

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Andrews*, 2019 NSPC 86

**Date:** 20191125

**Docket:** 8272673

**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Adrian Andrews

**Restriction on Publication: Criminal Code, s. 486.4(1)**

**Judge:** The Honourable Judge Ronda van der Hoek

**Heard:** November 6, 2019, in Kentville, Nova Scotia

**Decision** November 25, 2019

**Counsel:** Robert Morrison, for the Crown  
Sarah McDonald, for the Defendant

**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of the *Criminal Code*, information that may identify the person described in this decision as the complainant may not be published, broadcasted or transmitted in any manner. This decision complies with this restriction so that it can be published.**

**Order restricting publication — sexual offences**

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

**By the Court:**

***Overview:***

[1] After an evening of drinks, the complainant's boyfriend passed out asleep and she was left alone with his friend Mr. Andrews. It is alleged Mr. Andrews took advantage of the situation and forced a kiss on the impaired complainant. That act stopped when she said she would engage in a "three-way" if he could wake her boyfriend. Unable to rouse the boyfriend, all three bedded down for the night in separate locations. It is alleged Mr. Andrews then woke the complainant, forced her to fellate him, and eventually carried her off to another location where he forced vaginal intercourse upon her.

[2] As a result, Mr. Andrews is charged with one count of sexual assault contrary to s. 271 of the *Criminal Code of Canada* for which any and all, of these acts form the foundation. He elected trial before this court and the matter was heard on one day with two crown witnesses.

***Issue:***

1. Can Mr. Andrews rely on the defence of honest but mistaken belief in consent based on the complainant's conditional agreement to engage

in a threesome should he wake McInnis, a condition precedent that did not materialize?

2. What is the effect of the complainant's inability to identify Mr. Andrews in the courtroom?

***The Evidence:***

[3] The Crown called two witnesses: the complainant and her boyfriend. The defence elected not to call any but admitted by consent a forensic analysis completed on the complainant's clothing, Exhibit 1. Before setting out my analysis I will review the facts upon which it is based.

***Facts:***

[4] As in any criminal trial there are often noncontentious facts and this case holds no exception. It is useful to set out those facts first before addressing the more problematic evidence.

***Noncontentious Facts:***

[5] Mr. Nick McInnis and the complainant were seeing each other for a few short weeks when they decided to spend the night tenting in the woods behind his property. After setting up camp, they consumed alcohol and had sex. Mr. McInnis

recalls drinking somewhere between four and five cans of beer (tall boys), the complainant recalled him drinking four cans of which she had part of one. She also drank between a half and three quarters a pint of rum. The amount of alcohol they consumed is relevant in so much as they were both impaired to some degree by it, and whether and to what degree somewhat impacts the reliability of their testimony. Likewise, that they had sex is also relevant as it relates to Exhibit 1.

[6] Later that evening, Mr. McInnis received a telephone call from his friend Mr. Adrian Andrews who lives approximately fifteen minutes away by foot. The complainant had never met Mr. Andrews but agreed to walk through the woods with Mr. McInnis to hang out at Mr. Andrews' house.

[7] After arriving on the Andrews' property, the complainant and Mr. Andrews smoked marijuana before they all went to Mr. Andrews' basement bedroom where they lounged on his bed watching a movie. Mr. McInnis passed out asleep and recalls being roused the next morning from a couch located outside the bedroom. He and the complainant quickly left the house.

[8] What happened after Mr. McInnis fell asleep is the focus of this case and where fact finding becomes vital but is rendered more problematic. Fact finding of

course occurs within a legal framework and it is important to also set that out at this point, starting with the legal standards of proof to be applied to such facts.

***The Law:***

***The Onus and Standard of Proof***

[9] Mr. Andrews is charged with a criminal offence and is presumed to be innocent until the Crown proves beyond a reasonable doubt that he committed a sexual assault upon the complainant. Mr. Andrews does not have to prove he did not commit the offence because the Crown's onus of proof never switches from the Crown to him. Proof that he probably or likely touched the complainant for a sexual purpose does not rise to the reasonable doubt standard.

