

SUPREME COURT OF YUKON

Citation: *R. v. Campbell and Campbell*,
2018 YKSC 37

Date: 20180718
S.C. No.: 17-01504
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

EDWIN CODEY CAMPBELL and WILLIAM KELLY CAMPBELL

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

Before Mr. Justice J.Z. Vertes

Appearances:
Amy Porteous
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] VERTES J. (Oral): The accused persons are jointly charged in one indictment with the offence of sexual assault. There is no issue regarding the date and place of the alleged offence or the identity of the two accused. The two accused persons are brothers. Throughout these reasons, I will refer to the two accused as "Codey" and "Kelly", since those are the names they are commonly known by and that is how they were referred to throughout the trial.

[2] There is an order in place prohibiting publication of any information that could disclose the identity of the complainant. I will therefore refer to her in these proceedings simply as "A.V."

[3] Both counsel have described this case as one of consent or no consent. Like so many other sexual assault cases, it pits the testimony of the complainant against that of the accused. Here, the evidence is clear that there was sexual contact between A.V. and each of the accused persons. The Crown argues that this contact was without the complainant's consent or that she was incapable of consenting. The defence says that there was consent, indeed that the complainant was a willing participant, or I should at least have a reasonable doubt on the question of consent.

[4] I must remind myself that a criminal trial is not a credibility contest. It is a trial to determine whether the Crown has proved the guilt of the accused on the specific charge alleged beyond a reasonable doubt. Therefore, it is wrong to decide a criminal case where, as here, there is conflicting evidence simply by deciding which version of events is the preferable one. The decisive question is whether, considering the evidence as a whole, the Crown has proved the guilt of the accused beyond a reasonable doubt.

[5] I also remind myself that, in considering all of the evidence, I must avoid stereotypical analysis or assumptions about how a sexual assault victim may act in any circumstance. For example, the fact that a complainant offered no resistance is not something that can or should be relied on to conclude that she must have consented.

[6] The important thing is to consider all of the evidence and to consider it in the context of all of the other evidence in the case. No evidence, whether favouring the Crown or the defence, should be assessed in isolation.

[7] As I said before, a trial is not a credibility contest. It is not a matter of simply choosing between the competing evidence of the prosecution and that of the defence. Such an approach undermines the presumption of innocence and the burden on the Crown of proof beyond a reasonable doubt.

[8] The application of these principles, in cases where there is conflicting evidence on the essential elements of the offence, means that there is no "either/or" approach to the assessment of credibility. As set out by the Supreme Court of Canada, in such cases there is a three-step approach for dealing with this issue, namely:

1. If the evidence of the accused is believed, he or she must be acquitted.
2. If the evidence of the accused is not believed but that evidence leaves a reasonable doubt, he or she must be acquitted.
3. Even if one is not left in doubt by the evidence of the accused, one must still ask whether, on the basis of the evidence that has been accepted, the guilt of the accused has been proven beyond a reasonable doubt.

(see *R. v. W.(D.)*, [1991] 1 S.C.R. 742)

[9] The result of this analytical approach is that it is not necessary to believe or accept the defence evidence for there to be a reasonable doubt. Even if a trial judge believes the prosecution witnesses, the evidence as a whole may still leave the trial judge with a reasonable doubt.

[10] The charge of sexual assault requires proof beyond a reasonable doubt of two basic elements, what are referred to as the "*actus reus*" and the "*mens rea*". The term "*actus reus*" basically means the actions that constitute the commission of a criminal offence. For the offence of sexual assault, the *actus reus* consists of touching another

person in a sexual way without that other person's consent. The term "touching" is used in a general sense to include all manner of sexual contact. The term "*mens rea*" refers to the mental state of the accused necessary for criminal liability. In a case of sexual assault, the *mens rea* is the intention to touch, knowing of or being reckless of, or wilfully blind to a lack of consent from the person being touched.

