

SUPREME COURT OF YUKON

Citation: *R. v. J.C.R.B.*, 2019 YKSC 11

Date: 20190125
S.C. No.: 18-01503
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

J.C.R.B.

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*.

Disclosure of any information, in the course of the proceeding, that could identify a witness is prohibited pursuant to s. 486.31 of the *Criminal Code*.

Before Mr. Justice G.M. Mulligan

Appearances:

Keith D. Parkkari

André W.L. Roothman

Counsel for the Crown
Counsel for the Defence

VERDICT

[1] MULLIGAN J. (Oral): This matter proceeded as a judge alone trial. J.B. is

charged on a one-count indictment. That count reads as follows:

On or between the 29th day of September and the 30th day of September in the year 2017, at the City of Whitehorse in the Yukon Territory, did commit a sexual assault on T.S., contrary to section 271 of the Criminal Code.

[2] With respect to this count, the Crown is required to prove each of the essential elements of this count beyond a reasonable doubt, and this onus never shifts. It is a fundamental principle of our criminal justice system that J.B. is not required to prove his innocence. The essential elements of the offence can be simply stated:

- (i) That J.B. intentionally applied force to T.S.;
- (ii) That T.S. did not consent to the force that J.B. intentionally applied;
- (iii) That J.B. knew that T.S. did not consent to the force that he intentionally applied; and
- (iv) That the force that J.B. intentionally applied took place in circumstances of a sexual nature.

[3] The Crown called the complainant, T.S., to give evidence. The Crown's evidence also consisted of the evidence of a friend of hers, D.T.K. The Crown witnesses were subject to cross-examination.

[4] J.B. chose to give evidence on his own behalf and was subject to cross-examination.

The Events of September 29 and 30, 2017

[5] Crown and defence filed an Agreed Statement of Facts with respect to the events in question. In addition, a number of other facts not in dispute came forward in the testimony from T.S. and J.B.

[6] A review of what happened that day from the testimony of both parties will provide context for a discussion about each party's evidence as to whether or not a sexual assault or assaults took place.

Family Background

[7] At the time of the alleged assaults, T.S. was 19 years of age and J.B. was 50. E.B. is T.S.' mother. J.B. resided in a Yukon community with his wife and his wife's three younger daughters, ages 10, 13 and 16, T.S.' half-sisters. J.B. was self-employed.

[8] J.B. and his spouse knew each other from high school and were reacquainted years later. She moved from Vancouver Island to reside with him about six years ago. They are married and continue to reside with E.B.'s three daughters. It is not disputed that J.B. acts as a stepfather to E.B.'s three younger daughters. At the time E.B. moved to the Yukon, she was under some financial difficulty but after a time was successful in finding permanent employment.

[9] T.S. resided on Vancouver Island with her father after her parents separated, but she was in the habit of visiting her mother and her three sisters at the B. residence each year for a month or so, generally in the summers. She had had about four visits for two to four weeks each year, including a visit in 2017. Generally, she would fly to Whitehorse and be picked up by J.B., with his spouse, or some of E.B.'s children. She would be returned to Whitehorse at the end of her visit to catch a flight back home to reside with her father.

[10] Both T.S. and J.B. gave evidence about what they thought of each other. T.S. testified she was not fond of him and did not like him. She acknowledged that he was supporting her mother and her younger siblings. She gave evidence that she had seen J.B. push her mother and that this was upsetting. J.B. denied that any such pushing occurred. J.B. testified that their relationship was cordial, but not very close. On at

least one or two occasions while she was at his house, she went with him to work as a helper.

[11] I pause to note the demeanour of each witness while they gave evidence. T.S. became upset and emotional and breaks were required, especially when issues of sexual contact were discussed. J.B. gave evidence in a business-like manner and freely acknowledged his use of alcohol and cocaine during the evening, but vehemently denied that any sexual touching took place.

[12] On this particular visit, she was driven to Whitehorse, a considerable drive, by J.B. without anyone else present. This was the only time she travelled to Whitehorse with him alone.

