

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Dawson*, 2014 NSPC 71

Date: September 15, 2014

Docket:2512006

Registry: Halifax

Between:

Her Majesty the Queen

v.

Patrick Dawson

Restriction on Publication: Ban as per S. 486 of the Canadian Criminal Code

Editorial Notice: The electronic version of this judgment has been modified to remove identifying information.

Judge: The Honourable Judge Michael B. Sherar

Heard: January 27 and 28, 2014, May 28, 2014, July 8, 2014,
in Halifax, Nova Scotia

Charge: That he, on or about the 10th day of December, 2012,
unlawfully commit a sexual assault on J.C., contrary to
Section 271(1)(a) of the *Criminal Code*.

Counsel: Susan MacKay, for the Crown
Thomas J. Burke, Q.C. for the Defence

By the Court:

[1] The Defendant Patrick Dawson is accused of committing a sexual assault on J.C., contrary to s. 271(1)(a) of the *Criminal Code* at Halifax on or about December 10, 2012. He will be referred to hereafter as Dawson or the Defendant.

[2] There is a Ban on the Publication of any evidence that would tend to identify the complainant. Accordingly throughout this decision she will be identified only as J.C or as the Complainant.

[3] This is an indictable proceeding and the Defendant elected to be tried in the Provincial Court. Evidence was heard on January 27 and 28, 2014, and subsequently on May 28, 2014. Counsel provided written submissions and final oral argument was heard on July 8, 2014. Decision was reserved until September 15, 2014.

[4] Both the Defendant and the Complainant are young adults. The Defendant resides in New Brunswick and was visiting a friend in Halifax. The Complainant was a student from outside of Nova Scotia attending classes in Halifax.

[5] The Complainant and Defendant met briefly one evening at a drinking establishment. The Complainant agreed to accompany the Defendant and his friend to the friend's apartment. Shortly after arrival at the apartment the Defendant and Complainant had sexual intercourse. The Complainant alleges it was without her consent while the Defendant maintains any sexual activity between the pair was consensual.

[6] There is a significant divergence of evidence as to what occurred between the parties and even as to the date upon which any contact occurred. However there is no question that the forms of physical contact that either party describes was of a sexual nature, i.e. sexual intercourse (see R. v Chase (1987) 59 C.R. (3d) 137 S.C.C.).

[7] If the sexual contact was perpetrated on the Complainant by the Defendant without the consent of the Complainant then the contact would in law amount to a sexual assault.

“265. (1) **Assault** - A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) **Application** - This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(3) **Consent** - For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

(4) **Accused's belief as to consent** - Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

273.1 (1) **Meaning of “consent”** - 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) **Where no consent obtained** - 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;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) **Subsection (2) not limiting** - Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.”

[8] From the annotations in Tremear’s Criminal Code “Consent” means the voluntary agreement of the Complainant to engage in the sexual activity in

question. The Complainant's agreement, in other words, must not only be voluntary but also activity specific.

[9] The *Supreme Court of Canada* in its judgement in *R. v. Ewanchuk* [1999] 1 SCR 330 defined the elements of sexual assault for Canadian Criminal law and clearly determined that there is no defence to the crime on the basis of some concept of "implied consent". From the decision:

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

25 The actus reus of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any mens rea with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, and *R. v. Chase*, 1987 CanLII 23 (SCC), [1987] 2 S.C.R. 293.

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: see *R. v. Jensen* 1996 CanLII 1237 (ON CA), (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd 1997 CanLII 368 (SCC), [1997] 1 S.C.R. 304, *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

29 While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

30 The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the mens rea stage of the inquiry.

31 Counsel for the respondent submitted that the trier of fact may believe the complainant when she says she did not consent, but still acquit the accused on the basis that her conduct raised a reasonable doubt. Both he and the trial judge refer to this as "implied consent". It follows from the foregoing, however, that the trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the actus reus of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.

36 To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. The Code defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant's ostensible consent or participation. As enumerated in s. 265(3), these include submission by reason of force, fear, threats,

fraud or the exercise of authority, and codify the longstanding common law rule that consent given under fear or duress is ineffective.

40 Section 265(3) identifies an additional set of circumstances in which the accused's conduct will be culpable. The trial judge only has to consult s. 265(3) in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the actus reus analysis is complete, and the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite mens rea.

41 Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic mens rea requirement. See *R. v. Daviault*, 1994 CanLII 61 (SCC), [1994] 3 S.C.R. 63.

42 However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, 1993 CanLII 61 (SCC), [1993] 3 S.C.R. 3. As such, the mens rea of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or willfully blind to, a lack of consent on the part of the person touched. See *Park*, supra, at para. 39.

51 For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence (...) An accused cannot say that he thought "no meant yes"

52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that

consent now exists, nor can he engage in further sexual touching to “test the waters”. Continuing sexual contact after someone has said “No” is, at a minimum, reckless conduct which is not excusable.

62 If there is reasonable doubt as to consent, or if it is established that the complainant actively participated in the sexual activity, the trier of fact must still consider whether the complainant consented because of fear, fraud or the exercise of authority as enumerated in s. 265(3). The complainant’s state of mind in respect of these factors need not be reasonable. If her decision to consent was motivated by any of these factors so as to vitiate her freedom of choice the law deems an absence of consent and the actus reus of sexual assault is again established.

