SUPREME COURT OF YUKON

Citation: *R.* v. *Anderson*, 2010 YKSC 32

Date: 20100716
S.C. No. 09-01506
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

CHARLES LESLIE ANDERSON

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code.*

Before: Mr. Justice R.S. Veale

Appearances:

Judy Bielefeld — Counsel for the Crown
Malcolm Campbell and Brook Land-Murphy — Counsel for the accused

REASONS FOR JUDGMENT
(Sexual Assault Charges)

INTRODUCTION

[1] Charles Leslie Anderson has been charged with committing a sexual assault against the complainant on April 30, 2008, contrary to s. 271 of the *Criminal Code*.

[2] There is no dispute that sexual intercourse took place based upon DNA analysis and Mr. Anderson's admission of consensual sexual intercourse with the complainant.

ISSUES

[3] The issues to be determined are:

1. Has the Crown proved beyond a reasonable doubt that the complainant did not consent or did not have the capacity to consent to the sexual intercourse?
2. Has the Crown proved beyond a reasonable doubt that Charles Anderson did not have an honest but mistaken belief in the complainant's consent?

THE LAW OF SEXUAL ASSAULT

[4] The case of *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330, sets out the current law of sexual assault. Significantly, the concept of implied consent was repudiated, but the meaning of consent remains an important aspect of the law of sexual assault.

The Criminal Act

[5] There are three elements that the Crown must prove to establish the *actus reus* of a sexual assault:

1. touching;
2. the sexual nature of the contact;
3. the absence of consent.

[6] The touching and sexual nature of the contact are proved objectively.

[7] The Supreme Court said this about consent at para 26:

> 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 (citations omitted).

[8] The Court went on to say it is only the state of mind of the complainant that is determinative in this inquiry (para. 27). This means that the complainant in her mind must want the sexual touching to take place (para. 48).

[9] The *Criminal Code* expresses this concept of consent as follows:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> ...
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained

[10] In para. 29 of *Ewanchuk*, the Supreme Court stated that if the trial judge believes the complainant subjectively did not consent, the Crown has proved the absence of consent. The accused's view of the complainant's conduct is not relevant to whether the *actus reus* has been established.

[11] In the case of *R. v. J.R.*, [2006] O.J. No. 2698 (S.C.), Ducharme J. found both lack of consent and a lack of capacity to consent in the case of a complainant who suffered an alcohol blackout and could remember next to nothing of a sexual encounter. In noting that evidence of memory loss or blackout taken alone does not prove the absence of capacity or consent, he said at para. 20:

> This does not mean that evidence of memory loss or a blackout is unimportant, irrelevant or necessarily lacking in probative value. It may well be circumstantial evidence which, when considered with other evidence in a case, may permit inferences to be drawn about whether or not a complainant did or did not consent or whether she was or was not capable of consenting at the relevant time. But even here, while not required as a matter of law, for such

> evidence to be probative, some expert evidence will almost always be essential.

[12] I am in agreement with this statement, except that I do not think expert evidence is essential, although it can be very helpful (see *R. v. B.S.B.*, 2008 BCSC 917, affirmed 2009 BCCA 520).

[13] The finding that no consent was given by the complainant in *J.R.* was based mainly upon her circumstantial evidence that:

1. she would not have agreed to have sex with anyone as she had recently had an abortion and was told by her doctor to abstain from sexual intercourse for two weeks (para. 31);
2. she would not consent to sexual intercourse with a black man or with the other accused she considered to be a friend (para. 34 and 35); and
3. she would not have sexual intercourse without the use of a condom (which was not used) (para. 36).

[14] In terms of capacity to consent, the case law indicates that courts can infer a lack of capacity where there is direct evidence that:

1. the complainant was extremely intoxicated;
2. the complainant was asleep or unconscious when the sexual touching commenced; or
3. the complainant was asleep or unconscious during all of the sexual touching (para. 45).

[15] In *J.R.,* Ducharme J. concluded that the complainant lacked the capacity to consent. Firstly, she was quite intoxicated, having consumed 13 ounces of rum and two beers. As well, in the context of the finding that she would not have and had not

consented to sexual intercourse with the two accused, it was revealing that she had no injuries of any significance, no damage to her clothing, no evidence of a struggle and that no condom was used (para. 59).

[16] A similar decision about capacity was reached by Romilly J. in *R. v. B.S.B.*, *supra*. Here, the judge's finding that a blacked-out complainant did not have the capacity to consent was based upon a fabrication in the accused's statement to the police, the injuries inflicted on the complainant, her consumption of alcohol and vomiting. Romilly J. also used that the same evidence to support an inference that the complainant did not consent to sexual intercourse.

The Guilty Mind

[17] To establish *mens rea*, the Crown must prove that the accused had the general intent to touch the complainant (*Ewanchuk,* para. 41). The law also provides the defence of mistake of fact, which is available when an accused honestly but mistakenly believed that he had the claimant's consent to the touching. There is no burden of proof on the accused, but rather it is simply a denial of criminal intent.

[18] The *Criminal Code* places some limits on this defence:

> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from the accused's
>
> (i) self-induced intoxication, or
> (ii) recklessness or wilful blindness; or
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[19] The Supreme Court stated at para. 49 of *Ewanchuk* that, for the purpose of the honest but mistaken belief in consent, “... "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.”