[10] I cannot consider the evidence in a piecemeal fashion, rather I must consider the whole of the evidence and may only convict if I am satisfied that the Crown has established Mr. Andrews' guilt on the criminal standard. In saying so, proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt". (*R. v. Lifchus*, [1997] 3 S.C.R. 320) The burden of proof placed upon the Crown lies "much closer to absolute certainty than to a balance of probabilities" (*R. v. Starr*, [2000] 2 S.C.R. 144). "A reasonable doubt does not need to be based on the

evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt” (*R. v. J.M.H.*, 2011 SCC 45).

[11] I can accept some, none, or all of what a witness says. In assessing the testimony of the witnesses, I considered both reliability and credibility. In doing so I am aware of the important difference between the two concepts. Credibility assessments ask the Court to consider the veracity or truth of witness testimony, while a reliability assessment considers accuracy of that testimony.

[12] Accuracy requires scrutiny of such things as the ability to observe, recall and recount a situation. If a witness’s evidence on an issue is not credible, she cannot provide reliable evidence on that point in issue. However, a credible witness may give evidence that is unreliable, as in the case of mistaken eye-witness identification observation, where circumstances such as brief opportunity to observe render an honest belief unreliable.

***The Crown’s Case:***

[13] The complainant recalls Mr. McInnis buying and consuming four “tall boys” of beer and believes she consumed part of one. Mr. McInnis testified on direct that he thinks he bought and consumed 3-4 cans of Sapporo tall boys’ beer. Later, also

on direct, he increased that number to between 4-5. The complainant says she had two or three drinks from her pint.

[14] The complainant testified that she was familiar with the accused's name because Mr. McInnis told her he was his best friend and lived down the road, adding they would get together on occasion to smoke marijuana.

[15] Mr. McInnis explained that he has known Mr. Andrews all his life. He described their relationship as positive and close.

[16] The complainant recalls the phone call between the two and Mr. McInnis telling Mr. Andrews that he had a girl with him, and so she was also invited along. She told Mr. McInnis that she did not mind going and they walked 15 minutes through the woods to the house. They used phone flashlights to guide them in the dark.

[17] They both believe the phone call came around midnight or 1 am. Mr. McInnis says he was drunk but not enough to be unable to find his way.

[18] Upon arriving at the house, they met Mr. Andrews and stayed outside for awhile. Mr. McInnis did not rule out going into a holiday trailer but really cannot remember if they did. While he recalls marijuana being used by the complainant

and Mr. Andrews, he says he did not use any because “around that time” he had reasons to stay away from the drug.

[19] The complainant’s testimony was much more detailed. She described how she and Mr. McInnis sat together on the trailer table that folds into a bed, and Mr. Andrews “put himself in the far back”. She says, “Nick persisted to start passing out from the alcohol he drank, and Adrian got Nick to take a hit on the bong”. While she is sure he took one hit, she concedes he could have taken more than one. Next, she was offered a hit on the bong and she took one.

[20] The complainant says Mr. McInnis was still passing out so, “Adrian started to pack up to go in the house”. Being a planner, she asked Nick what they were going to do, and she was concerned about where they would spend the night. Nick, she says, got up and “pretty much invited them into Mr. Andrews’ house”.

[21] Asked to describe her state of sobriety at this time, she accepted the 1-10 scale proposed by the Crown attorney, and believes a 6-7/10 makes sense, explaining that she was feeling quite fine, level-headed but uncomfortable because she was in an unfamiliar place and starting to get anxious because she was not sure where they were staying. She also added that she was not in the same state as Nick but was starting to get tired.

[22] Mr. McInnis recalls entering the house although he is unsure which door they used. He says they went into Mr. Andrews's bedroom and watched a movie. He does not recall what they watched and fell asleep  $\frac{3}{4}$  of the way through it. He explained that his memory was fuzzy due to drink and the passage of time.

***In the House:***

[23] The complainant recalls entering the house through the basement door and settling into Mr. Andrews' bedroom. She and Nick went upstairs for water and returned downstairs where Mr. Andrews had put on a movie.

[24] Mr. McInnis cannot recall where people sat on the bed. He cannot recall conversations they had. He says, "all I remember is watching a movie and falling asleep on the bed".

[25] The next day Mr. McInnis recalls they left "very quickly", in what he believed to be the mid afternoon.