63 Turning to the question of mens rea, it is artificial to require as a further step that the accused separately assert an honest but mistaken belief in consent once he acknowledges that the encounter between him and the complainant unfolded more or less as she describes it, but disputes that any crime took place: see *Park*, supra, at p. 851, per L’Heureux-Dubé J. In those cases, the accused can only make one claim: that on the basis of the complainant’s words and conduct he believed her to be consenting. This claim both contests the complainant’s assertions that in her mind she did not consent, and posits that, even if he were mistaken in his assessment of her wishes, he was nonetheless operating under a morally innocent state of mind. It is for the trier of fact to determine whether the evidence raises a reasonable doubt over either her state of mind or his.

64 In cases such as this, the accused’s putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence.

65 Moreover, to be honest the accused’s belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some

evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's mens rea, the charge is not proven.

66 Cases involving a true misunderstanding between parties to a sexual encounter infrequently arise but are of profound importance to the community's sense of safety and justice. The law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.”

The Complainant's Testimony

[10] The Complainant is a young woman, age 24 at time of the incident. At the time of the incident she had been residing as a student in Halifax for some three years. She was working part time and continuing studies as a professional massage therapist.

[11] On the evening of Friday September 9, 2011, J.C. had completed her part-time work shift and had already skipped the day's classes. She met up with friends and drank some alcohol and may have ingested some marijuana. She recalled the location of the two premises she had visited on Bayers Road, and the corner of Oxford Street and Chebucto Road. Both locations in Halifax.

[12] by 11:30 pm she went with three friends to Cheers Bar in downtown Halifax. She was asked how she felt at the time.

“A. Drunk at that point, for sure.”

[13] She got separated from her friends and ultimately came upon the Defendant, Dawson, sitting at a bar with a friend of his who turned out to be Luke Megarity (hereafter called Megarity).

[14] She did not know either man but had some friendly banter with Dawson. She ended up sitting between the two of them. They each had another alcoholic drink.

“ I found out he's [Dawson] from Fredericton and he was visiting his friend, Luke.”

[15] They were together for about twenty minutes and upon Dawson's invitation she decided to accompany him to Megarity's apartment.

“At that point I thought that they seemed like they were nice to talk to, so I could enjoy having -- just going and hanging out with them, and I was also open to the possibility of sleeping with Patrick.”

[16] She remembered driving to the destination by cab and hearing they were going to Lady Hammond but thought it was in the Clayton Park or Bayers Lake area. She was intoxicated and a bit disoriented. She somehow got up to the apartment. She wanted to smoke a joint of marijuana.

“Patrick said that he was going to bed, and so he got up and left the room. And me and Luke stayed and talked for a while.”

[17] She felt comfortable talking to Megarity on her own. She had a cell phone with her.

“A. So after Pat had been gone for a couple of minutes from the living room, I'd estimate maybe five minutes, I stopped the conversation by saying, "I'm going to go to bed," and then I said, "I'm horny." Sorry, "I'm horny" to Luke, because I knew that I was going to go into the bedroom that Patrick was in.(...)

Q. Okay. Did you intend to do anything about that situation with Patrick?

A. I thought -- at that point I thought that we would probably do something sexual and physical. (...)

A. And so I went into the room, and I closed the door, and I got into the bed that Patrick was already in.”

[18] Dawson, according to J.C., was using his cell phone and put it down. She entered the bed and they started kissing each other. She let him take off her leggings and underwear.

“I let him take them off”.

[19] She asked if he had a condom. Neither of them did. She asked how many previous sexual partners he had. He replies three and then she asked him again and he replied 9. She said she was trying to negotiate possibly having sex with him. She was worried about pregnancy and sexually transmitted diseases.

“A. Yeah. At this point I was thinking that I'd like to do something sexual. I wasn't sure exactly what, so I was open to other things as well.”

[20] She then indicates that after he advised her he had been with nine previous intimate partners, she didn't think they were going to have sex together.

[21] Within five seconds, while she was on her back, he placed himself on top of her. He put his penis inside of her.

“So I saw that he was starting to push into me, so I put up my hands to stop him so that my hands were on his abdomen (...) so I was using all of my strength to keep him where he was. And I said, "Wait." (...) and I said, "Wait," again, and I

said, "Wait," one more time (...) he then overpowered me and pushed himself all the way into me."

"Q. Did you want to have sex with him at that point?

A. No.

Q. When had that changed? You initially got in there thinking you might be having sex, when had that changed?

A. When I discovered we didn't have a condom, I started thinking, "Okay. Sex probably is not going to happen." And then he lied about how many people he slept with, so then I was even less interested in having sex. I thought -- I think maybe in my mind there was still a possibility of fooling around, but I was leaning more towards no. And then by the time he had started to try to enter me, I knew absolutely I did not want to have sex with him."

[22] J.C. indicated that Dawson had been holding her arms with enough force that she couldn't move them. She had a checkered patterned wrist band on her arm from the Cheers Lounge which they had both previously attended. When undergoing a physical examination at a later time, a light imprint of a checkered pattern was noted on J.C's forearm.

[23] After thrusting in her vagina for awhile, Dawson released her arms and ejaculated on her stomach. He rolled over onto his side and she believed he went to sleep.

[24] She laid there for a while then put her clothes back on and went on her own into the bathroom and livingroom of the apartment. She did not see Megarity and the door to Megarity's room was closed.

[25] She stayed in the livingroom for a while wanting to get away. She didn't know the address to the apartment. When she looked through the kitchen window she could only see a giant parking lot.

“So I decided that I would go back into the room and try to ask Patrick for the address, because I didn't feel safe trying to leave the house without having an address”

[26] She did not think about calling the police to extricate herself from the situation. Neither did she want to involve Megarity in getting herself out of the situation.

“I didn't trust that he [Megarity] would have a reaction that would be helpful to me and choose me over his friend.”

