said that she was helped down the stairs from S.'s apartment to the accused's apartment by S. and the accused because she was intoxicated and could not walk properly. Initially, in her direct examination she said she did not remember very much about anything after that, including where in the apartment she ended up, whether she talked to anybody, or whether she did anything. When asked whether she recalled being in the kitchen, or the bathroom or the bedroom, she said she did not remember. She said she did not remember getting out of the bed. She said that the next thing that she could remember was waking up in the bedroom at about 11 a.m. the next morning.

[12] However, later in her direct examination, and before I granted the Crown's application for a screen to be installed between the complainant and the accused, pursuant to section 486(2.1) of the *Criminal Code*, she recalled waking up at one point in the bed against the wall with T.V.B. beside her and the accused laying on the far side of the bed beside T.V.B. She then said that she went back to sleep. The next thing that she recalled was waking up and there was only her and the accused in the bed. When asked about her clothing at that point, she said she had her clothes on, including her jeans and her top.

[13] She then sought to clarify her answer by saying that she was fully dressed when she first woke up on the bed together with T.V.B. and the accused. When asked by Crown counsel about the second time she woke up, when it was just her and the accused on the bed, she said, in reference to her testimony at the time, "my mind just went blank". She was then asked by Crown counsel about the time she woke up for the third and last time when she said she left the accused's apartment at 11 a.m. Crown

counsel repeated the question, this time asking about the time when she woke up and used the words “just before you left”, at 11 a.m. D.L. replied that she and the accused were in the bed and that she had no pants or underwear on. When asked by the Crown how her pants and underwear were removed, there was a long pause in answering. She said “this is the part where I get when I freeze … talking about things I am uncomfortable talking about”. In other words, the complainant did *not* say she did not remember how her pants and underwear were removed, but that she was uncomfortable talking about it.

[14] After the screen was installed, D.L. was again asked by the Crown about the second time she woke up when just she and the accused were on the bed in the bedroom. She was asked if she knew how her pants and underwear ended up being off. She replied “yes”. When asked how they came off, she said “I don’t know, how would I explain it?”

[15] She recalled that she was on her back, the accused had his penis in her vagina, that his head was in the air above hers and that he was moving his body up and down on top of her. She did not say anything to the accused, and when the accused said to her “I’m going to come in you”, D.L. did not respond. When asked what she was thinking at that point, she said “I did not know what to think”. After the accused stopped moving, she said she did not remember too much about what he did then.

[16] She was later asked by the Crown whether she wanted the accused to have sex with her and she replied “no”. When asked whether she said anything to the accused she replied “no”. When asked why she did not say anything, she said “I was too scared to”. When asked what made her scared, she said “I don’t know, I was just scared to”.

[17] Finally, in direct examination, she said that she was not awake the whole time when the accused was on top of her, but she had no idea how long she was awake for. She *did* recall the fact that he had no pants on and seeing the accused's penis.

[18] In cross-examination, she again said she was not awake the whole time during sex. When asked by defence counsel whether it was likely she was asleep, woke up to find that sex was going on and then stayed awake until the sex was over, she answered negatively. When asked whether she remembered *when* the accused started having with sex with her, she replied "no". However, immediately afterwards, she acknowledged that it was possible that she could have been awake when he started having sex with her. Defence counsel then put it to her that she did not actually remember the accused taking her pants off. She replied brightly "I remember!" and then said "OK, wait, I'm confused". Defence counsel asked again who took her pants off and she again replied brightly "Gordy!", and she continued "because I was awake then, I just don't know some of the parts".

[19] It is immediately apparent from this review of the evidence that the complainant has been internally inconsistent with her evidence about how much she remembers about the sexual intercourse. I allow for the fact that she may have been reluctant to testify fully and candidly before the screen was installed. However, even after the screen was put in place, she still testified to the effect that she was asleep for at least the initial part of the sexual intercourse and seemed to suggest that she woke up to find the accused engaged in the act. However, this is inconsistent with her evidence that she was awake and able to recall that it was the accused who removed her pants and underwear. She was awake enough to remember that the accused had no pants on and

she was able to see his penis. She allowed for the possibility that one of the reasons she knew the accused did not wear a condom was because she did not see him put one on. She was awake during the act because she recalled her position relative to the accused *and* his movements *and* the fact that he said that he was going to “come” in her *and* that she did not respond to that comment. She allowed that it was possible that she could have kissed the accused during the sexual intercourse. She recalled the accused stopped and got off of her and that the accused went to sleep. Given all that she *does* recall about the sexual intercourse, there isn’t much room, if any, for any portion of the act which she has *not* described, due to her claim that she was asleep for part of the time. And finally, it becomes virtually impossible to accept her evidence that she did not remember when the accused *started* having sex with her, since she clearly recalled “Gordy” taking her pants and underwear off and seeing him naked from the waist down just prior to the intercourse. These inconsistencies again undermine my ability to accept her evidence generally, and in particular, that she did not consent to the sexual intercourse.

