

**PROVINCIAL COURT OF NOVA SCOTIA**  
**Citation:** *R. v. Santiago Morales*, 2019 NSPC 71

**Date:** 20191212  
**Docket:** 8255618  
**Registry:** Bridgewater

**Between:**

Her Majesty the Queen

v.

Gerardo Santiago Morales

**Restriction on Publication: s. 486.4 CC A ban on publication of any information that could disclose the identity of the victim and/or complainant]**

<b>Judge:</b>	The Honourable Judge Paul B. Scovil, JPC
<b>Heard:</b>	November 5 <sup>th</sup> and 14 <sup>th</sup> , 2019, in Bridgewater, Nova Scotia
<b>Decision</b>	December 12, 2019
<b>Charge:</b>	<b>271 Criminal Code of Canada</b>
<b>Counsel:</b>	Leigh-Ann Bryson, for the Crown Robert Chipman, for the for the Accused

A Ban on Publication of the contents of this file has been placed subject to the following conditions:

- By court order made under subsection 486.4 (1) of the **Criminal Code**, information that may identify the person described in this decision as the victim [and/or complainant] may not be published, broadcasted or transmitted in any manner. This decision complies with the restriction so that it can be published.

**By the Court:**

[1] The labour force across Canada, including Nova Scotia, is often supplemented by foreign nationals on a temporary basis. Mr. Santiago Morales was one such foreign national from Mexico. Mr. Santiago Morales worked in the Christmas tree industry in Lunenburg County, Nova Scotia. On August 17, 2018, Mr. Santiago Morales was at the home of a co-worker socializing. Allegations by the wife of the co-worker led to the charge of sexual assault under section 271 of the **Criminal Code** being laid against Mr. Santiago Morales.

**Facts:**

[2] J. H. gave evidence that her husband, A. M., arrived home with several co-workers including the accused. All parties had consumed some alcohol and smoked some cannabis. J. H. reported that she had consumed a small portion of an Old Orchard cider and a “couple of puffs” of a marijuana cigarette. The group also consumed nachos. J. H. felt consumption of cider and cannabis had no effect on her. She reported her husband A. M. was considerably intoxicated. Gorge, one of the foreign workers was drinking as well. J. H. described Gorge as “pretty drunk”. The accused was consuming alcohol as well.

[3] At about midnight, J. H. left the upstairs kitchen area of her home to go down to the basement where her bedroom was located to go to sleep. At that point her husband, A. M., and Gorge were still awake in the kitchen. She told Gorge they could sleep outside in the camper trailer owned by the family.

[4] J. H., on going downstairs, noted that the accused was sleeping in a chair in what appears to be a rec-room portion of the basement. The chair is pictured in photo #2 of Exhibit #1. She then proceeded to enter her bedroom and closed the door to go to sleep.

[5] J. H. testified she was awakened by the accused digitally penetrating her vagina. She told the accused to get out, to which the accused said he was sorry. She stated in her direct examination that she was 100% certain that it was the accused. She denied in cross-examination that the accused merely stroked her.

[6] J. H. then cried out for help, got out of the bed and ran up and out of the basement. Upstairs she noted her husband, A. M., was passed out on the couch. Mr. Santiago Morales followed her up the stairs and he then went in the bedroom where Gorge was sleeping and began trying to get Gorge up to leave.

[7] J. H. then contacted her cousin through Facebook Messenger on her phone to come to assist her. In cross-examination, J. H. was questioned about advising

her Aunt that Ramone assaulted her. She denied saying that Ramone had assaulted her. J. H., as well as all other witnesses, were clear that no one named Ramone was at the home that night. J. H. did testify that it was the accused who told her aunt that J. H. was confused and that it was Ramone who had assaulted her.

[8] The accused and his colleague left the home of J. H. The next day J. H. recounted the incident to her mother who convinced her to report the matter to the police.

[9] The Crown also called Gorge Garaacuaro-Becerra who was also in the home of J. H. when the event occurred.

[10] Mr. Garaacuaro-Becerra has known the accused since childhood and come from the same town in Mexico. They were employed together working in the Christmas tree industry in Lunenburg County.

[11] Mr. Garaacuaro-Becerra stated that he and the accused arrived with A. M. between five and six o'clock in the afternoon at A.M.'s house. He estimated they were there four or five hours. Mr. Garaacuaro-Becerra stated that he had consumed a couple of beers but was "Okay". Mr. Garaacuaro-Becerra felt that A. M. was very drunk. J. H. was "some drunk", which I took due to language

difference to mean, a little drunk. Apparently, there was also an older gentleman at the residence who was very, very drunk.

[12] Later in the evening, Mr. Garaacuaro-Becerra stated that Mr. Santiago Morales wanted to go home. A. M. mentioned that they would sleep there and further let Mr. Garaacuaro-Becerra sleep in his son's room. Mr. Garaacuaro-Becerra testified that Mr. Santiago Morales fell asleep in the chair in the basement.