[27] She went back into Dawson's bedroom, after up to twenty minutes of being on her own, and turned on the light. She approached his bed inquiring what the

address of the apartment was. When she got close he grabbed her while she stated “no” and he pulled at her leggings and underwear. He pulled her onto the bed. He leaned down on her pinning her arms and thrust his penis into her vagina. She struggled.

“And I remember I'm still trying to struggle free, so I'm trying to, you know, pull my arms out from underneath him. And then he says, "I want to fuck you from behind."”

[28] She got one arm freed but he then flipped her over on her front. She estimated he was 6'2" and in good physical shape while she was only 5'4" and weighed 170 lbs at the time. Her face was forced into the pillow and he used his hands to grab at her thighs. He entered her vagina again. He stared at her face and she believed he was trying to intimidate her.

“he leant back up, like, took his face off of the mattress and said, "What about this hole?" And then he started trying to put his penis into my ass hole. And I -- the way I could bend my arm was so that I could turn my arm down and try to block him from being able to do that.”

[29] She tried to put her hand over her anus but he brushed it away.

“And so then he did manage to get his penis into my asshole”

[30] She did not want him to do that and she described that.

“It was painful and felt very dehumanizing.”

[31] She described that he then ejaculated on her buttocks and anus. Dawson then got up, turned off the light, returned to the bed then rolled over back onto his side of the bed. J.C. was then able to lay on her back and struggled to put her leggings and underwear back on. Her back was still hurting and she felt that she lost consciousness. She struggled with herself to get up.

[32] Then she states Dawson reached over and went under her sports bra and placed his hand on her left breast holding her in place. He then pulled her back into his chest.

[33] Once again he wraps his legs around her tightly. He pulls down her leggings over her buttocks and forces his penis into her vagina once again.

“Q. And, again, did he ask if he could do that?”

A. No.

Q. Did you say anything about it?

A. I didn't say anything, no.

(...)

Q. And do you have any recollection of how long he was thrusting inside you?

A. No. Because shortly after he began, I don't remember again, so I assume I lost consciousness.”

[34] He got her leggings and underwear off and inserted his penis into her vagina again. She recalls though “ really fuzzy mind space (...) some sort of unconsciousness” that:

“He was pulling on my hair really hard, hard enough that my head had been lifted off of the bed a bit.”

“Q. Did he ask if he could have sex with you?

A. No.

Q. Did he ask if he could grab your hair?

A. No. (...)”

[35] She tried to push him away. She finally was able to get her eyes open and saw him holding his penis and moving it back and forth.

“(…) like, in my crotch, like my vagina to my ass hole.”

“I can't remember exactly what happened first, but I just know then those all happened.”

[36] She slipped out of consciousness. Later she woke with a start and was able to move. Dawson touched her shoulder.

“and I hear [Dawson] say, "Is there anything wrong, sweetie.”

[37] She did not want him touching her because she felt threatened by him. He went back to sleep and once again she got out of bed by herself and went into the kitchen and livingroom for a significant period of time.

[38] She thought about leaving but didn't know where she was. She didn't have an address.

“I was not feeling strong at all.”

[39] She reasoned if she slept on the livingroom couch Dawson would rape her again. If she went into the hallway and wandered he might find her there so she went back into the bedroom.

“Q. Which room?

A. Into the room that Patrick was staying in. And I remember closing the door and getting back in the bed and thinking I would just wait there until -- until it got light or until I could leave.”

[40] She reasoned that if Megarity saw her and she relayed what had taken place then he would have tried to shut her up by taking her life.

[41] She got into the bed fully clothed and poked at Dawson to awaken him to get the address for the apartment. He appeared to be asleep. She stayed on the opposite side of the bed until daylight.

[42] She was afraid of getting out of bed because that might awaken Dawson.

“so I was afraid of getting up once it had gotten light out, because I didn't want him to be able to stop me from leaving.”

[43] He than awoke and placed his fingers in her vagina.

“Q. Okay. And what, if anything, did you do when he did that?”

A. I didn't do anything.”

[44] She didn't want him to do that but she thought the alternatives were more dangerous for her. He reached for her leggings and underwear, pulling them down. She did not consent and he didn't ask for consent.

“So I let him take off the one side of my leggings, the right side, and at the same time removing that side of my underwear as well.”

[45] He rolled her on her back and thrust his penis into her vagina yet again. She felt scared and sad. He lifted her sports bra and exposed her breasts and said “Well you are pretty sexy”.

“Q. Why were you going to let him do it to you?”

A. Because I decided at that point to just let him take what he was going to take anyways, and then he would be done with me and let me go.”

[46] Dawson ejaculated onto her pubic hair and then he got up and left the room. She replaced her leggings. She remained in the bedroom.

[47] She overheard him inquiring as to the whereabouts of his cell phone. She yelled it was in the bedroom and he returned.

“And then he came in and he sort of just looked at me once, didn't say anything, and then took the phone and left again.”

[48] She left the bedroom and saw Megarity and his girlfriend in the livingroom. J.C. had not realized, until that time, that the other girl was in the apartment.

[49] Dawson was on the livingroom couch and J.C. inquired as to what the address of the place was. Dawson suggested the address and Megarity confirmed its correctness.

[50] She felt mad believing that Dawson had purposefully not told her the address before. The other girl had already left. J.C. then put on her outerwear, called a cab and left the apartment.

[51] She estimated that it was around 11:30 Saturday morning when she left Megarity's apartment by cab. She went to her apartment and called in sick to her

part-time job. She was worried about pregnancy and purchased the “morning-after” pill from a pharmacy.

[52] She called a male friend and spent Saturday evening watching a movie. She walked home around midnight. The next day she went to lunch with another friend and by Sunday afternoon went to the hospital and got a “rape kit” done.