[11] In this case, there is no issue that each of the two accused touched A.V. in a sexual way. The question is whether it was without her consent.

[12] The question of consent or, more specifically, the absence of consent is a subjective factor determined by reference to the complainant's internal state of mind toward the sexual touching at the time it occurred. The focus is on the complainant's state of mind. (see *R. v. J.A.*, [2011] 2 S.C.R. 440)

[13] For this element of the offence, a trial judge must consider all of the surrounding circumstances, including a complainant's words and actions before and during the alleged offence. This is largely an issue of credibility that must be weighed together with the other evidence presented at trial. A trial judge may accept a complainant's direct evidence and conclude that she was not consenting or a trial judge may be left in a state of reasonable doubt about a complainant's lack of consent.

[14] The accused's perception of the complainant's state of mind is not a relevant consideration in determining whether the complainant was, in fact, consenting to the sexual activity. The accused's belief as to consent is only relevant when a defence of honest but mistaken belief is raised in the context of the *mens rea* element of the offence.

[15] It is important to note why the emphasis is on the complainant's state of mind. Subject to s. 273.1(2) and s. 265(3), "consent" is defined in the *Criminal Code* of Canada, for the purposes of ss. 271, 272 and 273, as the "voluntary agreement of the complainant to engage in the sexual activity in question." (see *Criminal Code*, R.S.C. 1985, c. C-46, s. 273.1(1)) Parliament thus signalled that the focus should be on whether a complainant positively affirmed her willingness to participate in the sexual activity in question. This means that silence or failure to resist does not equate to consent. Consent cannot simply be implied from the circumstances. The complainant must be conscious throughout the sexual activity in question and possess the capacity to consent or to withdraw consent. The right to say "no" always exists, even if the complainant has been drinking or changed her mind. Consent may be revoked at any time. (see *R. v. Barton*, 2017 ABCA 216, paras. 179 and 182 (leave to appeal to SCC granted - March 8, 2018))

[16] Turning to the evidence in this case, there are certain facts that are non-controversial or clearly established to my satisfaction.

[17] The complainant, A.V., is now 23 years old; 22 at the time of the alleged offence. She lived at that time with her parents in Whitehorse. She has known both accused for several years. They were friends and often went to parties together.

[18] On the evening of November 28, 2016, she was at home when she received a text from her friend, C.G. The text message invited A.V. to join C.G. and some others at a bar known as the "202". Before leaving for the bar, A.V. consumed three or four hard coolers or ciders.

[19] At the bar, she joined C.G.; Codey, who was then C.G.'s boyfriend; and two other people. This was at approximately 9 p.m. This group stayed at the bar for an hour or so. A.V. had another cider there.

[20] From the bar, A.V., C.G., and Codey went to a bank so that A.V. could withdraw some money from an ATM. This was so A.V. could pitch in \$20 as her share to purchasing some more liquor.

[21] From the ATM, the three of them went to an off-sales outlet, where they purchased a bottle of whiskey and a bottle of hard cider. They were travelling in a truck driven by Codey.

[22] After purchasing the liquor, the three of them went to an apartment occupied by a friend of Codey named Mark. They arrived there at approximately 12 midnight. There were a large number of people there, including the accused Kelly, and they were talking and drinking.

[23] A.V. drank some of the cider. She was also taking shots of whiskey. A.V. does not recall how much she had to drink but it was, in her words, "14 or 15" shots, but she was not sure. The others were drinking as well. Codey and Kelly also consumed cocaine while at that apartment.

[24] A.V., C.G., and Codey left that apartment at approximately 5 a.m. They drove to the home of Codey and Kelly's grandfather. It is there where the evidence of the participants diverges.

[25] A.V. testified that she started blacking out while at the apartment and does not remember leaving the apartment.