[20] A good and concise summary of the law of sexual assault is set out in the dissent by McLachlin J., as she then was, in *R. v. Esau*, [1997] 2 S.C.R. 777 at para. 52:

> The crime of sexual assault, like most other crimes, consists of two elements. The first element is a criminal act, or actus reus. The criminal act is the act of sexual contact without the consent of the other person. The second element is a guilty mind, or mens rea. The mens rea of sexual assault consists of knowledge that the complainant did not consent or that she lacked the capacity to consent, or alternatively, wilful blindness or recklessness as to whether or not she consented or whether or not she had the capacity to consent. These elements lead to several possible defences. One is that the complainant in fact consented to the act, negating the actus reus. Another is that, although the complainant did not consent, the accused honestly and mistakenly thought she did, depriving him of the necessary guilty mind.

THE EVIDENCE

The Complainant

[21] The 56 year-old complainant in this case works at an office in her community. She has lived in the community all her life. She knows the accused and his wife well. She has known the wife of the accused all her life and lived with her for a year when she was a child. The accused was also a friend that the complainant felt she could trust. There was never any sexual interest between them.

[22] The complainant has lived with her spouse for some 20 years but every spring he starts to drink and they split up for a period of a few months. She is able to cope without

drinking for about a week and then she begins to drink. It is a pattern that they have followed for years and so it was in the spring of 2008.

[23] The complainant went to residential school and was sexually abused there. As a result of this experience, she has adopted a number of practices. She always drinks with women for protection. She never wears a dress. She goes to bed in jogging pants because she always likes to have her body covered.

[24] The complainant has seizures that occur when she is drinking hard liquor.

[25] She is 5’6” tall and weighs 140 – 150 pounds.

[26] At the beginning of April 2008, the complainant had abstained from alcohol for the past year. But on April 26 or 27, she began drinking. When she woke up on April 29, she was “feeling good”, i.e. somewhere between sober and drunk.

[27] In the morning of April 29, the complainant remembers drinking with a bunch of women at her house. They were drinking beer as she had a couple of cases in the fridge. She personally drank 8, 9 or 10 beers before noon when they went to the bar. She admits that her memory of those present is not good and she thinks they walked to the bar but she isn’t sure. She has no memory of driving out to a lake.

[28] The complainant remembers walking into the bar and getting a beer but she has no memory after that until the next morning, except for one moment when she was sitting at her kitchen table. She remembers lifting her head up and seeing the accused sitting across from her. After that, she blacked out again.

[29] The complainant testified that she woke up with a start the next morning when the phone rang. She was on her couch with a blanket over her and she had no pants or panties on. She realized that something had happened. Her pants and panties were on

the floor. She freaked out and began crying because she always wakes up with her clothes on.

[30] With the assistance of some friends, she went to the nursing station to talk about the rape kit. She said she was reluctant to go as she was ashamed, but her nieces took her over. She talked to the nurse and understood the procedure she had to submit to if she wanted to report the incident to the RCMP.

[31] The complainant was with the nurse for two to three hours. Afterwards, she spoke to the police but she was not comfortable speaking to men about what had happened. She eventually gave a statement to a police woman.

[32] The complainant said that she had bruising on her arms, hips and legs after the incident that she did not notice before.

[33] The complainant said that the incident has affected her self-esteem and she doesn't go walking for exercise as she feels everyone is looking at her and talking about her. It has affected her relationship as she doesn't want to be touched and her spouse doesn't understand why.

[34] The complainant stated that she will never forget the accused's face as she thought she could trust him. She stated that she would never have consented to have sex with him because his wife was like a sister to her.

[35] The complainant confirmed that she has seizures and blackouts when she drinks. She had one on the morning of April 29th. At the preliminary hearing, she initially denied an earlier seizure on April 27 although she admitted it in cross-examination. She believes her seizures and blackouts happen when she drinks hard liquor but admits they can also occur when she drinks beer.

[36] The complainant confirmed that when she drinks she can hold her booze and has been told that she doesn't look like she is drunk. She stated that when she is drinking she may have no recollection of talking or doing things. She told the police she did not get her bruises from falling down as she doesn't normally fall down when she is drinking. She agreed that when drinking she can walk, talk and look normal even if she later cannot remember what she had been doing.

[37] The complainant remembers very little of the events that day beyond the fact that she started drinking at her home, went to the bar, and returned to her home. She has the one memory of seeing the accused across the table before she blacked out. She has no memory of a house party at her home in the late evening of April 29 and the early morning of April 30.

[38] The complainant denied or could not remember any of the specific events put to her by defence counsel. She said that she knows her own body and would not have consented to anything.

The Evidence of T.D.

[39] T.D. is a friend of the complainant who had been in the community for a year before these events. She has worked in the bartending business for 20 years. She said she met the complainant outside the bar at 2:30 in the afternoon and they went for a ride to the lake before returning to the complainant's house. T.D. was drinking quite a bit. She said the complainant had "a couple" but she was not paying attention to what the complainant was drinking. She remembers drinking from 4 to 9:30 p.m. but doesn't recall how much, although she thinks she had 10 to 12 beers in the 7-hour period. She said she was drinking the night before and woke up a little tipsy at 2:30 in the afternoon.