[53] In the interim she tried to act normal but requested that her upcoming course exams be postponed.

[54] During her physical examination at the hospital she noticed a light checkered pattern halfway up her biceps, the same outline as the wristband she had acquired at the Cheers Lounge.

[55] She brought her panties with her to the physical exam knowing that it might be helpful evidence since she was aware of the rape kit procedures from a previous incident years ago.

[56] A few days later, Wednesday of the following week, she made a statement to the police about the incident.

The Defendant's Testimony

[57] The Defendant Dawson was 24 years old at the time of the incident presently before the Court. He was living in New Brunswick with his parents and working as a scaffolder. He was invited to visit his long standing friend, Megarity, in Halifax on the weekend in question. This was only the second time he visited Megarity in Halifax. Megarity was the representative for a liquor manufacturer.

[58] Dawson says he left work in Sussex, N.B. around 3:30 pm and arrived in Halifax around 7:30 Friday evening. He parties with Megarity until 4:00 Saturday morning.

[59] Dawson says he did not meet J.C. until Saturday evening whereas she has their contact occurring on Friday evening.

[60] Saturday evening Dawson and Megarity had one drink at Megarity's apartment and then headed to the drinking establishment known as Cheers. Around

11:30 pm or 12 midnight Dawson and Megarity were sitting at one of the establishment's bars and were approached by J.C.

[61] Dawson asked her to join them. J.C. sat between Dawson and Megarity and they all had a drink. Dawson and J.C. engaged in conversation. Megarity after a while wants to go home. Dawson indicates that to J.C. who states she would like to continue in Dawson's company.

[62] Dawson asked Megarity if J.C. could come with them and the latter agreed. J.C. went to find her coat and purse that she had stashed away at Cheers.

[63] At 1:30 or 2:00 am the threesome hailed a cab to Megarity's apartment.

[64] Dawson and J.C. sat in the back of the cab together. Dawson says J.C. rubbed his penis.

“and just kissed a couple of times, and she was groping on me pretty hard.”

[65] Dawson estimated it took fifteen minutes to drive to Megarity's apartment and according to him, J.C. did not seem intoxicated.

[66] All three sat in the livingroom of the apartment upon arrival and for fifteen minutes had a cigarette and talked.

“[J.C.] informs me and Luke that she uses drugs, and she wanted to smoke marijuana. I informed her that that wasn't something I was into. I don't do drugs, and, in fact, I get piss tested for work, and I didn't want to be a part of it or around it, because I didn't want to get secondhand marijuana smoke in my lungs and fail a job opportunity or something because of that.

Q. Right. Okay. So what do you do?

A. I go off to the bedroom.”

[67] He went to bed and fifteen or twenty minutes later J.C. joins him. He recalls she enters the room, turns the lights on and asks if he was waiting for her. She removes a sweater and gets into bed with him. She had her clothes on. She started kissing and “ puts her hand underneath my boxers and starts beating me off.”

[68] He rubbed her vagina and she took off her leggings and performed oral sex on him.

“A. Anyways. And she asked me if I have a condom, and I told her, "No, I do not, but I can go and check and see if Luke does.”

Q. Okay.

A. And she says, "No, no, that's fine. Just make sure you pull out. I don't want to get pregnant."

[69] She then places his penis in her vagina. They have sex for five minutes. He requests that he have intercourse with her from behind. She said OK and turned over. They had vaginal intercourse again.

[70] She wanted to turn back over to which he agreed. More vaginal intercourse occurred and he pulled his penis out and ejaculated above her vagina.

[71] Dawson says there was no struggle and no words by J.C. indicating that she wanted him to stop having sex. He denied having anal intercourse and said "that grosses me out".

[72] After they had had intercourse they discussed the fact that they had just participated in unprotected sex. He said, she asked him how many people had he had sexual relations with. He replied he had previously had nine intimate partners. She refused to indicate how many she had since they had already had sex. Dawson then turned over and went to sleep

[73] The next morning he woke up. She was kissing the back of his neck and rubbed his left arm.

“A. Start again and then we start rubbing, touching. She starts playing with my penis. I get rubbing her vagina (...) she started rubbing my penis on her vagina and put it in her vagina.

Q. Okay. And what was her reaction to this?

A. She enjoyed it the same. She told me how wet she was and how good I felt inside of her (...) I believe I said how fucking sexy she was and how hot it was with her skirt still (...) I pulled out and I ejaculated.”

[74] He went to the bathroom. He spoke to Megarity who asked how his night was. Dawson said he just chuckled.

[75] J.C. called him back in the room and indicated his phone was ringing. He determined there was no call.

“A. I sit on the end of the bed with her. We get to talking. You know, I drop the hint, like, and wasn't trying to be rude, but I didn't want to hang out with her that next day very long, right. I told her, you know, it's a long drive back to Fredericton, got to take off pretty soon. She said, "Well, give me your phone number," and I told her that I don't give my phone number to strangers.

Q. Okay. And what was her reaction?

A. "Oh, you just fuck them."

Q. Pardon me?

A. She said, "Oh, you just fuck them then."

Q. Okay. What happen...

A. And I told her "No, no." I said, "It's called a one-night stand. You need to relax." And she said, "Well, maybe someday you might just get fucked over too."

[76] He then says he replied:

"You know, I'm not trying to be rude. I just -- I don't want to lead you on. I live in Fredericton. This isn't -- this wouldn't -- this wouldn't work, the whole phone number thing." Anyway, she said, "Well, if you want to get rid of me so bad, then you got to give me the address to the apartment so I can call a cab."