[26] Here, I want to clarify what I mean when I use the term "blackout". I use it to mean a loss of memory, not a loss of consciousness. This is consistent with how that term was used by Angela Filbert, the forensic toxicologist called at the trial, who testified that the term "blackout" is used to refer to a loss of memory. It could be a complete loss of memory but more commonly a fragmentary memory loss. This differs from the term "passed out" which is used to refer to a loss of consciousness.

[27] This is also consistent with how the complainant used the term "blackout". She said on cross-examination that when she says she "blacked out", she means that she has no memory of certain parts of that evening. She said she does not know if she passed out at any time. She also said that when she used the terms "awoke" or "waking up", she meant not that she fell asleep but that was when her memory returned.

[28] There is no question that A.V. had quite a bit to drink that night. She drank before she left home, she drank at the 202 bar, and she drank some more at the apartment. There is no evidence of further drinking after she, C.G., and Codey left the apartment.

[29] The Crown introduced a brief video clip into evidence showing A.V. and C.G. at the apartment. The clip lasts perhaps two seconds. In it, A.V. looks quite inebriated. Both C.G. and Codey testified, however, that the clip does not accurately reflect how A.V. looked that night. Both of them said that they saw A.V. drinking at the apartment but she appeared stable and in control of herself. C.G. testified, in particular, that A.V. wanted to go with her and Codey when they left the apartment instead of going home, even though A.V. lived close by.

[30] As I said, A.V. testified that she has no memory of leaving the apartment. The next thing she remembers is walking into a bedroom. She recognized it as Codey and Kelly's grandfather's house because she had been there before. Her recollection is one of walking into a bedroom with Kelly following behind her. She remembers lying down on a bed with Kelly beside her. They talked for a while. She remembers that the room she was in is the one labelled "Tricia's room" on a diagram of the house entered as Exhibit 16 at the trial.

[31] A.V. testified that at some point Kelly started touching her stomach under her T-shirt. She said he did not ask if he could do that. She said she did not want him to do that, but she did not say or do anything because she felt uncomfortable and she did not know what to do.

[32] At some point during this encounter, while Kelly lay beside her, A.V. called her mother on her cell phone. Phone records entered at trial show a call from A.V.'s phone to her mother at 6:09 a.m. A.V. said that she called because she wanted to go home.

[33] A.V.'s mother testified that she texted A.V. at 5:44 a.m. asking, "Are you OK?" She received a call from A.V. at 6:09 a.m. She asked A.V. how her night was and said that A.V. answered very quietly neither yes or no. A.V. asked if her father was awake and if she could get a ride. Her mother asked if she was coming home and A.V. replied that she was not sure. A.V. told her that she was with C.G.

[34] A.V. testified that she blacked out after she talked to her mother. She said she woke up to find Kelly "raping" her. She was on her back. He had his penis in her vagina. Her pants and underwear were off. She said she did not want this. She was shocked and scared. She froze.

[35] The complainant said she blacked out again. The next thing she remembers is lying on the bed with Kelly sucking her breast. She said she was shocked, scared, and could not do anything. She blacked out again. The next thing she remembers is Kelly performing oral sex on her. She blacked out again.

[36] The complainant testified that the next thing she remembers is Codey performing oral sex on her. She was in the same room and on the same bed. She said she was in shock, scared, and did not say anything. She still felt drunk. She said she never discussed having sex with Codey.

[37] The complainant said that she then felt Codey trying to do something to her, as she said, "trying to insert his penis or something." It was hurting her and she remembers saying "Ow". When she said that, A.V. testified, Codey asked if he should get some lube. She did not answer him because she was scared.

[38] According to A.V., when Codey came back, he put some lube on her vagina and then tried to "insert his penis or something" into her. She said she felt pain and told him to stop. Codey stopped but then, according to A.V., he asked her to "finish him off." She figured he meant by that that he wanted her to perform oral sex. She said she did not want to do it and she told him, "No." Codey then stopped and lay down beside her. She said that he got up after a few minutes and left.