Whether the complainant talked to T.V.B. about leaving the apartment in the morning

[20] The complainant was asked during cross-examination whether she talked to T.V.B. about leaving the accused’s apartment in the late morning and she initially replied “yes”. Yet, when further asked, only seconds later, how that conversation went, she immediately contradicted herself by saying “I don’t remember talking to her about leaving”. Again, this reflects adversely on her believability.

The complainant's inconsistency about kissing S.

[21] In cross-examination, the complainant was specifically asked whether S. tried to make a move on her and she replied "no, not at all". Later in cross-examination, she was again asked whether S. had ever tried to kiss her that evening and again she replied "no". This is inconsistent with the evidence of T.V.B. who saw the complainant standing up kissing S. that evening. I accept T.V.B.'s evidence on this point. While I find that the complainant was kissing S. at some point during the evening, I draw no inference whatsoever that this indicates she was more likely to have consented to the sexual intercourse with the accused. However, the external inconsistency between the complainant and T.V.B. is yet another reason why I found the complainant less believable overall.

The toast

[22] The complainant was specifically asked in cross-examination whether she ate any toast or bread and butter while she was visiting S.'s apartment. She said no she had not. However, T.V.B. recalled seeing the complainant on the couch in S.'s apartment eating toast and that she continued to eat the toast while she was assisted down the stairs to the accused's apartment. I accept T.V.B.'s evidence here. While this may seem like a small point on its own, it was not a point on which the complainant claimed to have no memory. Rather, she answered as if she clearly remembered that she did not eat any toast at S.'s apartment. Again, the external inconsistency with T.V.B.'s evidence tends to shake my ability to believe the complainant generally.

The complainant's capacity to consent

[23] Much of the complainant's testimony was about her state of intoxication, having consumed some beer, the pills and some marijuana. Clearly, she was affected by those substances. She was having trouble walking at one point and S. and the accused had to assist her from S.'s apartment down the stairs into the accused's apartment. However, there is also evidence that the complainant was still awake and eating toast at the time. Further, it would appear that T.V.B. consumed approximately the same amount of alcohol, pills and marijuana as the complainant. While I fully appreciate that two individuals will not necessarily react the same way to that combination of substances, there is no suggestion that T.V.B. was so intoxicated by these substances that she passed out at any point. She *did* say she was dizzy and paranoid earlier, and the following morning when she woke up and also awakened the complainant she said she was really sick and that she wanted to throw up and felt hung over. T.V.B. said the complainant was not hard to wake up and she simply shook her arm to do so. She said that although the complainant admitted to feeling sick and looking hung over, she was not staggering and she was talking fine. In fact, she agreed with the suggestion that D.L. was "perfectly fine" in the morning, with reference to her state of sobriety. This evidence suggests that the intoxicating effects of the combination of substances consumed earlier that night had dissipated to a significant extent.

[24] It is also important to remember that there is no clear evidence as to when the sexual intercourse took place. T.V.B. said that when she was in the bed with the accused and the complainant, the accused started trying to hug her so she got up and went into the living room to sit on the rocking chair. A couple minutes after leaving the

bedroom, T.V.B. heard the complainant moaning. While that evidence may be consistent with the complainant being involved in sexual intercourse, it is hardly conclusive. It is also contrasted with the earlier evidence of the complainant in direct examination that she and the accused were in bed “just before” she left at 11:00 a.m. While it is impossible for me to find, on this uncertain evidence, when the intercourse took place, it is possible that the complainant was having sexual intercourse in the late morning shortly before she awoke for the third and last time, got dressed and left the apartment at 11:00 a.m. If so, it is also reasonable to infer that the intoxicating effects of the various substances consumed by the complainant that evening had significantly worn off by that point.

The complainant’s fear

[25] D.L. said in direct examination that the reason she did not say anything to the accused to indicate she did not want to have sex with him was because she was “too scared to”. When asked what made her scared she replied “I don’t know” but said that she was just scared to.

[26] Firstly, this professed fear is somewhat inconsistent with the complainant’s earlier evidence as to what she was thinking during the sexual intercourse shortly after the accused said that he was going to come inside her. At that point she said that she “didn’t know what to think”.