[13] When they got to Whitehorse, it was necessary to stay overnight, so that T.S. could catch her flight to Vancouver later the next morning. J.B. had booked only one hotel room for both of them.

[14] Upon arriving in Whitehorse, they went to a restaurant for some lunch. Then they went to a liquor store. J.B. bought a 15-pack of beer cans for himself. He offered to buy T.S. a bottle, and she chose a 26-ounce bottle of spiced rum. They then went to the hotel room. They both had keys to the room.

[15] J.B. indicated that he had an appointment to see his tax advisor at about 3 p.m. At the hotel room, at some point, he took a nap. He went to his tax appointment. He had noticed that she had consumed some of the rum. After the appointment, he went to a take-out restaurant and, through text messaging, reconnected with T.S., who joined him. She had been shopping on her own. They went back to the hotel room at about

4 p.m. He said that T.S. poured some rum and Coke, and he observed that the bottle was not full at that point.

[16] On this same weekend, T.S.' younger stepsister, T., was in Whitehorse for a volleyball tournament with her school team. There was some discussion about T.S. wanting to go and watch these games but J.B. was reluctant to drive her because he had been drinking. There was a discussion about an offer of taxi fare. In any event, T.S. did not go to any of the games, nor did she specifically ask for taxi fare. She acknowledged having some drinks during the afternoon time in the hotel room.

[17] Later in the evening, they made dinner plans and went to a local steak house within walking distance of the hotel, around 8:30 p.m. They both had some drinks there. She said she had a glass of red wine. He had two beers and paid for the dinner and drinks.

[18] They left at about 9:30 p.m. and went to a nearby bar, where there was a pool table. She had a drink there, too. She expressed an interest in seeing her stepsister before the 10 p.m. curfew imposed on the team, so she left on her own to make her way to her sister's hotel. She did not have a plan and did not specifically ask for taxi fare.

[19] J.B. testified that while at that bar, he bought cocaine from a friend and consumed a line of cocaine there. I will have more to say about his continuing use of cocaine later in these reasons.

The Taxi Driver

[20] What happened after T.S. left J.B. began as somewhat of an adventure, but turned into what she described as a "kidnapping". J.B. had no involvement with this

incident and would not see T.S. again until she returned to the hotel room at about 12:30 a.m.

The Taxi Incident

[21] T.S. gave evidence about what occurred with two taxi drivers. She indicated that she was feeling intoxicated at the time and wanted to visit her sister. The first taxi driver drove her to the hotel where her sister was staying without charging her for this very short trip.

[22] She testified that she then met her sister briefly, but their visit was curtailed by the chaperon imposing curfew on her sister.

[23] She was then picked up by another taxi driver. Her evidence was that this taxi driver would kiss her and attempt to assault her. The taxi driver drove to a store, picked up some Grey Goose vodka and orange juice. While at one of these stores, this taxi driver met a dealer and bought some marijuana. Later, they drove out of town to a gravelled pull-out area and he walked her to the river. She had been consuming some of the taxi driver's Grey Goose vodka. She consumed some marijuana from a joint that he offered her.

[24] Her evidence was that at the river, he attempted to kiss her and she was nervous and fearful. She feared for her life. She testified that she was sobbing. As a ruse, she convinced the taxi driver to take her back to her hotel, indicating she had a key to the hotel room. In her mind, this "kidnapping" by the taxi driver would end if they could get back to the hotel room with J.B. being there. She acknowledged drinking a couple of glasses of vodka at the pull-out on the road, but did not consume any other drugs, other than the marijuana offered.

[25] They then drove to the hotel room and she went into the room, using her key, with the taxi driver. Initially, she thought the room was empty, but J.B. was there and the taxi driver left moments later, taking the bottle of Grey Goose that he had brought up with him.

[26] It is evident that the taxi driver was charged with some offence or offences because T.S. was cross-examined about aspects of her testimony at the taxi driver's preliminary hearing. T.S.' version of events was corroborated, in part, based on the fact that the taxi driver was subject to a preliminary hearing. Further, the taxi driver was seen by J.B. when T.S. returned to the hotel room.