[39] A.V. testified that she then went into another bedroom, one marked as the "guestroom" on Exhibit 16. C.G. was sleeping in that room. The complainant then called her mother.

[40] A.V.'s mother testified that she received a call from A.V. at 7:43 a.m. A.V. told her she had been sexually assaulted. She was crying. Her mother told her to get to a safe place.

[41] A.V. testified that during her call to her mother she noticed she had an incoming call from a number she did not recognize. It is agreed by counsel that this call came from the landline phone in that house. It is also agreed that the call would have resulted in A.V.'s phone ringing but not necessarily being picked up.

[42] This is significant because, as I will relate later, Codey testified that A.V. asked him to call her cell phone so she could locate it. The phone records show the call to A.V.'s phone from the house phone at 7:42 a.m. and A.V.'s call to her mother at 7:43 a.m. A.V. denies that she asked Codey to call her phone but she recollects seeing Codey with a cordless phone in his hand when she left.

[43] The complainant said that after she called her mother, she asked Codey to find her clothes. He retrieved them from the other room. She dressed, went out the back door of the house, and called for a taxi to pick her up.

[44] The complainant went home and her mother called the police. A.V.'s mother described A.V. as trembling and appearing scared when she saw her at home.

[45] Crown counsel submits that this evidence establishes that the complainant was not consenting or lacked the capacity to consent. The complainant was clear that she did not want to engage in the sexual conduct at the time. As argued by Crown counsel, she may have significant gaps in her memory but it strains credulity to think that she was consenting at those times she could not remember while clearly saying that she did not want to engage in sexual activity during those periods that she can remember.

[46] I should note that the complainant, while testifying, did so by way of closed-circuit television with the attendance of a support person. This was by consent of the defence. I was also satisfied that there was an evidentiary basis for making this provision. The complainant was described as having some intellectual deficits which could cause her to get confused or freeze up if under stress and in an emotionally charged setting. I must say, however, that I did not detect during her testimony any sign of intellectual impairment. A.V. held up under many hours of questioning, including over five hours of cross-examination.

[47] During A.V.'s cross-examination, defence counsel raised a number of what he says are inconsistencies with what A.V. said at trial and what she said on previous occasions. In my opinion, many of these are not material, but a few are relevant.

[48] First, in her statement to the police — a statement which apparently was reviewed and corrected at least twice — A.V. said that when she got to the grandfather's house, she was passed out with C.G. sleeping in the same bed. At trial, she did not remember that. This is relevant because, as I will relate later, evidence that she was on the same bed as C.G. coincides with the testimony of C.G. and the accused.

[49] Second, in her statement to the police, A.V. said that, in her interaction with Kelly, he was on top of her and trying to kiss her. At trial, she said that what she told the police was wrong. She did not say that Kelly was trying to kiss her.

[50] Next, it will be recalled that A.V. testified that Codey tried to penetrate her vagina with his "penis or something". But at the preliminary inquiry into this matter, on this point, she was asked, "You think he tried to have sex with you. You're not sure about

that?" A.V. answered, "No, because I can't really remember that part good." A.V. said that she was wrong at the preliminary inquiry.

[51] A.V. was subsequently examined at the hospital by Dr. Robin Jamieson, a family and emergency room physician. The doctor observed that A.V. was alert and acting normally during the examination. The examination revealed indications that, according to Dr. Jamieson, A.V. had incurred some form of friction to her vagina and some form of vaginal intercourse but she could not say whether it was from manual, oral, or penile contact. She could not say, on the basis of the physical examination, whether the sexual contact was consensual or not. She also could not say, from the pelvic examination, whether a lubricant had been applied to that area.

[52] Dr. Jamieson observed a significant bruise on A.V.'s right arm. She stated that if a significant vein is affected a bruise may manifest itself within a few hours. Others might take a few days.

[53] The police and the complainant took further photos the following day. These revealed bruises to A.V.'s left arm, right wrist, lower left leg, and left thigh. Dr. Jamieson said that she was not surprised that further bruising might manifest later after her immediate examination.