[13] After falling asleep, Mr. Garaacuaro-Becerra was awakened by Mr. Santiago Morales, who wanted to go home. Mr. Santiago Morales said that he had moved a person and that he thought it was Mr. Garaacuaro-Becerra. In cross-examination, he stated Mr. Santiago-Morales looked concerned and scared.

[14] J. H. came upstairs and then her family arrived who, according to Mr. Garaacuaro-Becerra, attacked Mr. Santiago Morales.

[15] In cross-examination, Mr. Garaacuaro-Becerra stated that there was never an invitation to sleep in the camper.

[16] The only other witness to testify was the accused. Mr. Santiago Morales has been involved in seasonal employment in Nova Scotia for the last nine years. He had only met J. H. that evening. Mr. Santiago Morales speaks Spanish but can say "thank-you" and "sorry" in English.

[17] Mr. Santiago Morales began by denying guilt.

[18] In direct, Mr. Santiago Morales outlined his alcohol consumption on the night in question. Prior to arriving at the home of J. H., he had consumed seven beer. At the home he consumed both tequila and whisky. He agreed he was intoxicated but added not enough to lose consciousness. Mr. Santiago Morales stated that A. M. was very drunk, J. H. was drunk, and Gorge only had two beer.

[19] Later in his testimony, Mr. Santiago Morales described where A. M. had in fact driven he and Gorge home. As they saw their boss outside, they returned back to A. M.'s home.

[20] Later in the evening he asked Gorge to leave several times as he had to go to work in the morning. He also asked A. M. to take them home, but A. M. refused as he was too intoxicated.

[21] Mr. Santiago Morales testified that he eventually went to the basement area where he fell asleep in the chair. He denied that anyone offered the camper for him to sleep in. At some point, Mr. Santiago Morales awoke and wanted to go home.

[22] While the area was dark, Mr. Santiago Morales saw an open door with a bundle on the bed. He went to move the bundle thinking it was Gorge and that he would wake him to go home.

[23] J. H., he said, looked at him and said she wasn't Gorge and to "get out of my house". He then lied down on the floor and J. H. went up the stairs.

[24] Mr. Santiago Morales reported he then went upstairs to find Gorge, wake him, and leave. Upon coming upstairs, he saw J. H. crying. Gorge asked him what happened to which he replied, "I just moved her".

[25] J. H.'s aunt arrived with several others. She asked Mr. Santiago Morales if he was Ramone, to which he said "no".

[26] When asked in direct how he was feeling in the room, Mr. Santiago Morales said he "was desperate to leave the home as there was work. We work everyday".

[27] In cross-examination, Mr. Santiago Morales was asked if he touched fabric or skin when he woke J. H. His answer was, "truthfully I am not sure what it was that I touched. I cannot tell you if it was skin or not".



**Law:**

[28] Not unlike a number of sexual assaults, this matter provided little in the way of ancillary evidence to which a judge can turn to in making definitive fact findings. Sexual assaults rarely occur in the view of another individuals and perpetrators almost always choose private areas which isolate them and their victims. Such cases rely heavily on findings of credibility by the trier of fact.

[29] The most fundamental rule that a trial judge must remember in a case such as this is that the burden of proving the guilt of the accused lies upon the prosecution. Before an accused can be convicted of any offence, the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the offence. See *R. v. Vallancourt*, [1987] 2 S.C.R. 636.

[30] The principle of reasonable doubt as outlined above applies equally to issues of credibility, as well as those of fact. See *R. v. Ay*, [1994] B.C.J. No. 2024 (B.C.C.A.).

[31] The question of what is reasonable doubt as a standard of proof was discussed by the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320. There, the Supreme Court set out that reasonable doubt is not like subjective standards of care that we employ in important everyday situations. It is not proof

to an absolute certainty. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice. The Court was clear about proof beyond a reasonable doubt and that it falls much closer to absolute certainty than to proof on a balance of probabilities. See *R. v. Starr*, [2000] S.C.J. No. 40.

[32] In this matter, given that an accused has testified, I must also apply the principles of *R. v. W.D.*, [1991] 1 S.C.R. 742. If having heard all the evidence, I believe the accused, then I must acquit him. If I do not know whether to believe the accused and his testimony raises a reasonable doubt, I must acquit. If any of the evidence by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. Even if I reject his evidence, before I can convict, I have to ensure myself that on each and every element of the offence, there is proof beyond a reasonable doubt. If the Crown has not proven any element beyond a reasonable doubt, then I must acquit.