[27] The incident gives some insight into T.S.' state of mind and sobriety when she returned to the hotel room. J.B. testified that he was able to observe this himself when he first saw T.S. He thought she appeared intoxicated and wondered if something else had happened to her. He questioned her for some time, but she indicated that nothing happened. She then indicated to him that the taxi driver had bought alcohol, taken her out of town, and attempted to kiss her. His evidence was that he offered to call the RCMP, but she declined.

[28] I pause to note that T.S. was not asked in-chief or in cross-examination of any discussion about calling the RCMP about the events with the taxi driver.

[29] She acknowledged in her evidence that "I didn't have good judgment" with respect to the time she spent with the taxi driver.

[30] At some point while in the room, she noticed white powder set out on the desk. J.B. acknowledged it was cocaine. He had been using it prior to T.S.' return and either

had just used it or was about to use it again when T.S. entered the hotel room at about 12:30 a.m.

The Events of 12:30 a.m. - 4:00 a.m.

[31] The parties disagree about whether or not sexual assaults occurred within this time period, but some facts are not in dispute. J.B. testified that he continued to consume lines of cocaine regularly. He offered cocaine to T.S., telling her it was "coke" and would help calm her down. She testified that she did not want to anger him by refusing. She accepted the offer. He continued drinking the beer, which he had purchased from the liquor store, ultimately consuming about 16 beers from the afternoon through the evening at dinner, while playing pool, and throughout the night at the hotel room.

[32] T.S. appeared to drink continually from the time she first opened the bottle of rum in the hotel room until she returned to the hotel room. A screenshot caption by her indicated the rum bottle was about one-third empty at one point in time, and she continued drinking from it, possibly consuming one-half of the 26-ounce bottle of rum. She testified that she had a glass of wine at dinner and a drink at the bar. While with the taxi driver, she consumed some of his Grey Goose vodka. She indicated in her evidence that by the time she got to the hotel room, she felt that she was intoxicated. On a scale of 1 to 10, with 10 being blacked out, she felt that she was at about 9. J.B. verified this in his testimony, feeling that she was both intoxicated and extremely upset when he saw her at about 12:30 a.m.

Sexual Activity and Cocaine

[33] T.S. indicated to the Court that some sexual activity took place overnight that she did not consent to. I will explore the different versions of evidence from each witness, but what is not in dispute is that at some point during the night, J.B. snorted a line of cocaine off the bare buttocks of T.S. while she was laying face down on the bed. He also took pictures of her while she was naked on the bed.

[34] J.B. testified that he was snorting cocaine almost continuously from the time he acquired it at the bar until he fell asleep in the hotel room about 4 a.m. It is not disputed that T.S. also consumed cocaine once or twice during the night. Both parties testified that J.B. snorted cocaine off T.S.' buttocks on two occasions during the night.

[35] I have already noted T.S.' level of intoxication. She testified that the cocaine was offered to her to help her calm down. She did not want to anger J.B. and she did the drugs. She felt that she had lost control of her limbs. J.B. had his pants off and was wearing boxer shorts. He talked to her about her being beautiful. She was aware of him doing cocaine off her bottom, testifying that his nose touched her. He continued to touch her, telling her she was beautiful. Later, he asked if he could sleep with her in the same bed. She testified that she said no. She testified that he asked her to stay for another night.

[36] J.B. testified that T.S. asked to do cocaine when she observed it on the table. She was being sexually aggressive and spoke about doing body lines with her friends. He testified that she asked him and he agreed to do a body line on the bed. He testified that he took some cocaine on a room key, put it on her buttocks, and used a five-dollar bill to snort two lines. He then did this a second time. He testified that he then asked

her if he could take pictures, and took seven pictures on his cell phone. He testified that he deleted them the next morning.

[37] Her evidence was that he fondled her by touching her breasts and digitally penetrating her vagina while telling her she was beautiful. Her evidence was that he helped her take her clothes off. She indicated that she felt that she did not invite him to do so. She was scared. She felt that she had lost control of her limbs.