[40] T.D. remembers walking to the bar at 9:30 p.m. with the complainant and buying herself and the complainant a beer. They had been there for 45 minutes to an hour when the complainant asked T.D. to go home with her and have more beer. T.D. declined as she had had enough to drink and wanted to go to bed. T.D. said no a second time when the complainant asked her to go home with her.

[41] T.D. said she asked the accused to drive the complainant home. The accused had just dropped his daughter off at the bar and looked sober. He agreed and told the complainant he would take her. T.D. said the accused grabbed a 12-pack of beer from offsales and left with the complainant.

[42] T.D. said that she doesn't know how much the complainant had to drink but she doesn't think it was that much. T.D. described herself as "pretty" drunk. On a scale of 0 (sober) and 10 (drunk), she said she was a 7 and the complainant a 5. In her experience, the complainant did not come to the bar much and is not a drinker.

[43] In cross-examination, T.D. recalled getting a ride half way to the bar that evening from R.F. T.D. also remembered that the complainant bought the case of beer that she and the accused took with them. T.D. agreed that the complainant looked pretty good and like she was feeling good but not drunk. T.D. said the complainant could talk and was coherent.

[44] T.D. was not aware of the complainant's blackouts or of the fact that she could look normal even when she was blacked out. T.D. has taken the course to identify intoxicated persons.

The Evidence of the Nurse

[45] Deborah Crosby is a registered nurse with 22 years experience. She had recently arrived in the community on April 18, 2008, and was working at the nursing station. She has been trained as a sexual assault nurse examiner. Her practice is to offer an individual a range of assistance when they come in alleging a sexual assault, including medical treatment for STDs, documenting the injury, counselling, taking oral, vaginal and anal swabs and seeking out RCMP involvement.

[46] Ms. Crosby met with the complainant at 9:10 a.m. on April 30, 2008. The complainant was very teary and upset. Ms. Crosby explained the assistance options and the complainant agreed to complete the full sexual assault kit treatment and have it delivered to the police. Ms. Crosby documented areas of bruising, including several bruises on her left arm, inside her thigh, on her left knee, her left buttock and under her right upper arm. Several of these were painful.

[47] On cross-examination, Ms. Crosby said that she could not determine if the bruises were fresh. The documented injury did not include any vaginal, vulva or anal trauma.

[48] The sexual assault kit was given to the police at 12:02 p.m. on April 30, 2008.

[49] Ms. Crosby also testified about the ambulance attendance of the complainant at the nursing station at 5:15 a.m. in the morning of April 29, 2008. The complainant was having a seizure and was brought in by ambulance. Ms. Crosby said that seizures typically occur during detoxification, but the complainant’s seizure was the result of too much alcohol. She observed three episodes of the complainant clenching her jaw and arching her body. During the episodes, she described the complainant as not

unconscious. Ms. Crosby. treated her with intravenous valium and she was discharged at 9:35 a.m. The health centre notes also recorded seizures on April 27, 2008.

The Evidence of Cst. Smith

[50] Cst. Ryan Smith attended at the health centre at approximately 12 noon on April 30, 2008. He observed the complainant sitting on a bench in the lobby. She was slouched over and sobbing. He described her as “kind of closed inward” and he found it difficult to converse with her. She described the previous evening but did not give any details about the alleged sexual assault. She was not noticeably intoxicated or impaired.

[51] Cst. Smith made arrangements for the complainant to attend the detachment to provide a recorded statement, but each appointment was cancelled and rescheduled. He finally met her on May 12 at the health centre, and she said she didn’t recall anything else and did not want to provide a statement because she didn’t have a good memory of the event.

[52] He finally asked her if she would prefer to speak to a female investigator and the complainant gave a statement to Cst. Drover on May 27, 2008.

[53] Cst. Smith had several conversations with the complainant prior to her May 27 statement. On May 12, she said that she did not want to give a recorded statement until they received the results of the sexual assault kit. She said that she was confused because she thought that a group of people that she had over for a party may have taken advantage of her. She believed it was Charles Anderson because he was the last person she remembered seeing. She also said that she was not interested in pursuing charges because she couldn’t remember what had happened.

[54] In cross-examination, Cst. Smith was asked if what the complainant in fact told him was that she did not wish to proceed with a criminal investigation as she could not remember anything from the night in question, could not be certain of whom she had sex with, or even if it was against her will. Cst. Smith acknowledged that was the gist of it, but he confirmed as follows:

> A I believe what she had told me was that she was confused the morning she woke up with no panties or pants on. Her initial thought was “perhaps some people here took advantage of me”, and then she – as she worked through it in her mind she – she came to believe that it was Charles Anderson that had had sex with her, and she wanted to wait until the results of the sexual assault kit come (sic) back.

[55] Cst. Smith also wrote in his notes: “It was Charles Anderson. He was the only one in the house.”

The Evidence of the Toxicologist

[56] D’Arcy Smith, a toxicologist, was qualified to give opinion evidence on the analysis of bodily fluids and tissues for the presence of alcohol and drugs and the effects of alcohol and drugs on the body.

[57] The blood samples from the complainant were taken April 30, 2008 between 9:15 a.m. and noon and were analyzed in July 2008. The blood sample indicated 165 milligrams of alcohol in 100 millitres of blood.