[54] Dr. Jamieson took swabs and drew blood for analysis.

[55] The swabs and A.V.'s clothing were examined for presence of DNA. Codey's DNA was found in A.V.'s underwear and Kelly's DNA was found on a rectal swab from A.V. The analyst could not say how those got there and could not confirm the presence of semen on any of the samples examined. The import of this evidence is diminished, obviously, by the accused's admissions that they had sexual contact with A.V.

[56] A.V.'s blood was analyzed in order to estimate the complainant's blood alcohol level at the time of the alleged offence. A blood collection time of "11 a.m. (approximately)" was noted on the exhibit packaging. If the time of blood collection was a few minutes earlier or later, the change in the estimate would not be significant, according to the toxicologist's report (Exhibit 14).

[57] The toxicologist, Angela Filbert, testified that the blood alcohol concentration in the sample collected was 141 mg%, that is, 141 milligrams of alcohol in 100 millilitres of blood. She then extrapolated the blood alcohol level back to the time frame of the alleged offence. All of this has become a fairly basic and accepted scientific process. Her extrapolation showed that between 6 a.m. and 7:30 a.m., the complainant's blood alcohol level would have ranged from a low of 171 mg% to a high of 241 mg%.

[58] Ms. Filbert also testified that at 150 mg% the average drinker would be considered intoxicated, that being an advanced state of impairment. The effects of alcohol are magnified as the level of intoxication rises: lack of inhibition, sense of euphoria, impairment of judgment and physical responses.

[59] Ms. Filbert said, however, that a person may be impaired or intoxicated but still be capable of conscious thought and decision-making. Such an individual may make different decisions if sober but still be capable of making decisions, however poor or risky those decisions may be.

[60] This evidence, of course, touches on the question of the complainant's capacity to consent. The *Criminal Code* stipulates that there is no consent where the complainant is incapable of consenting to the sexual activity in question. (see *Criminal Code*, R.S.C. 1985, c. C-46, s. 273.1(2)(b)) But the question of incapacity by

alcohol has not been definitively answered in the jurisprudence and there is no benchmark as to what level of intoxication constitutes incapacity. Incapacity has been said to be an inability to understand the risks and consequences of the activity in question. The complainant must understand the sexual nature of the act and realize that she could choose to decline to participate. (see *R. v. Siddiqui*, 2004 BCSC 1717 at para. 55)

[61] An obvious example is where the complainant is in a coma, asleep, or unconscious. Intoxication might rob a person of capacity but this is not an inevitable result. Mere drunkenness or alcohol induced impairment of decision-making, loss of inhibition, loss of memory are not the equivalent of incapacity. (see *R. v. J.R.*, [2006] O.J. No. 2698 (QL), para. 43 (affirmed on appeal – [2008] O.J. No. 1054)) It is well-established in the jurisprudence that an intoxicated person may still have the capacity to consent to sexual activity even if that person, when sober or less impaired, would not have done so. (see *R. v. Al-Rawi*, 2018 NSCA 10 at para. 113)

[62] In this case, not even the complainant said she was incapacitated. All she could say is that she has no present memory of many of the events of that night. This is an absence of evidence, not direct evidence of incapacity. I therefore reject the argument that non-consent is established on the basis of incapacity.

[63] I wish to comment on one further aspect of the complainant's evidence. At the end of her cross-examination, A.V., after stating that she did not consent, stated, "And I know I would not hook up with these guys, ever." On re-examination by Crown counsel, she was asked why she said that. A.V. replied, "Because I have no interest in them

whatsoever. I don't like them. They're some — nobody I would ever hook up with. No interest in them whatsoever."