[38] In cross-examination, she was asked if J.B. had done anything to make her scared. She replied, "I was scared of everything about him, what he was doing, what he did to me, and what he had done in the past. . . . I thought I was going to be safe after the taxi driver." She was asked why she became scared and she said, "Because I didn't know where this was going to go. How am I supposed to get out of there? I was in the room with him, there was nowhere else to go. I was not feeling good and I was sick, just back from being kidnapped."

[39] Her evidence also indicated that at one point, she was on her hands and knees on the bed and J.B. approached her from behind in an attempt to have sexual intercourse. J.B. was unable to maintain an erection; however, he continued to touch her. T.S. was cross-examined as to why she did not report this incident in her two police statements or at the preliminary hearing. Her answer was that she was not asked about it. Her evidence was that at some point in the evening, he put her hand on his penis. She testified that he kissed her lips and asked about oral sex.

[40] J.B denied that there was any such discussion.

[41] At some point during the evening, T.S. took and retained two screen shots. One picture showed the bottle of rum partly consumed; the other, a video, showed J.B.

sitting at the desk consuming a line or lines of cocaine. In addition, T.S. gave evidence that she took an audio recording of about an hour and a half in length of conversations they had during the night. However, she deleted this and it was not able to be recovered.

[42] J.B. admitted that during the night, he took pictures of a naked T.S. on the bed, something he initially denied in his police statement. He said that she was being sexually provocative, requesting that he have sex with her, but he denied that any sexual touching took place. She continued to lay naked for a considerable period of time and refused to put on clothing, even though he offered clothing on numerous occasions. J.B. testified that the next day he deleted the photographs, not wanting his wife to see them. He acknowledged that he had other provocative photographs on his phone involving him and his wife. When the phone was handed over to the RCMP, the pictures of T.S. were not recovered.

[43] As a result of the Extraction Report of J.B.'s cell phone, the police were able to recover text messages between J.B. and a friend of his, as well as texts to his stepdaughter, T., who was in town playing volleyball, and texts to his wife.

[44] Texts to his wife stated, in part:

- Yup, T.S. is drunk lol.
- And actually, so am I, hahaha.
- Havin fun with T.S.
- Did a line of coke.
- (Question from his spouse) How long are you staying for?
- Just a few days.

[45] J.B.'s testimony indicated that this was in jest. He never planned to stay another day.

[46] However, the testimony of T.S. shows that she had a great deal of concern about staying beyond the one night. Her evidence was that she texted a friend early in the morning from under the covers while J.B. was sleeping. Screenshots of the texts, which were made as exhibits, indicated her concern about the activities of J.B. and requested that her friend phone her, pretending to be her father, and requesting that she continue her trip home that day to meet her father after he had travelled by ferry to meet her at the Vancouver airport. Her evidence indicated — and her friend confirmed in testimony — that he made such a call.

[47] J.B. acknowledged in his evidence that he heard her talking on the phone, he thought to her father.

[48] That morning they got up, got dressed, got some food, and checked out. They did not stay for a second night.

\$1,000 Payment

[49] At about 8 a.m., J.B. and T.S. went to the CIBC branch and J.B. withdrew \$1,000: \$800 on his debit card and \$200 on his Visa card. He gave this money to her. His evidence was that this was in the nature of a loan to assist her with buying a car. He said they had discussed this on the trip. There was no documentation as to any terms of this loan. There was no history of him giving large amounts of money to T.S. during any of her prior visits, although he did give her \$20 here and there to buy cigarettes during her visits.

[50] He acknowledged that when it came to large personal expenses for the home, he would often discuss this issue with his wife. However, there was no indication that he discussed this transaction with his wife, T.S.' mother.

[51] T.S.' evidence was that there was no discussion about using this money towards a car. She had a car. Instead, she treated this money as a gift, as a thank you for the events that had occurred the night before. She testified that he thanked her twice.

[52] I pause to note that when she reported this matter to the police, after discussing it with her father, she turned the money over to the police as part of her initial report after the events in question on September 2, 2017.