[58] Dr. Smith testified that alcohol is a central nervous system depressant, and the more alcohol consumed, the greater the impairment. However, no specific findings could be made for the complainant as he had no information about the amount of alcohol consumed, the time when consumption started and stopped, or a specific time for the taking of the blood sample. However, Dr. Smith indicated that binge drinkers can

develop a tolerance for alcohol and acquire masking skills to hide impairment, such as using short words and speech and standing with their feet wide apart to give the appearance of sobriety.

DNA Evidence

[59] No evidence was led on the DNA analysis, as the defence admitted it was the accused's DNA found in the complainant's vagina.

Defence Evidence

Examination in Chief of the Accused

[60] The accused testified as part of the defence case. He moved to the community in 1971. He married in the 1980's and has two children, one of whom also testified.

[61] The accused recalled going to the bar. His daughter had phoned him and asked for a ride. He picked her up at 20 or 25 after 10 p.m. and arrived at the bar at 10:35 p.m. He did not have a drink before arriving at the bar.

[62] The accused described the bar as packed with people. The complainant and some other people were at a table full of drinks. He said the complainant asked him for a ride home and he replied he wasn't going to leave right away. He said that the complainant asked for a ride several times and his daughter finally told him to give her a ride. The accused said he still did not want to leave the bar but the complainant kept asking him and he finally relented. He said he gave her a ride at 10:50 p.m. at the latest.

[63] He described the complainant as drinking and laughing but said she didn't seem drunk to him. Before leaving the bar, he picked up a case of 24 beers that the complainant purchased. He said the complainant didn't stagger but walked out and got in his truck.

[64] When they arrived at the complainant's house, she invited him in. He said she fell on the steps and he helped her in. There was no one else at the house.

[65] The accused said the complainant went into the bathroom. When she came out, he could smell marijuana. He said that he had better leave and she said "don't leave, sit with me for a while." They sat at the kitchen table and he asked where her husband was. She said that she had kicked him out. She asked if he would drive her to get her truck in the morning. He agreed.

[66] The complainant began to smoke a cigarette and then walked to the living room to play some music. He said the song was Sitting on a Rock and the singer was Ernest Monias.

[67] The complainant then asked the accused to dance and kind of pulled him by the arm. He said she was dirty dancing and rubbing up against him. He said "What are you doing?" and she replied "Dancing".

[68] They returned to the kitchen table and she pulled a bunch of condoms out of her jacket pocket and said that he might need one for later. He put one in his pocket. He said she put the other condoms back in her pocket.

[69] The accused said the complainant went to the bathroom again and began calling people on her phone to get them to come over. She then drank some more beer and they talked about her husband again.

[70] The complainant called the bar which closes at 2 a.m. Between 1 and 1:30, four boys came over. The accused remembered the names B.B., C.W., B.J. and B. By that time, the complainant had drunk several beers.

[71] The accused said that he and the complainant were dancing again and the boys snickered when they came in. After dancing, he talked to C.W. and the complainant talked to B.B.

[72] Five or ten minutes later, a song was playing and the complainant grabbed the arm of C.W. and danced with him.

[73] Around this time, the accused's daughter arrived with R.F. Some of the boys left. The accused said the complainant sat on the couch and asked him to bring her a beer, which he did. He returned to the kitchen table for a while and then she called him over to the couch and laid her head on his lap and his right knee. They talked about her plans for the next day.

[74] Her face was facing away from him. He asked her what she was doing and she said she just wanted to lay there. At that point, the accused's daughter came in and said "What are you doing on my Dad's lap?" The accused said that the complainant sat up straight.

[75] The accused remembers that the complainant asked him if he liked her and he said he did, like a friend.

[76] The accused said he went to the bathroom, and when he came out his daughter asked him what he was going to do. His daughter was sitting on the couch with the complainant. He said he had to go home as he had to work the next day.

[77] The accused said he was about to leave with his daughter when the complainant, who was still sitting on the couch, said, "Don't leave. Come back."

[78] The accused wasn't sure what time it was but he thinks it was around 3 a.m. He explained that he wasn't drinking heavily that night and only had five drinks so he was able to keep an eye on the time.

[79] He described the complainant's condition at the time:

> I would say she was – she looked normal to me, like, you know, even though she drank all those beers, she still looked sober to me.

[80] The accused returned to the complainant's house after dropping off his daughter and R.F. He said the complainant invited him in and they sat and talked on the couch. He said he guessed that she was feeling bad because her husband hadn't come home. He said she began to rub his leg and put her hand between his legs saying "Do you want me?" He said she continued to rub him while he told her "No" until she started to unbutton and unzip her pants.

[81] At this point, the accused said they were hugging each other and he got an erection. She grabbed his hand and put in on her private parts. She asked him to take her pants off.

[82] The complainant told him that the couch was too small and he suggested "We could lie on top of the floor." She then got up off the couch, took her pants off and laid them on the floor beside the couch. He said "I was going to get down on her but she didn't like it that way."

[83] The accused said they made love and she asked if he used the condom she gave him and he said he forgot. She replied "Well, don't worry about it."

[84] The accused said he got dressed and the complainant sat on the couch. He asked her if she was okay and she said she was fine. When he left, she asked him to

pick her up in the morning to get her truck. He looked at the clock on his stove when he got home. It was 4:15 a.m.

[85] The accused said that he had about five beers that night and that he was “pretty sober.” He said it takes him eight or nine beers to get drunk. He said that the complainant “was just like normal as me and you. She could talk good, she moved around good, she not (sic) falling around or anything like that.”