[77] Dawson asked Megarity for the correct address of the apartment. She eventually called a cab and left that Sunday morning. Dawson and Megarity had lunch and the former left for New Brunswick around 12:30 or 1:00 pm in the afternoon.

[78] A month later Megarity contacted him and indicated the police had advised that they wanted to speak to Dawson and that the girl “J.C.” was alleging that she had been raped.

[79] In summary Dawson says that there was only two incidents of sexual intercourse. Once at the beginning and the next time in the morning. Both contacts by him were without force and that J.C. was consenting.

[80] He concluded that J.C. was angry with him when she left the apartment though had calmed down somewhat. The implication being that J.C. became angry because Dawson had advised her that their intimate contact only amounted to a one night stand and that he did not want anything further to do with her.

Luke Patrick Megarity’s Testimony

[81] Throughout this decision Luke Megarity has been referred to as Megarity. He is a longtime “best” friend of the Defendant, Dawson. He was the representative for a wine and spirits agency. He invited Dawson to visit him in Halifax the weekend commencing Friday December 9, 2011.

[82] Friday night Megarity and Dawson went shopping for shoes and visited numerous drinking establishments. They returned to Megarity's apartment by themselves. On Saturday evening they both went to a bar called Cheers around 11:30 pm or 12:00 midnight.

[83] While sitting at a bar inside the establishment they were approached by J.C. whom Megarity described as flirtatious. Megarity remembers that Dawson sat between Megarity and J.C. and had conversation with her. She was touching and rubbing his back at some points as well.

“A. I was ready to go. I had no -- I was done with the night. I was ready to leave the bar.”

[84] Megarity, Dawson and J.C. went by taxi to Megarity's apartment at 6028 Lady Hammond Road. Dawson and J.C. were in the back seat of the cab kissing. They all walked up to his apartment and conversed for a while.

[85] Dawson went into a bedroom. J.C. and Megarity talked about her courses and studies as a massage therapist while J.C. smoked a marijuana joint. Then twenty minutes after Dawson had gone:

“She stood up, she said, "I'm going to go get -- I'm going to go get fucked now.”

Q. Okay. Okay. And where does she go next?

A. She walked into the room...

Q. Okay.

A. ...where Patrick was in bed.”

[86] He described the apartment building as having 112 units. He was on the Third Floor and there were 30 units on his floor.

[87] From a picture window inside his apartment there is a view of a large well-lit parking lot with several retail establishments in the vicinity. Some of which were illuminated at night.

[88] Megarity described J.C.’s level of intoxication while he was speaking to her in the apartment.

“didn't come off as being intoxicated in the least bit. She was -- she was well spoken. She wasn't slurring her words, her head wasn't bobbing. Her eyes weren't closing. They weren't half shut.”

[89] During cross examination he defined:

“Intoxicated, to my understanding, is verbally slurring words or not having full awareness of what your surroundings are.”

[90] Megarity indicated his own girlfriend arrived at the apartment one and a half hours after J.C. joined Dawson in the bedroom. Megarity did not hear any yelling or sounds of distress from Dawson’s bedroom. He next saw J.C. in the morning.

[91] Prior to that Dawson asked Megarity for the address to his apartment and Megarity provided the address. Megarity advised that this was Dawson’s first visit to that particular apartment since Megarity had lived elsewhere when Dawson last had come to visit.

[92] Megarity recalls seeing J.C. in the livingroom at first and once J.C. left the apartment Dawson came out of the bedroom. He did not see them together.

[93] He believes J.C. left around 10:30 or 11:30 in the morning. When J.C. was leaving the apartment, Megarity had the following exchange with J.C.

“THE COURT: Sir, did you have any conversation with [J.C.] the morning -- the morning that she left?”

MR. MEGARITY: When I seen her, I said it was nice meeting her, and that was it.

BY MS. MACKAY:

Q. And did she respond in kind to that question, sir?

A. I believe she did, yes.

Q. Something, the same lines, nice to meet you?

A. It was nice to meet you as well.”

[94] Megarity’s girlfriend Cara MacKinnon, was the first person to leave the apartment that morning.

Cara MacKinnon’s Testimony

[95] Ms. MacKinnon was Megarity’s girlfriend at the time Dawson was visiting Halifax at Megarity’s apartment on Lady Hammond Road. She met Dawson for the first time on that occasion.

[96] She was familiar with the two bedroom apartment. She described that there was a balcony off of the kitchen facing a parking lot. She also indicated there were a number of retail establishments visible through the parking lot.

“it's Lady Hammond Road. It's just off of Robie. It's a pretty big street, well lit.”

[97] Ms. MacKinnon stated that Megarity had been texting her while he was at the bar with Dawson. Ms. MacKinnon arrived at the apartment after the bars had closed. Probably 2:00 or 3:00 am.

“Like, 3:30 would make sense, yeah.”

[98] She heard no signs of struggle or loud noises coming from the bedroom occupied by Dawson and J.C.

[99] The next morning she and Megarity were in bed and woken up by Dawson requesting the address for the apartment. She both later saw Dawson and J.C. that same morning.

“What were your observations of -- of [J.C.] that morning?”

A. She was just sitting, being very quiet, waiting for a cab I was told.”

[100] She saw J.C. around 10:00 in the morning. Ms. MacKinnon does not recall whether she offered J.C. a drive but it is something she would normally do.

[101] In any case Ms. MacKinnon left by herself and J.C. was still present in the apartment.

Hillary Nette's Testimony

[102] Ms. Nette is a Registered Massage Therapist, she had been a fellow student of J.C. [She was not with J.C. on the evening of her contact with Dawson].