[53] They then went to the airport where T.S. was able to check her bags and get a boarding pass. This was about 8:30 a.m. Rather than staying at the airport or going through security, she left the airport with J.B. to drive around until she returned around 10:30 a.m. for check-in for her 11:00 a.m. flight. Her evidence was that she asked J.B. to drive her around the locations where she may have been with the taxi driver the night before. She acknowledged that she could have left him at the airport but did not want to cause a scene.

[54] J.B.'s evidence was that he went to the washroom at the airport and there was a period of time when T.S. was alone at the airport and could have proceeded through security.

[55] When they returned to the airport, T.S. then proceeded on her travels to Vancouver and connected with her father. Her evidence was that she called her father about the incident from the airport in Whitehorse on Saturday. She reported the matter to the police on Monday, two days later. She gave two statements: one on

September 2, 2017; and a further statement on November 20, 2017. In addition, she gave evidence at a preliminary inquiry on April 27, 2018. Days later, after the events in question, she testified that she was still emotional about these events and subsequently has had counselling.

J.B.'s Alcohol and Drug Consumption

[56] There is no doubt that J.B. consumed a great deal of alcohol from the time he arrived at the hotel in the afternoon until he finally fell asleep about 4 a.m. He purchased a box of 15 beer. He began drinking it in the afternoon. For part of the time, T.S. was not with him. Before they left for dinner at around 8 p.m., he thought he had consumed six to eight beers. He acknowledged that he had two beers with their dinner and two beers at the bar afterwards while they were playing pool. Back at the hotel, he continued to drink beer, consuming about 12 from the box, together with the four that he had while out, making a total of 16 beers.

[57] In addition, he consumed cocaine continually. He first acquired it at the bar while he was playing pool. He testified he was not sure of the quantity that he acquired from his friend. It could have been a quarter or an eighth of a gram, or even a gram, but it was not more than that. He first used it at the bar around 10:30 p.m., snorting a couple of lines in the bathroom. He continued to consume it at the hotel when he was there on his own and then after T.S. returned, consuming somewhere close to 14 lines in total.

[58] He gave evidence that he was experienced in using cocaine. He denied that he used any other drugs. His evidence was that the use of cocaine can have a sobering effect on him, but he acknowledged that cocaine does not remove alcohol from the body. His evidence was that the use of cocaine prevents him from getting an erection.

He did not testify as to its effect on his sexual impulses. He testified to snorting cocaine off her bare behind while she was on the bed, and he testified about photographing her naked seven times while she was inviting him to have sex with her.

T.S. and Alcohol

[59] T.S. also consumed a great deal of alcohol that day. Although she was only 19, she gave evidence that she was somewhat of an experienced drinker for her age.

While visiting her mother, when there was not much else to do, she would be drinking coolers and other beverages with her friends, about three times a week, starting in the late afternoon until she returned home late in the evening, consuming alcohol until she had a "buzz".

[60] On the night in question, she acknowledged that she was extremely intoxicated, reaching 9 on a scale of 10, 10 being blacked out. She did not black out.

[61] She testified that she began consuming the bottle of rum in the hotel room in the afternoon. She had a drink at dinner with J.B., a glass of wine. She had drinks around the pool table with him thereafter. While out with the taxi driver, she consumed some of his Grey Goose vodka. J.B.'s own observation of her when she arrived around 12:30 a.m. was that she appeared to be quite intoxicated. This is the state he found her in. While they continued to share a room, he continued consuming alcohol, used cocaine continually, and offered some to her.

Elements of the Offence

[62] In this case, J.B. is charged with sexual assault. The elements of the offence of sexual assault can be broken down into the following elements:

- (i) That the accused intentionally applied force to the complainant;

- (ii) That the complainant did not consent to the force that the accused intentionally applied;
- (iii) That the accused knew that the complainant did not consent to the force that the accused intentionally applied; and
- (iv) That the force that the accused intentionally applied took place in circumstances of a sexual nature.