[64] There are cases that have held that such an assertion, while only expressing the witness' assumption as to how she would have acted or behaved in a certain situation, can be viewed as circumstantial evidence of an absence of consent. A Court could draw inferences from the complainant's pre-existing attitudes and assumptions regarding the period for which she has no recollection. (see *R. v. Garciacruz*, 2015 ONCA 27 at para. 113)

[65] This is a problematic area of the law in these types of cases and I know of no settled opinion on how much weight should be accorded to such evidence or, indeed, how it should be treated in every case.

[66] In this case, neither counsel asked me to consider this evidence in any particular manner. I have therefore placed no weight on it. It is not necessary because this is not a case like many where the complainant has no recollection whatsoever as to the events. Here, the complainant says she did not consent.

[67] I want to now turn to the defence evidence. I wish to start with an aspect of the evidence that is supported in the main by all defence witnesses.

[68] C.G. testified that when she, Codey, and the complainant arrived at Codey's grandfather's house, the three of them went into what is labelled the "guest room" and they all lay down on the bed. Kelly arrived shortly after. He had come on foot to the house. Kelly lay on the floor. They were all talking. A.V. was participating. When they heard the accused's grandfather come into the house they pretended to be asleep.

[69] The grandfather, Edwin Campbell, testified that he looked into that room. He saw Kelly lying on the floor and Codey lying on the bed. He could not tell if there were other people on the bed or if there were just blankets. Mr. Campbell then left and sat in the living room.

[70] C.G. and Codey both said that shortly after that, Kelly asked A.V. to go "lay with him" in the next room. They testified that A.V. got up and went with him.

[71] C.G. said that she could not remember what, if anything, A.V. said at that time but that A.V. got up and went with Kelly. C.G. also said that on her way out she was teasing A.V. about going with Kelly. C.G. remembers A.V. laughing in response.

[72] Codey said he could not remember A.V. saying anything. He just remembered her getting up and walking out. She and Kelly went into the next room, the bedroom called "Tricia's room".

[73] This evidence, which I have no reason to reject, indicates that A.V. was consenting at a point in time that she does not recollect, at least consenting to going into another room with Kelly. It is not necessarily inconsistent with A.V.'s evidence that the first thing she does remember in that house is going into a bedroom with Kelly.

[74] Kelly testified that, indeed, he asked A.V. to go into the other room with him. He said she got off the bed and followed him into "Tricia's room". In the room, he asked A.V. if it was all right if he lay beside her. He claims that she said, "Yes." They lay there talking. He said that he then started to touch her stomach and then he kissed her. He claims she kissed him back.

[75] Kelly testified that it was then that the complainant took her pants off. He then started kissing her on her breast and moved his hand to her vagina. He said she then

turned to her side and rubbed her backside against his crotch. He then pulled his pants down. He claimed that A.V. also touched his penis with her hand. He tried to put on a condom but he could not get an erection. He had the condom partially on his flaccid penis but he finally gave up. He got up, went to the washroom, and flushed the condom down the toilet. Kelly testified that both he and the complainant were awake at all times.

[76] If this evidence is accepted, then this could amount to affirmative conduct on the part of the complainant.

[77] On cross-examination, Kelly acknowledged that he tried to get the complainant to give him oral sex. He asked A.V. to turn around; A.V. said, "No, I do not do that." He was questioned as well about what he told the police about this. At that time, he said that A.V. said, "No, sorry."

[78] There is no contradiction or inconsistency here, in my opinion. The significant point is that the complainant testified that it was Codey who asked her for oral sex, asking her to "finish him off", and she refused.

[79] Kelly further testified that after he was in the washroom he went and joined Codey and his grandfather in the living room. Codey asked him if he had slept with A.V. He responded, "I tried." He then said to Codey, "She's tight."

[80] Kelly said he then got into an argument with his grandfather over work so he decided to leave. He said he went back to the bedroom and told A.V. that he was leaving. He asked her, "Are you okay? Do you need anything?" According to him, she said, "Yes, I'm good." He then left. Kelly went back to his friend's apartment, slept for an hour or so, and then returned to his grandfather's house. By then, A.V. was gone and both Codey and C.G. were asleep.