[86] He went on “So I just -- I just assumed that she was sober, like you know, I know she was drinking.”

[87] The accused then remembered a further phone call by the complainant who called a friend to see if she would come over “and meet my boyfriend.”

[88] When asked if she used any words to indicate that she did not want to have sex, the accused replied that “She just played along.” The accused said that his wife was working in Whitehorse at the time.

[89] He was asked by his counsel to recall how many beers the complainant had to drink over the course of the evening. He replied:

> A Oh, I would say about pretty close to two cases.
>
> Q Just -- just J.S. I mean, not the whole group of people?
>
> A Well, out of the case of beer she drank most of it.
>
> Q Out of?
>
> A The case of beer that I took -- she took home.
>
> Q Yeah.
>
> A She drank most of it.
>
> Q Okay. And you had some of that as well?
>
> A I only had five out of it.

Q Okay. And how big is a case of beer and how many beer are in the case?

A There's 24 -- 24 in a case.

Q Twenty-four in a case?

A I believe, yeah.

Q Okay. Were other people drinking that beer? Mr. B. –

A Yeah.

Q -- and J. and –

A Right, that B. [indiscernible], that B. boy was drinking beer and kind of everybody kind of helped themselves, like.

[90] Mr. Anderson's counsel asked him about his prior convictions for sexual offences, pursuant to an earlier court ruling that these convictions were admissible for the purpose of credibility. The accused said there were a couple of convictions in 1991, involving an 11-year old girl "that was just touching at the time." He also advised that he had recently been released from jail for the sexual assault of a 10 ½-year old girl.

Cross-Examination of the Accused

[91] In cross-examination, the accused said he knows that his wife and the complainant hung out when they were young. He has known the complainant since 1971 when he moved to the community. He also knows the complainant's husband and once helped him fix his car.

[92] The accused said that he believes there is a pattern that each spring, the complainant's husband leaves and goes drinking. He has observed the complainant drinking when her husband leaves the household. He denied that it has been a pattern

for some years. But he agreed that, before the incident, it was not a common event to see the complainant drinking.

[93] On the night in question, when the accused saw the complainant at her table in the bar, she had six beers in front of her and the table was full of beers. He agreed that it was unusual in the sense that she didn't normally drink. He also knew that her husband had left before being advised of this by the complainant.

[94] The accused said he and the complainant arrived at her house between 11:10 and 11:15 p.m. He said he knew the time because she had a clock on the stove that he noticed. When pressed on the time of arrival, he reflected and said it was between 11:05 and 11:10. He said he was sure of it.

[95] He said that the complainant tripped on the steps on her way into the house, but he wouldn't call it a fall. He described her grabbing the handrail and slipping, like there was packed ice on the stairs. He then said she slipped on the ground before the steps and she lifted her right hand to grab the rail but missed it and fell to the ground.

[96] He said that her right thigh and her right arm hit the ground. He helped her up by lifting under her right arm. He was positive it was her right arm.

[97] The accused repeated his evidence that he asked the complainant where her husband was and she said "I kicked him out." When asked if he believed she said that, the accused said that she told him her husband was down at her mother's place. He was no longer sure that she said "I kicked him out." In any event, he believed they were split up because every time she would go on a bender she would tell her husband to leave.

[98] The accused then said he never heard the complainant say that she told her husband to leave.

[99] The accused said that the complainant was smoking king-size filtered DuMaurier cigarettes in a 25-pack. He said it was when the complainant reached in her jacket pocket to get a cigarette, she pulled out six or seven condoms and threw them across the kitchen table at him saying “here you might need this for later.”

[100] He was then cross-examined about the fact that she still had her jacket on when his earlier evidence was that she had taken it off when they arrived at her house. He then concluded that the jacket was on the back of the chair when she pulled the condoms out and flipped one to him. She put the rest of the condoms back in her pocket.

[101] The cross-examination led to this exchange:

> Q Yeah. And one of your concerns were -- I mean you noticed that she was drinking a lot? You observed that?
>
> A Yep. Yep.
>
> Q You knew she was getting drunk?
>
> A I noticed she was drinking quite a bit, but I didn't know she was getting drunk, because -- like she didn't look drunk at all. She looked like -- just like you are now, sober.
>
> Q You'd seen her drunk before?
>
> A I seen her drink before but not falling down and stuff like that.
>
> Q You knew that, given how much alcohol she was drinking, it was enough that it concerned you; you knew she was getting drunk?

A Well, I thought about at the time and that, but I didn't -- didn't worry about it because I know she handled herself, so, you know. I can't tell her, quit drinking because you're too drunk, really. I didn't say that. I didn't –

[102] Under cross-examination, he began to forget details of his previous evidence. At one point, the accused said the following:

A Yeah, two years. Like -- like I say, I'm 55 years old now and my memory's going to go sooner or later, so. Like even you -- if you ask me something today, I'll forget about it tomorrow.

Q You'll forget about it tomorrow?

A Yeah.

...

Q Okay. That's different than memory, though.

A It's not a loss of memory, it's just that I -- I don't know how would you call it, alcohol syndrome.

THE COURT: The what?

A Not alcohol syndrome but if you're -- but if you're born, when your mom drinks with you, that's -- that's what I think I have, so.

THE COURT: A syndrome?