[27] Secondly, this professed fear is inconsistent with the fact that she knew the accused well enough to continually refer to him as “Gordy” during her testimony. Also, she had been to the accused’s apartment on a previous occasion in the fall of 2003 and had stayed the night there, without incident. On the evening of January 30th, the

complainant said that it was a combined decision of both her and T.V.B. to go to the accused's apartment that night to see about a possible ride home. Once they arrived at the apartment, the complainant herself phoned her uncle to let him know that she would not be requiring a ride home that evening. This is consistent with the complainant having made a decision that she was going to spend the night, just as she had done on the previous occasion.

[28] Lastly there is no evidence whatsoever of any actions or words by the accused or anyone else objectively supporting any fear by the complainant towards the accused.

[29] I agree entirely with the Crown's submission that it is a far cry from saying that the complainant wanted to have sex with the accused simply by showing up at his apartment that night and deciding to spend the night. However, the problem remains that, apart from her testimony that she was "too scared" to say to the accused that she did not want to proceed with or continue the sexual intercourse, there is no other evidence at all to indicate that the complainant had any reason to fear the accused.

The conversation between D.L. and S.W.

[30] The only witness called for the defence was S.W. and she acknowledged that she had been a friend of the complainant and had lived with her for a period at the Children's Receiving Home in Whitehorse. She said that she accompanied the complainant to the preliminary inquiry and was present as a support person during the complainant's testimony there. A couple weeks before the preliminary inquiry she said that she was having a cigarette with the complainant outside the Receiving Home and that they were talking about the accused. S.W. asked the complainant about what was going to happen in court and what happened on the night of January 30th. S.W. testified

that the complainant said to her that the accused did not rape her and that she “wanted to”, which I infer to mean that she wanted to have sexual intercourse. S.W. testified that when S.W. asked the complainant why she was charging the accused, the complainant said she was being pressured by workers at the group home and that she was “not sure”. The complainant said to S.W. that she knew she “wanted to” but she was messed up on pills that night. Again, I infer that the expression “wanted to”, means that the complainant wanted to have sex with the accused.

[31] In cross-examination, S.W. said that she did not talk to anybody about what the complainant had told her until she talked to the accused about it while they were in jail together. She said she had this conversation with the accused in the presence of guards and other officials at the Whitehorse Correctional Centre. When asked again about the conversation with the complainant, she relayed that the complainant wasn’t sure if she could call it rape or not because she was messed up on pills. Also, the complainant told S.W. that she “liked” the accused.

[32] S.W. also testified that she had a previous relationship with the accused, which ended about three years ago. They had a child from that relationship when S.W. was 15 years old. She confirmed that they continued to be friends on and off since then and that they periodically talk with each other. When asked by the Crown whether they are friends now, S.W. said “I wouldn’t say that. No.” She also said “I’m not exactly being supportive” with reference to the accused. That struck me as an odd comment at the time and it was not pursued in further cross-examination by Crown counsel. However, on further reflection, I believe it is fair to conclude that S.W.’s comment about not being supportive of the accused might have been ambiguous. On the one hand, it could be

said that her evidence about the complainant's disclosure to her could be *nothing but* supportive. On the other hand, it could simply have been her perception of the current state of affairs between her and the accused. I do not find that the statement causes me to reject her testimony. And, while there is a basis for the Crown to argue that S.W. was biased in favour of the accused, I did not detect that bias from my observation of her testimony.

[33] I accept S.W.'s evidence about the conversation she had with the complainant two weeks prior to the preliminary inquiry.

[34] Defence counsel cross-examined the complainant about this conversation on the assumption that the conversation had taken place while D.L. and S.W. were outside of the courtroom at the preliminary inquiry. At this point in the cross-examination, Crown counsel intervened suggesting that defence counsel should put the actual conversation to the complainant in order to satisfy the rule in *Browne* v. *Dunn* (1893), 6 R. 67 (H.L.), a decision of the House of Lords, which states that if the cross-examiner intends to subsequently impeach the credibility of a witness by means of other evidence, he or she must confront the witness with that evidence under cross-examination and give the witness an opportunity to respond. However, the rule is not absolute, and the extent and manner of its application is to be determined by the trial judge in all circumstances of the case. In this case, after the intervention by the Crown there was some discussion between the Court and counsel about the issue. When defence counsel resumed questioning he specifically asked the complainant whether she told S.W. that the accused did not sexually assault her, that is, the complainant, and that the accused should not be in court. The complainant replied "no" to both parts of that question. Given

that the complainant had had such a conversation only two weeks prior to the preliminary inquiry, I conclude that she was not misled by defence counsel mistakenly placing the conversation at the time of the preliminary inquiry. Clearly, the complainant knew that her credibility was under attack and she had an opportunity to address the issue in her answer to defence counsel's question. The inconsistency between the complainant and S.W. on this point significantly undermines her credibility.