Legal Principles

[63] There are a number of legal principles that have application to a trial such as this where credibility is very much at issue. In submissions, both Crown and defence made reference to some of these principles. As stated previously, the Crown bears the onus to prove guilt beyond a reasonable doubt and that onus never shifts. J.B. has no obligation to prove his innocence.

[64] When juries are triers of fact, judges often explain the principle of reasonable doubt as follows: A reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence or the lack of evidence. Proof of probable or likely guilty is not proof of guilt beyond a reasonable doubt. However, it is nearly impossible to prove anything with absolute certainty. Crown counsel is not required to do so. Absolute certainty is a standard of proof that is impossibly high.

[65] Although credibility is an issue, a trial such as this is not a credibility contest requiring the trier of fact to decide who to believe. To do so would shift the burden to the accused to prove innocence.

[66] In *R. v. W.(D.)*, [1991] 1 S.C.R. 742, the Supreme Court of Canada provided an approach to the issue of reasonable doubt when an accused gives evidence.

[67] In *R. v. C.L.Y.*, [2008] 1 S.C.R. 5, Abella J. repeated the *W.(D.)* warning in the following context:

[6] ... This Court has consistently warned that verdicts of guilt should not be based on "whether [triers of fact] believe the defence evidence or the Crown's evidence". Rather, the paramount question remains whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused. The following suggested steps in *W.(D.)* are intended to ensure that the trier of fact remains focused on the principle of reasonable doubt:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused. [Citations omitted.]

[68] In his recent article¹ considering the *W.(D.)* framework, Justice David Paciocco noted that a criminal trial is not a "credibility contest" and reframed the *W.(D.)* analysis in his conclusion as follows:

- (i) Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred;

¹ David M. Paciocco, *Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment*, (2017) 22 Cdn. Criminal L.R., 31.

- (ii) A criminal fact-finder that believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;
- (iii) Even if a criminal fact-finder does not entirely believe evidence inconsistent with guilt, if the fact-finder cannot decide whether that evidence is true, there is a reasonable doubt and an acquittal must follow;
- (iv) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
- (v) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

[69] In a case such as this, I remind myself of the importance of the principles of credibility and reliability. The difference was explained in *R. v. H.C.*, [2009] ONCA 56 at para. 41. As Watt, J.A. stated:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

- i. observe;
- ii. recall; and
- iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a

credible witness may give unreliable evidence.
[Citations omitted.]

[70] More recently, Watt J.A. stated in *R. v. Wadforth*, [2009] O.J. No. 4176 (QL)

at para. 66:

... Assessment of credibility is a difficult and delicate subject, often defying precise and complete verbalization. At bottom, belief of one witness and disbelief of another, in general or on a specific issue, is an alloy of factors, not a purely intellectual exercise. [Citations omitted.]

[71] The Crown submitted the case of *R. v. M.J.H.*, 2018 YKTC 45. In his Reasons for Judgment, Cozens J. instructed himself by making reference to the helpful summary of these principles as set out by Molloy J. in *R. v. Nyznik*, 2017 ONSC 4392, at para. 15:

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

Consent

[72] In this case, the accused advances the defence of consent, in the event that the Court determines that sexual touching took place.

[73] Section 273.1(1) of the *Criminal Code* provides:

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.

Where no consent obtained

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where ...

(b) the complainant is incapable of consenting to the activity; ...

[74] Section 273.2 further provides:

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.
1992, c. 38, s. 1.

[75] In *R. v. Mirzadegan*, 2018 ONSC 3449, K.L. Campbell J. reviewed these two statutory provisions in the context of the Supreme Court of Canada's decision in *R. v. A.(J.)*, 2011 SCC 28, stating at para. 14:

In *R. v. A.(J.)*, 2011 SCC 28 (CanLII), [2011] 2 S.C.R. 440, at paras. 3, 31-50, 65-66, the Supreme Court of Canada concluded that these various statutory provisions require that, in order to provide legally effective consent, the complainant must provide present, active, ongoing, conscious consent throughout the course of the sexual activity in question. In short, consent can flow only from a conscious, operating mind. Accordingly, as McLachlin C.J.C. concluded, in delivering the judgment of the majority of the court, at para. 66, "[a]ny sexual activity with an individual who is incapable of consciously evaluating

whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*."