[103] J.C. had spoken to her on Sunday and alleged that an incident had occurred 2 days earlier on Friday.

[104] J.C. recounted the events to Ms. Nette, Ms. Nette testified that J.C. went through a serious depression. She was not able to sleep and dropped out of school which Nette attributed to the incident. While in discussion with J.C. on Sunday Nette was of the opinion that J.C. was "devastated".

Lynn Dorcas' Testimony

[105] The one independent witness who was before the Court was Lynn Dorcas. She is a sexual assault nurse examiner. She completed a physical examination of J.C. starting at 5:30 pm on Sunday December 11, 2011.

[106] While she was certainly sympathetic to J.C. she outlined her findings in a objective manner. The Nurse took swabs from J.C.'s vagina and belly button area. They did urine and blood tests for pregnancy and a toxicology test. They examined her black underwear and took photographs of J.C.'s arm.

[107] The Nurse did not detect any visible bruises. A patterned design was detected with a "poly light" on J.C.'s left bicep and left lower arm but she would not define that as a bruise since it was not visible to the naked eye.

[108] A one centimetre (very small) abrasion was found on the posterior fourchette of J.C. outside the vagina and towards the anus.

[109] She described J.C. as quiet and very cooperative.

[110] Ms. Dorcas was asked how often or common was it to see, from her experience, bruising or lacerations or abrasions on the body in sexual assault examinations. She finally explained that:

"A. If the person has been held down, we will see bruises.

Q. Okay. Thank you. And here you've -- did [J.C.] explain to you the facts at all? In parts of your notes you would have taken some description of what was alleged to have taken place, correct?

A. Yes.

Q. And what -- does [J.C.] at any point in time explain to you that she was held down?

A. Yes, she did say she was held down."

[111] She agreed that the one centimetre abrasion seen on the posterior fourchette can occur during consensual sex.

[112] Finally she was of the opinion that a checkered pattern found on the Complainant's forearm as located by the poly light, could have been caused by someone sleeping on the side where the wrist band was located in one particular spot.

[113] Ms. Dorcas examined the anus and rectum area of J.C. during the completion of the "rape kit" investigation and could not detect any redness or tenderness of that area.

Review of the Evidence

[114] J.C. was cross examined at great length as to her recall of the events of the alleged incident. A lot of questions revolved around detailed descriptions of the scene. Details as recalled by any witness many months after the event tend to be inexact. Unless the witness has memorized a part, variations in answers regarding details by any witness, including the Complainant and Defendant, is to be expected.

[115] The recall of various witnesses to the same event will often be different. The position of the individuals and their perspective as to what is important effects their recall.

[116] It is quite clear that Dawson and J.C. were in intimate physical contact with each other in the spare bedroom in Megarity's apartment on Lady Hammond Road. What took place inside that bedroom is known only to Dawson and J.C.

Bruising

[117] During cross examination J.C. was asked:

"Q. You said -- you testified yesterday that you were fighting with all of your force and all of your might to get away from Mr. Dawson on four separate occasions.

A. Not on four separate occasions.

Q. Sorry, three separate occasions.

A. The third time I didn't have really any strength available, so I was not able to fight very hard. And the first two times I was fighting with all of my might to get out from underneath him, yes.

Q. And I would put to you that if you're fighting with all of your might, that would mean that Mr. Dawson would have to exert enough pressure and control on you, on your body, to restrain you.

A. Yes.

Q. Would you not agree with that?

A. I would agree with that.

Q. And that pressure and that exertion of control on your body would create some form of bruising or scratching, [J.C.], is that not reasonable to put to you?

A. I cannot explain why I did not bruise. Perhaps I am not a person who bruises easily."

[118] Under further cross examination:

"A. Yes. He definitely was using enough force to control my movements.

Q. Yeah. And there was -- you've also testified that there was no bruising from your wrist to your elbow down, correct, on either arm?

A. In the rape kit they found no bruising and I did not see any bruising later myself.

Q. Okay. Did you have bruising in other areas that -- aside from the arms, which you believed you were being pinned down?

A. I did not -- I stated no -- that comment about no bruising was for my whole body as far as I could tell.

Q. Okay. Any red marks the following day, any scratches that you were able to point out to the sexual assault nurse examiners?

A. No.”

Date of the Incident

[119] One of the peripheral points in these proceedings is the day upon which the incident occurred. Dawson and Megarity recall it being a Saturday night and the next day Sunday Dawson was heading back to New Brunswick. J.C. testified it happened on Friday night and she went to the hospital to have a “rape kit” completed on Sunday, two days later.

[120] In cross examination the following exchange occurs:

“Q. Do you recall that following morning, before getting into the cab, a conversation with Mr. Dawson about him having to drive back home that day, a long drive?

A. He spoke about that, yes.

Q. Okay. And your testimony is that that was on a Saturday as opposed to a Sunday?

A. Yes.”

[121] Regardless of the evening in which the event occurred the salient question for this court to determine is, has the Crown proven beyond a reasonable doubt that the sexual contact that Dawson had with J.C. was without the consent of J.C. as she alleges.

Complainant Remaining in the Apartment

[122] J.C. alleges that during incidents where she is forcefully sexually assaulted by Dawson, between the first and second incident, she leaves the bedroom for up to twenty minutes and does not leave the apartment or seek assistance from anyone including the police through 911. Though she has an available cell phone.

[123] She returns to the bedroom and is assaulted on two more occasions. She left after the third attack and goes to the bathroom. Once again, alone, she returns to Dawson's bedroom. She poked at him while he was asleep in bed. She got under the blankets and stayed there until 11:30 in the morning.