[33] The concepts embodied in *W.D.*, were expanded upon by the Nova Scotia Court of Appeal in *R. v. Brown*, [1994] N.S.J. No. 269. In *Brown*, Justice Matthews stated as follows:

**17** These observations in our opinion are equally applicable to cases where a judge sits alone. As Chipman, J.A remarked in **R. v. Gushue** 117 N.S.R. (2d) 152 at 154:

- ...There is a danger here that the court asked itself the wrong question: that is which story was correct, rather than whether the Crown had proved its case beyond a reasonable doubt. See *R. v. Cooke* (1988), 83 N.S.R. (2d) 274; 210 A.P.R. 274 (C.A.); *R. v. Nadeau*, [1984] 2 S.C.R. 570; 56 N.R. 130 (S.C.C.); *R. v. K.(F.)* (1990), 73 O.R. (2d) 480 (C.A.); *R. v. J.G.N.* (1992), 78 Man. R. (2d) 303; 16 W.A.C. 303; 73 C.C.C. (3d) 381 (C.A.); *R. v. K.(V.)* (1991), 68 C.C.C. (3d) 18 (B.C.C.A)

[34] Justice Matthews continued on his decision to adopt the reasoning used in the following case:

**18** The British Columbia Court of Appeal in **R. v. K. (V.)** considered issues similar to the instant case. Understandably not all of the issues were the same. After a useful analysis of the proper procedure to be followed in such cases, Wood, J.A speaking for the court commented at p. 35:

I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgment I noted the gender-related stereotypical thinking that led to assumptions about the credibility of complainants in sexual cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of complainants which would have the effect of shifting the burden of proof to those accused of such crimes.

[35] In **R. v. Mah**, 2002 N.S.C.A. 99, Justice Cromwell of the Nova Scotia Court of Appeal (as he then was), spoke about **W.D.** in the following manner:

**41** The W.D. principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment

of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt: **see R. v. Avetyan**, [2000] 2 S.C.R. 745; [2000] S.C.J. No. 57 (Q.L.) at 756. As Binnie, J. put it in Sheppard, the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

### **Credibility:**

[36] Throughout all trials, judges must remind themselves of the most fundamental rule in hearing the matters before them is that the burden of proving the guilt of the accused rest upon the prosecution. Before an accused can be convicted of an offense the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the elements of the offense. This principle of reasonable doubt also applies to issues of credibility as well as fact (see **R. v. Ay**, [1994] B.C.J. No. 2024 (BCCA))

[37] Credibility plays a crucial role in the matter before this court.

[38] While a trial judge must give reasons for how they resolved credibility issues the Supreme Court of Canada has recognized that it is difficult, “to articulate with precision the complex intermingling of the impressions that emerge after

watching and listening to witnesses”. It is not a “purely intellectual” exercise. See *R. v. R.E.M.*, [2008] 3 S.C.R. 3

[39] Judges are entitled to accept all, some, or none of a witness’s evidence.

[40] Trial judges must scrutinize and examine all at the evidence when considering the credibility of any single witness. In *R. v. D. D. S.*, [2006] NSJ No. 103 (NSCA), Justice Saunders of our Court of Appeal stated as follows;

... It would be wise to consider what has been said about the trier’s place and responsibility in the search for truth. Centuries of case law that remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by season judicial stirring will yield proof of veracity. Human nature, common sense, and life experiences are indispensable when assessing credit worthiness, but they cannot be the only guidepost. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence but standing alone it is hardly determinative. Experience tells us of that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witnesses account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or criminal case?

[41] Credibility cannot be determined by following some prescribed set of rules.

Having said that trial judges can and have assessed credibility by using a number of guidepost of factors. While not exhaustive Justice Mossip in *R. v. Fillion*, [2004] O. J. No. 3419 (Ont. SCJ), set out a series of factors which are instructive. He stated:

In assessing the reliability and credibility of witnesses testimony, I have considered factors that judges invite juries to consider such as:

\*does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable?

\*Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?

\*Does the witness seem to have a good memory? Does any inability or difficulty that the witness has and remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions?

\*Does the witness's testimony seem reasonable and consistent as she/he gives it? Is it similar to or different from what other witnesses say about the same event? Did the witness say or do something different on an earlier occasion?

\*Do any inconsistencies in the witness's evidence make the main point of the testimony more or less believable and reliable? Is the inconsistency about something important, or minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does it make sense?

\*The manner in which a witness testifies may be a factor, and it may not, depending on other variables with respect to a particular witness.

### **Analysis:**

[42] Credibility is key in this matter. If I accept Mr. Santiago Morales's denial, then I must acquit. Even if I do not accept his evidence but his evidence raises a reasonable doubt, I must acquit. Do I accept his evidence, or does it raise a reasonable doubt? In this matter, I do not accept his evidence relating to the assault nor does it raise a reasonable doubt.