[76] In jury trials, judges are required to instruct on the issue of lack of capacity.

Justice Davit Watt in *Watt's Manual of Criminal Jury Instructions*, 2nd ed., at p.1162

suggests the following instruction:

A voluntary agreement to participate in sexual activity is not valid unless the person who agrees to participate in that activity is (the complainant). To voluntarily agree to participate in a sexual activity, (the complainant) must not be so intoxicated, or in any other type of mental state that renders him/her unable to understand (the accused's) conduct. The sexual nature of (the accused's) conduct or the identity of (the accused) as (the complainant's) sexual partner. (The complainant) must be able to realize that she/he has the right to choose not to participate in sexual activity with (the accused). In other words, the complainant must be able to realize that he or she has the right to say "no" at any time.

Alleged Sexual Acts

[77] Not every sexual act alleged by a complainant needs to be proved beyond a reasonable doubt to conclude that other sexual acts occurred.

[78] In *R. v. J.J.R.D.*, (2006), 215 C.C.C. (3d) 252, Doherty J.A. upheld the conviction of the accused. At para. 25, he reviewed the trial judge's verdict and at paras. 53 and 59 noted that the trial judge:

Concludes he is satisfied beyond a reasonable doubt that A.D. was sexually assaulted and sexually touched by the appellant, but that he is not satisfied beyond a reasonable doubt that the appellant engaged in anal intercourse with his daughter. [Emphasis omitted.]

[79] In upholding the conviction, Doherty J.A noted at para. 53:

... The trial judge rejected totally the appellant's denial because stacked beside A.D.'s evidence and the evidence concerning the diary, the appellant's evidence, despite the

absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt. . . .

[80] Justice David Paciocco's article, *supra*, summarized *R. v. D.(J.J.R.)* as follows at p. 49:

Specifically, the trial judge rejected an allegation by the complainant that anal sex had occurred, because this allegation arose for the first time during trial. This showed that the trial judge turned his mind not only to the credibility of her evidence, but its sufficiency.

Analysis

[81] Having reviewed the basic principles applicable to a case like this where credibility is very much at issue, I now turn to the evidence of J.B. using the suggested framework in *W.(D.)* for analysis. The essence of J.B.'s evidence is that he did not commit any of the sexual assaults that T.S. alleged that he committed during the evening in the hotel room. Having considered the totality of his evidence, I do not believe his denials that sexual assaults took place.

[82] The following points assist me in making that determination:

- Because of her age, 19, and her ordinary residence with her father, I am not satisfied that J.B. was in a position of authority over her. But there clearly was a power imbalance.
- He booked one hotel room for himself and his stepdaughter, who was then 19 years of age.
- Immediately upon arriving in Whitehorse, he purchased for her a 26-ounce bottle of rum.

- When he woke up from his afternoon nap, he observed that she had been drinking from the bottle. She continued to drink rum with mix later in the afternoon when they both returned about 4 p.m.
- He observed that she had drinks at dinner, at the restaurant, and a drink while they had a game of pool together in a bar.
- When she returned to the hotel room with the taxi driver at about 12:30 a.m., he observed that she was both intoxicated and upset.
- Over the course of the evening, J.B. consumed about 16 beers and consumed numerous lines of cocaine at the bar, in the hotel room by himself, and in the hotel room in the presence of T.S.
- He admitted snorting cocaine off her buttocks while she was unclothed on the bed, at a time when he was intoxicated, by his own admission, from alcohol and cocaine consumption.
- He admitted taking sexual pictures of her while she was naked on the bed, later deleting these photographs, and initially lying to the police about the photographs.
- He gave her \$1,000 in cash the next morning. There were no documents suggesting this was a loan. He did not discuss this with his wife, T.S.' mother.

[83] After considering these key facts, I conclude that I do not believe his evidence with respect to whether or not sexual assaults took place. However, he is still entitled to an acquittal if his evidence leaves me in a state of reasonable doubt about his guilt.