[124] Once Dawson stirs he took off her leggings. She did not try to stop him or say she was not in agreement though he was positioning her for intercourse. In fact she let her body and voice go with it to the extent her vocalizations could be

interpreted sexually. She stated she was in fear and was not participating but “I was just not stopping him”.

[125] Dawson left the bedroom after having completed the sex act. She got dressed and Dawson returned for his cell phone. He went back to the livingroom. J.C. walks out and sees Megarity and for the first time a woman. J.C. was surprised that another woman was in the apartment. J.C. spoke a few sentences to her.

[126] J.C. called a cab and waited for it. The woman left before. J.C. stayed in the apartment because:

“I didn’t feel scared of him because things were different now.”

[127] She felt it was bright outside, she was near the door and had the address for the apartment even though she purported to be previously scared for her life with the 2 men who were left in the apartment with her. Namely Dawson and Megarity.

[128] One is left to consider why if one has been subject to a violent sexual assault and has the present ability to exit the site of the assault that one would remain at

the site. Not only remain but crawl back into bed with the assailant on one's own accord.

[129] She took the cab home, got the morning after pill and spoke with several friends over a two day period until she attended a physical examination for sexual assault at the local hospital on Sunday afternoon. She approached the police to stop the Defendant from hurting others.

Motive

[130] The Defendant's position is that the Complainant is fabricating the allegations of sexual assault only because he rejected her the morning after and told her their intimate contact was only a one night stand.

[131] J.C. denied any conversation took place between her and Dawson about getting his phone number. She also denies there being any conversation about their intimate contact just being a one night stand.

[132] J.C. states that she regretted that the whole incident happened and that both she and Dawson would have to remember what had happened. As a result:

“I think he's capable of some intense violence, but that's the only bias that I have. So it's a bias I got after he raped me four times.”

[133] In reviewing the foregoing it is evident as previously stated that there is a significant difference in recall of the Complainant and the Defendant as to the extent and consent to intimate sexual activity between them on the incident in question.

[134] First of all, it is clear that the Complainant is not on trial only the Defendant. The Court is aware that historically many victims of sexual abuse were subject to opposition and ridicule. The Complainant's personal history and morality became the focus of the trial rather than the purported acts of the Defendant. That is not the case in the current Canadian Criminal jurisdiction.

[135] The Complainant and Defendant previously strangers to each other met only briefly and both decided that they might possibly engage in intimate sexual activity.

[136] The law does not pass judgement on the consensual sexual habits of Canadians. The law does become involved when a person alleges that their sexual

integrity has been violated without their consent or where their consent has been induced by fear or other prohibited methods.

[137] J.C., the Complainant, alleges that she was sexually assaulted on four different occasions during the early morning hours the day by the Defendant without her consent. The Complainant alone has the right to decide whether he or she wishes to engage in sexual activity. It is the subjective belief of the Complainant as to whether they wished to engage in sexual activity that the Court must examine.

[138] the Crown must prove beyond a reasonable doubt that subjectively the Complainant did not consent to the alleged sexual contact.

[139] In this case the Defendant has testified that he did engage in physical contact with complainant for s sexual purpose. His position is that there were only two incidents of sexual intercourse between the parties and that they both consented to the sexual contact.

[140] Credibility is the central issue in this case. As stated previously only the Complainant and the Defendant actually know what happened between them at the time of the incident.

[141] Since the Defendant has testified the Court must consider the decision of the Supreme Court in *R v. W(D)* [1991] 1 S.C.R. 742 from the head note:

“It is incorrect to instruct a jury in a criminal case that, in order to render a verdict, they must decide whether they believe the defence evidence or the Crown's evidence. Putting this either/or proposition to the jury excludes the third alternative: namely, that the jury, without believing the accused, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to his guilt.

Where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that: (1) if they believe the evidence of the accused, they must acquit; (2) if they do not believe the testimony of the accused but are left in reasonable doubt by it, they must acquit; (3) even if not left in doubt by the evidence of the accused, they still must ask themselves whether they are convinced beyond a reasonable doubt of the guilt of the accused on the basis of the balance of the evidence which they do accept. The failure to use such language may not be fatal, however, if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply.”

[142] In a nutshell, the Defendant argues that the Complainant concocted the allegations of sexual assault because he rejected her in the morning. His position is that she wanted to maintain contact with him and he advised that their relationship

was only a “one night stand”. The testified that he told her that he didn’t give his phone number to strangers, even though they had been intimate partners the night before. He alleges that she insinuated that she would get even with him.

[143] J.C., the Complainant, denies any such conversation took place between the two of them. She states the only reason she approached the police with the version of the events is that she was concerned about the Defendant’s violent behaviour and she wanted to stop him from committing such violent act on other people.

[144] J.C. claims that not only did Dawson sexually assault her both vaginally and anally, he did so while forcefully restraining her. A physical examination carried out within either 12 or 36 hours of the incident, depending on the date of the assaults, revealed no bruising to the Complainant. There was no evidence of injury or trauma to the Complainant’s rectum or anus.

[145] A one centimetre abrasion noted on the Complainant’s posterior fourchette could be consistent with consensual sexual activity.

[146] The poly light discovered a faint pattern indentation on the Complainant’s forearm and wrist could be consistent with the complainant sleeping on that side.

She had a wristband on her arm as a result of her gaining admission to the bar where she met the Defendant.

[147] In her description of the four violent sexual assaults on her person, J.C. indicates that in between she had two occasions to be alone and away from the Defendant (while still in the apartment) for significant period of time.