[81] Kelly confirmed that earlier, during his encounter with the complainant and while they were on the bed, A.V. spoke to her mother on her cell phone. This would have been the call recorded at 6:09 a.m.

[82] Codey testified that after Kelly and the complainant went into the other room, he tried to sleep but could not. He got up and went to the kitchen to listen to some music. His grandfather returned around 6:30 and they sat together. Kelly came out of "Tricia's room". Kelly said to him that A.V. was "tight". He said he knew what Kelly meant. They talked and then Kelly left. He then gave some money to his grandfather and asked him to get some cigarettes, since his grandfather was going out to do some work.

[83] Codey testified that he got up to go back to bed. He walked down the hallway past the room where the complainant was. He said that, at that point, A.V. asked him to come lay down with her. She was on the bed covered with a blanket.

[84] Why he would do this, lay down with A.V. while his girlfriend was asleep in the next room, Codey could not say. Perhaps it was simply an urge, he said.

[85] Codey testified that he lay down on the bed beside the complainant. They kissed each other. He claimed it was mutual activity. He kissed her neck, then her stomach, and then he saw she had no pants on. He then performed oral sex on her.

[86] Codey was asked about what was A.V.'s response. He said, "Nothing, just laid there, kind of, just like it was normal." "Did she say anything?" He said, "She never said anything." Asked if she said anything when he kissed her on the stomach, he replied, "No, just something like a tickle, or ha ha ... she moaned." Codey further claimed that A.V. was wide awake the whole time.

[87] Codey further testified that while he was giving her oral sex, the complainant was responding, pushing into him, and moaning.

[88] Codey said that he then went to get a glass of water. He went back into the room. He kissed the complainant; she kissed him back. He started to perform oral sex on her again.

[89] Codey said that after a while he got up. He could not get an erection so he thought there was no use going on. A.V. started to get up and asked him where her phone was. Codey said he went to the kitchen and got the house cordless phone. He used that to call A.V.'s cell phone number. Her phone rang in the bedroom and he retrieved it and gave it to her.

[90] Codey testified that A.V. then went into the other bedroom where C.G. was sleeping. She closed the door. Shortly after, A.V. came out and asked where her clothes were. He found them on the floor in "Trish's room" by the bed.

[91] Codey claimed that he never used lube. Defence counsel noted that a search of the residence conducted by the police on the afternoon of November 29 did not turn up any lube.

[92] Codey further claimed that he never tried to penetrate the complainant, that, in fact, he never had his pants off. He also said that he never asked her to perform oral sex on him or to "finish him off".

[93] On cross-examination, there was the following exchange between Codey and Crown counsel:

- Q I'm saying so you kissed her, and she kissed you back.
A Yes.

- Q So as far as you're concerned, she must have been fine with the oral sex?
- A All she would've had to say was no.
- Q Pardon?
- A All she would've had to say was no.
- Q Okay. But she didn't say no?
- A No.
- Q She didn't say anything?
- A No.

[94] Based on all of this evidence, defence counsel submits that there was affirmative conduct by the complainant indicating her consent to the sexual activity with each accused. This case, in counsel's words, is a typical credibility case calling for the application of the three-part test I enunciated at the beginning of these reasons.

[95] Crown counsel argues that the evidence of the two accused condemns them out of their own mouths. This is a very strong point that Crown counsel makes. She points to the fact that neither had any conversation with the complainant regarding the sexual activity in question. Indeed, there was no talk whatsoever. She points out that acquiescence and passivity cannot be taken as consent. Consent must be communicated.