A When your mom drinks with you, because my mom drink when she was -- when I was –

THE COURT: Oh, I see.

A Yeah, and that's why I can't -- some things I can't remember.

MS. BIELEFELD:

Q Right. So what you're saying is you think that -- that affects your memory?

A Well, it's -- I believe sometimes it does, yeah, because my [indiscernible] tell me just whatever, you know.

Q Sorry? Sorry, I didn't –

A That -- that's what my wife said, I don't remember, my mind isn't.

Q Okay. Because you forget things?

A She knows, she knows that, yeah.

Q You forget details?

A If it's for last two years, yeah. I'm pretty sure you can't remember what happened two years ago.

[103] When he returned after dropping his daughter off he said in cross-examination that the complainant was "kind of crying" in addition to being sad. To use his words:

Q So she looked sad?

A Yeah, she looked sad, I guess. I guess you could say that.

Q And her eyes were red and puffy then?

A Wasn't red and puffy, no, it just -- I guess maybe -- well, I can't say for sure because I was taking a stab at this.

Q I'm sorry you were?

A I'm just -- I don't know for sure but I'm taking a stab at -- at this.

Q You're taking a stab at it?

A I figure that before I got there maybe she felt bad and she started crying. I don't know -- I just -- I'm just kind of throwing that in, so ...

[104] The accused continued on to say that the complainant needed help taking her pants off, and he took the right leg out and she took the other leg out. He then claimed that he told her the couch was too small and he asked her to lay on top of the floor.

[105] The accused then described how the complainant did not like him giving oral sex to her and she pulled him on top of her so they could have sexual intercourse.

[106] The accused then said he left and got home between 4:15 and 4:20 a.m. in the following cross-examination:

> A Well, when I got to my place it was, what did I say, 20 after, something like that, 20 after 4:00, quarter after 4:00, so 20 after 4:00, somewhere around there. Between quarter and 20 after anyway.
>
> Q Okay. When you got back?
>
> A Yeah.
>
> Q What I'm asking you is what was the time from the end of this sexual encounter to the time that you walked back in your own home?
>
> A I really couldn't say the right time because I didn't look at the -- there was no clock there.

The reference to "no clock there" referred to the complainant's house. He previously testified that he noticed she had a clock on the stove.

The Evidence of the Accused's Daughter

[107] The accused's daughter testified after sitting through a portion of the complainant's evidence, contrary to a court order for the exclusion of witnesses.

[108] She said that she was drinking at home after supper on April 29, 2008. She called her father for a ride to the bar. She thinks they arrived at the bar between nine and ten. She described drinking three or four beers during the hour-and-a-half before

she and R.F. went to the party at the complainant's. She said there was only the complainant, her dad, B. and B.B. there.

[109] The daughter said that she and R.F. stayed about one hour at the complainant's house. She described the complainant as laying on the couch with her dad sitting beside her. They were laughing and talking but not touching. She said the complainant and her father were friends, but it seemed a little too friendly. She felt uncomfortable because her mother was out of town and her father shouldn't have been drinking and shouldn't have been at a party. She said that she didn't really talk to the complainant and the complainant didn't get off the couch while she was there. Her father drove her and R.F. home.

The Rebuttal Evidence

[110] The Crown was permitted to call rebuttal evidence on May 21, 2010 about whether R.F. and B.B. were at the complainant's house on the evening of April 29 or the morning of April 30. (see *H.M.Q. v. Anderson*, 2010 YKSC 18). Defence counsel was also permitted to call surrebuttal evidence.

[111] B.B. testified that he had been at the complainant's house in the afternoon with C.W., but he left between 5 and 6 p.m. He stated that he was not present around midnight.

[112] R.F. stated that she never partied at the complainant's house. She recalled giving the complainant and T.D. a ride to the bar but she could not remember the date. She did acknowledge giving rides to the accused's daughter but she could not recall giving the accused's daughter a ride to the complainant's house.

[113] On May 21, 2010, the defence advised that they wished to call the complainant and Cst. Ryan Smith, both of whom had already testified, in addition to S.C. and C.W. S.C. is a witness that the police were unable to obtain a formal statement from but who may have been at the party. The Crown objected to recalling Cst. Smith and the complainant. I ruled that the rebuttal ruling was not to be an opportunity to recall witnesses for further examination but rather to determine whether particular individuals attended a party at the complainant's house.

[114] The defence called C.W. who testified by phone from the courthouse in Whitehorse. He is presently serving a sentence for drinking and driving.

[115] C.W. remembered a party at the complainant's house. He could not remember the year or the month but he said he attended a party at the complainant's house after his 12-hour working day of 7 a.m. to 7 p.m. He attended with B.B. He said he was not there long, i.e. 1 ½ to 2 hours before he left with B.B. He said the accused and his daughter were there but he was not sure about S.C. and was very unsure about R.F. He stated that he left early because he had to work in the morning. He said that the complainant was there and did some dancing.

[116] S.C. also testified. Despite being hung over from a party the night before he testified, he was quite lucid. He said that he was at a party at the complainant's house on the evening of the alleged assault. The complainant is his cousin. He said that he left before anything happened. He did not know if R.F. was there. He said C.W. was there. He said it was relaxed and people were drinking beer until the accused and his daughter arrived and he left because he doesn't get along with them. He described himself as pretty buzzed out and, although he drank eight beers, he could walk home.