[148] On both occasions, according to her, the Defendant had aggressively assaulted her and then fell asleep. She exited the bedroom. She didn't know where she was and she wanted to find the address for the apartment building. She stated she was fearful for her safety and scared of what the Defendant might do to her.

Q. there were at least two occasions where Mr. Dawson was asleep and you left the room, is that not correct?

A. Yes.

Q. Okay. In fact, I would also suggest to you that during your testimony today, after the alleged second sexual assault, you described in your testimony that you were giving yourself a pep talk in bed about having to get up and get away from the situation immediately. Do you recall that testimony?

A. Yes.

(...)

Q. You were outside of the bedroom two occasions...

A. Yes.

Q. ...and you came back into the bedroom after you allege Mr. Dawson sexually assaulted you?

A. Yes.

Q. You came back in willingly, didn't you?

A. Yes.

Q. You got back into that bed with him willingly on the fourth occasion of which you testified today, didn't you?

A. Yes."

[149] After the third alleged incident when she was away from Dawson, she contemplated sleeping on the couch in the livingroom. But she decided against that because she felt that if she stayed on the couch Dawson might get up and rape her again.

[150] She didn't leave the apartment for the hallway because if Dawson found her in the hallway he would sexually assault her.

Q. And then you had plenty of opportunity to leave at that point in time, didn't you?

A. Yes.

[151] So while Dawson was asleep in his bedroom she re-entered.

Q. Okay. But then you came back into the bedroom and got under the blankets with him again, correct?

A. I -- yes.

[152] She was asked why she didn't wake Megarity to provide her with the address or some assistance. She stated that she felt Dawson was the dominant friend and that he would convince Megarity to harm her to the point of taking her life.

[153] She did agree that Megarity had at all times been friendly to her and gave no indication that he would be harmful.

[154] Furthermore despite her stated aim of trying to extricate herself from the situation she did not contact 911 emergency services or the police or exit the premises to contact others in the apartment building or attempt to locate the address on the outside of the building. Neither did she attempt to utilize her available cell phone.

[155] It is possible that the trauma of the alleged assaults may have adversely affected her from rationally coping with her situation. It is also possible that she did not feel she was in danger and that her sexual contact with the Defendant was not as she testified. It is also possible that she voluntarily stayed in the bedroom with Dawson until the morning and did not leave the bedroom for the extended times that she claims.

[156] The Complainant's reactions seem to be somewhat inconsistent with the allegations that she had made about the Defendant's violent behaviour. The physical findings of the rape kit examination also are not congruent with her allegations of the use of force by the Defendant.

[157] Dawson, the Defendant, was contacted by Megarity and the police a significant time after the alleged event. According to him this was just another one

night stand of no particular importance. However, he was surprisingly able to recall the exact dialogue that passed between the parties.

[158] The rather juvenile and puerile utterances purportedly made by the Complainant, according to the Defendant, seem rather contrived.

[159] That being said it is just as reasonably conceivable that the Defendant's recall of the events as 2 incidents of consensual vaginal intercourse was accurate. According to the Defendant each party stimulated the other and participated in vaginal intercourse.

Proof Beyond a Reasonable Doubt

[160] The Crown must prove the case against the Defendant to a standard of proof beyond reasonable doubt. In *R. v. Lifchus* [1997] 3 S.C.R. 320, the *Supreme Court of Canada* gave direction to the trial courts of this country as to how a judge alone

or a jury should be instructed as to what “beyond a reasonable doubt” means in the context of Canadian Criminal Jurisprudence.

[161] From the head note:

“A jury must be provided with an explanation of the expression “reasonable doubt”. This expression, which is composed of words commonly used in everyday speech, has a specific meaning in the legal context. The trial judge must explain to the jury that the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused.”

[162] From paragraph 39 of the reasons of Mr. Justice Cory (as he then was) in

Lifchus:

“39 Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression “beyond a reasonable doubt” mean?

The term “beyond a reasonable doubt” has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our

criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt. [Emphasis Added]”

Conclusion

[163] After extensively reviewing the admissible evidence in this case it is evident that at one point in time the Complainant wanted to have sexual relations with the Defendant. She purports that she subsequently changed her mind, as she had the

right to do. The Defendant at all material times wanted to have sexual relations with the Complainant.

[164] Sexual intercourse took place between the parties. There is a disagreement as to the date upon which that sexual intercourse took place and the number of times sexual intercourse occurred.

[165] The Complainant testifies that she did not consent to having sexual intercourse with the Defendant. She states she was forced to have vaginal and anal intercourse on four occasions. She was either being physically over powered by the Defendant and/or she was in fear of being harmed by the Defendant. She states that she reported the Defendant to the authorities only to stop him from committing violent acts to other potential victims.

[166] The Defendant admits to two acts of vaginal intercourse with the Complainant. He states that the sex acts were not only with the consent of the Complainant but also with her instigation and active participation.

[167] He alleged that the Complainant has falsely accused him of sexual assault only because he rejected further contact with her and described their intimate time

together as a “one night stand”. Thus he suggests that these false accusations are a form of revenge.

[168] The Court is left with two competing versions of the events. While the Court has some consternation about aspects of each version, both are plausible. After hearing the Defendant’s testimony, considering the details of the Complainant’s evidence, and mindful of the elements of the offence, the Court cannot be sure that the Complainant did not consent to sexual activity with the Defendant.

[169] Thus following the decision of *Lifchus* supra, the Court cannot be sure of the guilty of the Defendant. Therefore the Crown has not proven its case beyond a reasonable doubt. Thus the Court is obligated to and does enter a verdict of Acquittal.

Order Accordingly,

Dated at Halifax on the 15th day of September, 2014.

Michael B. Sherar
Judge of the Provincial Court