No evidence motion on Count 3

[35] Counsel for the accused applied at the end of the defence case to have Count 3 dismissed for lack of evidence. He referred to his application as a "no evidence" motion. Crown counsel referred to it as a "nonsuit" application. At the time, I questioned whether this application should have been made at the close of the Crown's case and before the defence elected to call evidence. Upon further review, it appears that the term "nonsuit" has more recently been used interchangeably with the term "motion for a directed verdict" and a "no evidence" motion. However, such a motion is normally made at the close of the Crown's case and before the accused is put to his or her election as to whether to call evidence.

[36] In any event, I have treated the application as part of the defence submission upon the close of the case and I will rule on it as part of my reasons for judgment.

[37] Count 3 alleges that the accused administered or distributed a substance "held out by him to be … Valium …", contrary to section 5(2) of the *Controlled Drugs and Substances Act*. In short, there is no evidence that the accused did so and to the extent that there is any evidence at all about the accused offering Valium to anyone on January 30, 2004, the evidence clearly falls short of proof beyond a reasonable doubt.

[38] D.L.'s evidence was that on a previous occasion in November 2003, the accused had offered pills to her and T.V.B. On January 30, 2004, D.L. said the accused got some pills out but he only said something about one of them, that is "it was a hangover pill and that it would get us high". The other pill was a Tylenol 3. She took them both. The accused also gave pills to T.V.B., but D.L. did not know what those pills were. Later, when the accused was out of the apartment, D.L. took another two Tylenol 3 pills from the cupboard above the stove, swallowed one and gave the other to T.V.B. Earlier in her testimony, D.L. said that when she took the pills out of the cupboard above the stove, one was Valium, but she did not remember what it looked like. When asked how she knew it was Valium, she said she had seen the pill before but no one had told her it was Valium. The pill she thought was Valium was not the hangover pill.

[39] T.V.B. said the accused gave pills to her and D.L., one was blue, round and small with some writing on it. One was yellow in the shape of a school bus stop sign with five sides. Two were Tylenol 3, which the accused had given to T.V.B. before during the visit in November 2003. As for the pills given to the young women on January 30, 2004, T.V.B. testified that the accused said, "they would cure a hangover", but T.V.B. did not know which one he was referring to. Later, T.V.B. confirmed that D.L. took another two Tylenol 3 from the cupboard, which she shared with T.V.B., each taking one. Then, inconsistently, T.V.B. described the pills given by the accused to D.L. and said that she did not know the shapes and colours of those pills.

[40] Crown witness, B.G., said that the accused had given him three Valium pills during the evening of January 30, 2004, which B.G. described as "round, blue and very small". B.G. recognized these pills because he had previously been prescribed Valium.

Interestingly, the evidence of B.G. does indicate that the accused had administered or distributed Valium to B.G., but fails to establish that the accused “held out” the pills as such. In any event, I understand that B.G. did not testify at the preliminary inquiry. Furthermore, Count 3 was only added to the indictment after the preliminary inquiry. It was not a charge which the accused was committed to stand trial upon. Rather, it was added to the indictment pursuant to the Crown’s authority to prefer a charge under section 574(1)(b) of the *Criminal Code*, based upon “the facts disclosed by the evidence taken on the preliminary inquiry”. As I understand the submissions of both counsel, the evidence at the preliminary inquiry indicated that the accused may have administered or distributed Valium to the two young women, D.L. and T.V.B. Therefore, the particulars of the charge under Count 3 must be deemed to refer to D.L. and T.V.B., as the persons to whom the accused administered or distributed a substance held out by him to be Valium. Clearly that is what the accused must have thought was the case he had to meet in preparing for trial and not that he had to defend against administering or distributing Valium to B.G.

CONCLUSION

[41] I have a reasonable doubt about whether the complainant did not consent to the sexual intercourse with the accused. Accordingly, I find the accused not guilty of Count #2. I also conclude that there is no evidence that the accused administered or distributed a substance held out by him to be Valium to either D.L. or T.V.B., and I find the accused not guilty of Count #3. A stay of proceedings was earlier directed on Count #1.

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GOWER J.