He guessed that he arrived at around 10 and left at 12:30 a.m. when everybody was taking off.

ANALYSIS OF THE EVIDENCE

[117] I will deal firstly with Charles Anderson. While I accept the general thrust of Mr. Anderson's evidence that he drove his daughter to the bar, he drove the complainant to her home, there was a house party, his daughter came, he drove her home and returned to have sexual intercourse with the complainant, I do not believe his evidence that the complainant was sexually provocative and that he was the reluctant friend who finally succumbed to her sexual desire. I find his evidence about the sexual intercourse with the complainant incredible. He admitted that he could not remember events two years ago but gave incredibly precise details of the night in question.

[118] The accused's examination-in-chief presented a detailed progression of the events, including almost exact references to relevant times. The times were very precise from his sober beginning that evening to when he left after the sexual intercourse and arrived home between 4:15 and 4:20 a.m. But he did not know "the right time" for the end of the sexual encounter because there was no clock at the complainant's house. That statement was contradicted by his previous statement that he first arrived at the complainant's house between 11:10 and 11:15 p.m. When asked how he knew the time, it was because she had a clock there so he noticed right away.

[119] Also, while the accused presented a seamless story of sexual provocation from a sober-looking complainant in his examination in chief, he also said that the complainant drank "pretty close to two cases" each containing 24 beers. While he modified that statement somewhat in further questions from his counsel, I find that he knew that the

complainant did a lot of drinking. In cross-examination, his assertion that he noticed she was drinking quite a bit, but didn't know she was getting drunk, changed somewhat from expressing a concern or worry that she was getting drunk to the thought that "I can't tell her, quit drinking because you're too drunk, really I didn't say that."

[120] The accused did acknowledge some understanding of the complainant, who he has known for some 39 years. He agreed that normally the complainant drank when her husband left home. He acknowledged that there was a pattern in the spring when her husband would go drinking. However, he later denied that her husband had been leaving the household for some years in a pattern. He also agreed it was not usual to see the complainant drinking.

[121] The accused's evidence about the complainant falling on the steps to her home and hitting her right arm and thigh on the ground, strikes me as a fabrication created to explain the bruises on the complainant's body, despite the fact that most of the bruises were on her left side. In chief, Mr. Anderson said the complainant was walking straight without staggering and looking sober but that she fell down walking towards her steps. In cross-examination, he said she tripped going up the steps and fell down the side of the steps. He clearly stated there that she fell on the steps. On further questioning, however, he said that he was following her at a distance of eight to ten feet or 15 feet and he didn't see her fall but first saw her laying on the ground. He then went into great detail on how she didn't fall on the steps but before she stepped onto the first step and how she lifted her hand to grab the rail but missed it, falling on her right thigh and arm.

[122] Mr. Anderson disclosed no memory problem in his evidence in chief. On cross-examination, when he had some difficulty with some of the details he had given

previously, he began to describe memory problems like “... if you ask me something today, I’ll forget about it tomorrow.” He then explained how he had “alcohol syndrome” because his mother was a drinker presumably when she was pregnant with him. It strikes me as a convenient excuse, as this statement was not made in examination-in-chief but rather when he was having trouble keeping his own details straight. While I accept that individuals with FASD are suggestible and can be easily led in cross-examination, I do not believe that this was the case with Mr. Anderson. He was incredibly detailed in his examination-in-chief and simply could not keep track of his story in his cross-examination.

[123] I simply do not believe Mr. Anderson’s evidence about the complainant’s appearance of sobriety or her active participation and consent to the sexual intercourse. I do not need to rely on Mr. Anderson’s previous convictions to make this adverse finding about his credibility.

[124] I accept the complainant’s evidence about her residential school experience, her desire to drink with women for safety, her preference to wear long pants and her lack of any sexual interest in Mr. Anderson, a friend of many years.

[125] However, the complainant has no recollection of the time that they went to the bar or how she got here. She has no recollection of what happened at the bar or what happened at her house. I accept her evidence that she remembers Mr. Anderson seated across from her and that she woke up the next morning with her pants and panties off. There is ample evidence of her upset emotional state when she went to the health centre and when she spoke to the police.

[126] I also find that the complainant's indecision about proceeding with the charge is not surprising given her lack of memory of that evening. I do not regard this evidence as anything more than her dealing with the understandable confusion arising from clearly knowing something had happened but having no memory of the event.

[127] I conclude that there was a party at the complainant's house in the late evening of April 29 and the early morning of the April 30. However, that finding does not affect my disbelief of the accused's evidence as it relates to the complainant and the other events leading up to the sexual intercourse.

The Consent of the Complainant

[128] As discussed earlier, whether the complainant consented to the sexual intercourse is a subjective determination. There is no consideration of the accused's belief. The Crown must prove beyond a reasonable doubt that the complainant did not consent. I conclude that the Crown has so proved. The complainant has no memory of the sexual intercourse. But for the DNA evidence confirming the semen of the accused inside her, she could not be sure of her belief that it was the accused.

[129] I accept her evidence that she would never consent to have sexual intercourse with the accused because he was a friend she could trust, and his wife was like a sister to her. In addition, her residential school abuse has left her with lifelong habits of never wearing a dress and going to bed in jogging pants. In short, she would never sit on her couch with no pants. All of these factors support her lack of consent to the sexual intercourse. Finally, the bruises she received are consistent with being moved physically to make the sexual intercourse possible.