[96] Crown counsel pointed, in particular, to the exchange with Codey quoted above, specifically, his comment that "All she would've had to say was no" as being not only wrong in law but as displaying an indifference to the issue of consent. I certainly agree with the propositions of law stated by Crown counsel. There is no question that an accused person can no longer say that a complainant consented because she was passive, silent, or submitted without compulsion. It is not the law that a complainant must expressly say "no". Consent cannot be assumed. The law requires that a complainant say "yes", either expressly through words or unambiguous affirmative conduct. (see *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 49 and 51)

[97] But this is not a trial about an accused's ignorance of the law. It is a trial about whether the Crown has proven an absence of consent. That becomes very much, in the circumstances of this case, a credibility exercise.

[98] When I consider the evidence of each accused, I must admit that each gave their evidence in a clear and forthright manner. I may be skeptical about the detail of their recollection — and I am certainly skeptical about their boastful evidence that they are able to consume large quantities of alcohol and cocaine without impairing their ability to function — but their evidence was not seriously shaken on cross-examination. Indeed, it remained fairly consistent throughout.

[99] I said before that I have no rational reason to reject the defence evidence as to what happened in the "guest room" when the group first arrived at the grandfather's house. This indicates some partial consent on the part of the complainant, even though she has no recollection of it.

[100] Crown counsel says that the complainant's evidence about her memory loss is credible. I agree. But the difficulty is that it leaves gaps to fill in as to what happened.

[101] Crown counsel says that it is more plausible to think that the complainant was going in and out of consciousness as opposed to being merely memory loss or fragmentary blackouts.

[102] But there is no evidence of loss of consciousness. The complainant herself continually used the term "blackout" as referring to a lack of memory. Further, the evidence of C.G. at least was to the effect that while the complainant had been drinking — and no doubt feeling the effects of intoxication — she was functioning, walking, and talking immediately prior to the start of the sexual activity.

[103] I am also concerned about the evidence given by the complainant, where she told Codey "No" when he asked her to "finish him off". Leaving aside the discrepancy in the evidence where Kelly said it was him who asked her for oral sex, the complainant's own evidence suggests that she had the capacity to refuse that particular sexual activity. And the accused, according to her, stopped.

[104] Crown counsel submits, as well, that there was an opportunity for collusion among the defence witnesses. After all, the accused are brothers, they have the same lawyer, and C.G. was the girlfriend of one of the accused. While there may have been opportunity, there was no evidence to suggest that the opportunity was exercised. The two accused denied that they talked about the case with each other. They may have expressed to each other their dismay at being charged, but they claim they did not discuss the evidence. They said that they had separate meetings with their lawyer.

[105] I am also not convinced about collusion because it does not appear that they had the opportunity to collude before Kelly gave his statement to the police. There is no evidence that the brothers were in contact with each other after their arrest and before Kelly gave that statement. Kelly was cross-examined on parts of it but there seemed to be no major inconsistency in those parts with his in-court testimony.

[106] Further, I fail to see why Kelly would add his revelation about asking the complainant to give him oral sex if he fabricated his account to the police. This would just add to his difficulties, it seems to me, especially if the complainant did not implicate him in this act, but his brother.

[107] I am also concerned about the possible misidentification by the complainant as to which accused asked her for oral sex. The concern is obviously about the accuracy of those things she does remember.

[108] Finally, Crown counsel submits that the two accused are simply not credible witnesses. But, as the three-part test in credibility cases tells us, I do not have to believe the evidence of the accused. I can choose to believe all, part, or none of what any witness tells me. The important thing is considering the totality of the evidence in context and keeping the burden of proof in mind.

[109] I do not say I believe the accused. Indeed, I am highly skeptical about parts of their evidence. Under any consideration, they showed a callous disregard for their friend's feelings. I also have concerns about the injuries suffered by the complainant. But I cannot say that the totality of the evidence convinces me beyond a reasonable doubt as to the absence of consent.

[110] I want to say to the complainant that I do not find that she was lying. I know she believes that she did not consent.

[111] However, on the whole of the evidence, I cannot be satisfied beyond a reasonable doubt that the Crown has proved its case.

[112] I therefore find each accused not guilty.

VERTES J.