Even if I am not left in doubt by his evidence, I must still be satisfied that the evidence I do accept and rely upon is satisfactory to prove his guilt beyond a reasonable doubt.

[84] The evidence of T.S. bears close scrutiny.

[85] At the time of the alleged sexual assaults, she was 19, and the stepdaughter of J.B.

[86] Although she did not reside with him regularly, she stayed at his home with her mother for about a month at a time each year.

[87] He provided her with \$1,000 in cash the next morning. On a balance of probabilities, I am satisfied that this was a gift, not a loan. It was a gift because of the sexual touching and the use of cocaine.

[88] On this occasion, he was responsible for driving her to the airport, providing overnight accommodation, and seeing to it that she caught her plane the next day. Although she did not like J.B., according to her evidence, she had no reason to distrust his treatment of her and freely participated in the consumption of alcohol on her own and while with him in the hotel room and the restaurant.

[89] When she arrived back at the hotel room at about 12:30 a.m., she was relieved and thought that she was in a position of safety. The taxi driver had, in her mind, "kidnapped her". The taxi driver left immediately from the hotel room when he saw that J.B. was there. In addition to being upset, she was clearly intoxicated. She told J.B. about the incident with the taxi driver. She then accepted cocaine as offered to her by J.B., her stepfather.

[90] She testified that he snorted cocaine off her buttocks. She felt his nose touch her body. I accept her evidence that on a scale of sobriety of 1 to 10, she was at a 9, but

had not blacked out. I accept her evidence that J.B. fondled her, touched her breasts, and digitally penetrated her vagina, in addition to his admitted conduct of snorting cocaine off her body and taking sexual pictures.

[91] However, I do have a reasonable doubt about whether or not he attempted to have sexual intercourse with her while she was on her hands and knees on the bed. First of all, J.B. testified that the use of cocaine inhibits his ability to have an erection. But more fundamentally, T.S. did not mention this significant event in her two police statements or at the preliminary hearing.

[92] I further accept T.S.' evidence that J.B. thanked her and provided her with \$1,000 in cash as a gift. There were no terms of repayment. T.S. turned this money over to the police in connection with her report about the alleged sexual assaults, after telling her father what had happened in the hotel room. In my view, the cash was a gift for the sexual touching that occurred.

[93] I pause to note that T.S. remained with J.B. after she checked her bags at the airport and drove around with him for about two hours before departure. In my view, that does not diminish her credibility about what happened in the motel room. Both parties had regained a level of sobriety. The circumstances had changed. She had taken positive steps to avoid another night in the hotel room with J.B. She testified that she did not want to create a scene at the airport. She had a booked flight and had checked her bags for the departure. J.B. had purchased her ticket.

[94] When I consider the totality of her evidence, I find it to be credible in all the circumstances.

[95] In summary, I do not believe the evidence of J.B. and I am not left in reasonable doubt about his guilt. I am satisfied that the rest of the evidence proves his guilt beyond a reasonable doubt and the Crown has met its onus with respect to the count before the Court.

Consent

[96] The defence submits in the alternative that if a sexual touching took place, it was with the consent of T.S. The defence of consent has no air of reality in these circumstances.

[97] I accept the evidence of T.S. that she did not consent to the sexual touching and digital penetration that took place. There is no evidence that J.B. made reasonable inquiries to determine her consent, given her level of alcohol consumption, and his own admitted impairment by alcohol and cocaine. J.B. provided her with alcohol and cocaine, and was well aware that T.S. was intoxicated. He knew - or ought to have known - that based on her level of intoxication, she was in no position to consent to sexual touching. Given his own level of self-induced intoxication from alcohol and cocaine, it is hard to fathom how he could determine her consent.

[98] I therefore find J.B. guilty of sexual assault on T.S.

[99] I now move to the sentencing stage of this trial. I suggest that we take a short break so that counsel can confer with his client, J.B., and so that both counsel can have a discussion with each other about the next steps for sentencing.

MULLIGAN J.