The Capacity of the Complainant

[130] I am also satisfied that, apart from not consenting, the complainant did not have the capacity to consent to sexual intercourse with Mr. Anderson. I do not rely on the evidence of the toxicologist except for the fact that the complainant had a blood alcohol reading of 165 milligrams of alcohol in 100 millilitres of blood between 9:15 a.m. and noon on April 30, 2009.

[131] I accept the nurse's evidence about the complainant's episodes of seizures and the fact that they were alcohol related. I accept the evidence of the complainant that she suffered from blackouts and memory loss related to her alcohol consumption.

[132] I conclude that the complainant was on a drinking binge for several days up to the early morning of April 30 when the sexual intercourse took place.

[133] The complainant had seizures in the morning of April 29 but continued to drink heavily. Although the evidence of T.D. indicated that the complainant was a 5 out of a scale of 10 when they were together, I accept that T.D. is a serious drinker, was intoxicated herself that day and evening, and was hardly a good judge of the capacity of others. Her evidence was also based on observations at the bar, and not several hours later, after the complainant had consumed an excessive amount of beer.

[134] I conclude that the complainant was blacked out or passed out at the time of the sexual intercourse, and that the Crown has proved beyond a reasonable doubt that she had no capacity to consent due to excessive alcohol consumption and blackout. She had been on a drinking binge for several days. She had suffered seizures and she continued consuming beer throughout the day of April 29 and into the early morning of

April 30. Prior to the sexual intercourse, she was laying on her couch after what could only be described as an incapacitating consumption of beer.

Honest but Mistaken Belief in the Complainant's Consent

[135] There is general agreement on the law of honest but mistaken belief in consent as a defence to a charge of sexual assault, although the question of when it applies is often in dispute. After a lengthy consideration of the subject in *R. v. Esau*, *supra,* McLachlin J., in dissent, stated at para. 85:

> These considerations lead me to conclude that the defence of honest but mistaken belief may arise where the evidence indicates a situation of ambiguity which the accused, not being wilfully blind or reckless and acting honestly, misinterpreted as consent. The requirements of the defence are thus: (1) evidence that the accused believed the complainant was consenting; (2) evidence that the complainant in fact refused consent did not consent, or was incapable of consenting; and (3) evidence of a state of ambiguity which explains how lack of consent could have been honestly understood by the defendant as consent, assuming he was not wilfully blind or reckless to whether the complainant was consenting, that is, assuming that he paid appropriate attention to the need for consent and to whether she was consenting or not.

[136] In the case at bar, the defence of honest but mistaken belief in consent should be considered based upon the evidence from the complainant herself and others that her appearance of sobriety could mask her excessive intoxication.

[137] I have concluded that the Crown has proven beyond a reasonable doubt that Mr. Anderson did not have an honest but mistaken belief in the complainant's consent to sexual intercourse. To the extent this issue relies on the credibility of Mr. Anderson's story that the complainant actively pursued sexual activity with him, I have rejected his evidence. I do not find that it has raised a reasonable doubt about his guilty state of

mind based on all of the evidence I have heard. I do find that the accused was well aware of the incapacity of the complainant from observing her excessive drinking for several hours. After telling his daughter that he was leaving the complainant's house to go home, he returned to take advantage of her when everyone had left.

[138] There is no doubt that the complainant has a tolerance for excessive alcohol consumption and that she, by her own acknowledgment, can appear to be sober despite actually being drunk to the point of having no memory of events. Mr. Anderson testified that he thought she was sober or looked sober during several hours on April 29 and 30, when he had full knowledge of her excessive alcohol consumption. I have completely rejected his evidence in this regard. His evidence does not meet the "honesty" requirement in that he knew she was drinking heavily. In my view, he was wilfully blind both to her incapacity to consent and her lack of consent.

[139] Alternatively, contrary to s. 273.2(b), I find that Mr. Anderson failed to take reasonable steps to ascertain the complainant's consent, given his history with the complainant and his knowledge of her excessive alcohol consumption that evening.

[140] I do not find any real assistance in the evidence of T.D. She herself was highly intoxicated from an afternoon and evening of drinking and was not a reliable observer of the complainant's demeanour or actual level of intoxication. As I stated earlier, her observation was also made before the several additional hours of drinking by the complainant at her home.

[141] The evidence of Mr. Anderson's daughter similarly does not leave me with a reasonable doubt. Both she and her father were mistaken about the presence of R.F. and B.B. who testified they were not at the complainant's residence after the bar. Her

evidence put the complainant on the couch near her father, although not with her head on his lap. The daughter hardly talked to the complainant and on her evidence did not spend any time talking and sitting on the couch with her. Her evidence supported the existence of a party and drinking at the complainant's residence, but that does not leave me with a reasonable doubt about the accused having an honest but mistaken belief in the complainant's consent to sexual intercourse after the daughter went home, and when the party was over and everybody had left the complainant's house.

[142] To conclude, the Crown has proven beyond a reasonable doubt that Mr. Anderson sexually assaulted the complainant on April 30, 2008. I find Mr. Anderson guilty. I adjourn the sentencing to Criminal Chambers at 1:30 p.m. on July 20, 2010, to set a date for the sentencing hearing.

VEALE J.