[43] To begin with, the accused was intoxicated. While he testified, “he was some drunk”, which I take to mean drunk to some degree, it is also clear that he consumed a large number of beers prior to arriving at the complainant’s home. Additionally, Mr. Santiago Morales consumed whiskey and tequila at the residence. That description of alcohol consumption leaves me to find that Mr. Santiago Morales was quite intoxicated. This would affect his perception and his judgement during the course of the evening in question.

[44] In his evidence regarding the act of touching J. H., Mr. Santiago Morales described moving a bundle. In cross-examination, he stated he could not tell if it was skin or fabric. What is remarkable is that he had no clear recollection of whether he touched skin or fabric despite within minutes afterwards being accused of sexually touching J. H. Given that, I find Mr. Santiago Morales was either failing to testify to the truth of what happened or in the alternative unable to adequately remember what had occurred to the extent such as to give credence to his denials.

[45] Mr. Santiago Morales reported that after he touched J. H., she told him to get out of the house. In response he said he laid on the floor next to the chair he had fallen asleep in. J. H., he stated, went up the stairs.

[46] Mr. Santiago Morales went up the stairs to find Gorge to immediately go home. As he did so, J. H. was crying. Mr. Santiago Morales then told Gorge he had “just moved her”. This appeared to show an effort to extricate himself from the scene given what he had done to sexually assault J. H. I also note that Gorge Garaacuaro-Becerra testified that Mr. Santiago Morales appeared concerned and scared when Mr. Santiago Morales woke him up. This all is more consistent with his sexually assaulting J. H. as opposed to simply have shaken her awake thinking she was Mr. Garaacuaro-Becerra.

[47] Mr. Santiago Morales also reported that prior to going to sleep A. M., a man everyone described as being extremely intoxicated, had driven Mr. Santiago Morales and Mr. Garaacuaro-Becerra to their home. When they arrived the boss of the workers was repairing a pump. So, they turned around and went back to A.M.’s home. Mr. Santiago Morales stated that after driving away from where his boss was repairing a water pump, he and Mr. Garaacuaro-Becerra wanted to be let out of the truck, but A. M. refused and drove them back to A. M.’s house.

[48] Once at A. M.s house, Mr. Santiago-Morales stated that he again asked A.M. to take him home. A. M. refused because he was too intoxicated.



[49] The story recounted by Mr. Santiago Morales simply is not believable. I have considered that in his testimony and his denial of the offence itself, the possibility of language difficulties given Mr. Santiago Morales's lack of English. Even taking that fully into account I do not accept Mr. Santiago Morales's testimony, nor does it raise a reasonable doubt.

[50] While I have rejected Mr. Santiago Morales's evidence, I must still scrutinize the Crown evidence. If having done so I am left with any reasonable doubt on any essential element of the offence, I must acquit. In relation to the evidence of J. H., Mr. Santiago Morales in summation agreed that J. H. never wavered in her description of the sexual assault itself.

[51] The defence did argue that there were inconsistencies in J. H.'s other evidence which would lead to a trier of fact finding her evidence incredible. These inconsistencies include the offer for the guest to sleep in the camper parked outside. While J. H. indicated the ability for their guest to sleep in the camper was offered, the other two witnesses say no mention of the camper was made.

[52] Photograph four of Exhibit one clearly shows a camper outside the residence. It is not hard to believe some offer may have been made for it to be

used. In any event, it is an insignificant ancillary point which does not detract from the evidence of J. H. particularly in relation to the sexual assault.

[53] The defence argued that J. H. was intoxicated and that evidence of consumption of several sips of alcohol and the smoking of a puff or two of cannabis would detract from her credibility. I found J. H. forth right in her description of what she consumed. Both Mr. Garaacuaro-Becerra and Santiago Morales were consuming more intoxicants and there is nothing that indicates in ancillary evidence that the two men were paying any great attention to the volume that J. H. consumed. I note she was very quick to gain assistance by messaging her aunt. Nothing shows any degree of intoxication such as to detract from her evidence.

[54] The defence argued that the inconsistencies regarding an older gentleman who was very intoxicated being at the kitchen table or not were crucial to J. H. credibility. Nothing regarding this aspect is integral or important to the narrative and any such inconsistencies are minor.

[55] The defence stated J. H. testified that Mr. Santiago Morales spoke English. While there may have been some reference by J. H. to limited conversations with English nowhere was there a blanket assertion by J. H. that Mr. Santiago Morales

spoke English. Even Mr. Santiago Morales described speaking to J. H.'s aunt when she arrived and asked him if his name was Ramone.

**Conclusion:**

[56] Nothing in J. H.'s evidence affected the clear and concise description of being digitally penetrated in her vagina by Mr. Santiago Morales. I am left in no doubt that this is exactly what occurred. Consequently, I convict the accused.

Paul B. Scovil, JPC