[26] While watching the movie, the complainant says Nick was passing out from the weed and the alcohol. As a result, she was feeling awkward because with Nick passed out, she was alone with only Mr. Andrews. She says while talking to him, he noticed the cut lines on her legs visible near the top of her shorts. He questioned her about them. She explained to the Court that they resulted from self harm.

Feeling uncomfortable, she told Mr. Andrews she wanted to have a cigarette, so they left Nick passed out on the bed and went outdoors where they stood for a short time before Mr. Andrews suggested they sit in a van located near the house.

***The Kiss in the Van:***

[27] The complainant described the van and where it was parked on the property. She also described where she sat- next to the opened door. Mr. Andrews sat in the middle seat and started “pursuing” her “making comments of how he wanted a blow job, or he wanted a hand job, just wanted something because he had not seen his girlfriend in a while. That is when I started saying no, I am with Nick, your best friend, this is wrong”. At one point, after looking away out the door, she looked back and he pulled her in, kissing her. She says she shoved him away saying “No” and to “Stop” “and he was just very persistent in what he wanted”. She told him she was with Nick. He was making her feel very uncomfortable and, in an effort to make herself feel better, she told him “when we got inside, if he could wake Nick up, we could have a three-way. And that kind of got him to calm down a little bit and I finished my cigarette and we went back in”.

[28] On cross examination she elaborated on why she said this, explaining it was to lighten the mood. She added on cross examination that she knew Nick was

passed out and would not be woken and the suggestion made Mr. Andrews lighten up and not be persistent.

***Back to the House:***

[29] Returning to the house, they went to Mr. Andrews' bed where they resumed their previous positions with her snuggled into Nick who was lying at the foot of the bed. She says she did so, "to show a message that I was with Nick". Mr. Andrews sat at the top of the bed and there was no discussion of a three-way, although he did try to wake Mr. McInnis but could not.

[30] The complainant says Mr. Andrews announced that Nick was not sleeping in his bed and did finally wake him enough to take him to the couch in the living room located outside the bedroom door. Nick, she says, was very incoherent, very tired and "just was not with it" and was "slurring his words a lot". That said, he did manage to pop out the reclining ends of the sofa bed and try to get her to lie down on it with him. She did so but finding it too uncomfortable, went to sleep on the nearby love seat.

[31] Asked to assess Mr. Andrews' state of sobriety at the time, she says he did not seem affected by the weed she saw him smoke in the trailer. She conceded that

while she saw him “do at least three”, she was not paying particular attention to his level of sobriety.

***The Loveseat:***

[32] The complainant explained that the loveseat sat in a direct line of sight from Mr. Andrews’ bedroom door; the couch where Nick slept was to the left of it. Nick had a blanket from the bed, and she had one recommended to her by Mr. Andrews that came from the back of his bedroom door, having grabbed it while Nick was being assisted to the couch.

[33] Once again asked to assess her sobriety, she says she was between a 6-7/10 and was feeling extremely anxious and extremely tired. She put her glasses and phone on a table near the couch and got on the loveseat assuming a fetal position with her back to the armrest. She started passing out from the weed, tiredness, and alcohol, and has no recollection of time for the most part.

[34] She was woken three times. The first time she heard a creaking noise in the unfamiliar house and looked up for two seconds to see Mr. Andrews with his face approximately six inches away from Nick’s face. She assumed he was trying to determine if Nick was awake, seeing no reaction from Nick, she closed her eyes and passed out again.

[35] Woken a second time by the creaking noise, she opened her eyes to find Mr. Andrews standing over her touching her arm. While the indoor light was not on at the time, she says there was a glow that she believes came from an outside source that illuminated the room. Mr. Andrews placed a finger over her mouth and told her to be quiet because Nick was sleeping. She says he was tugging gently on her arm, and she believes it was for the purpose of trying to take her to his bedroom. She kept saying, “No, I am too tired. I want to sleep”. He left, and she passed out once again.

[36] Finally, she was woken a third time by the same sound of the floor creaking nearby, this time she decided not to open her eyes in hopes Mr. Andrews would leave her alone. Once again, she felt the brush of his fingertips on her upper arm, she was startled awake but kept her eyes closed pretending to be asleep. She felt him tug on her arm and she opened her eyes saying, “No, I am tired”.

[37] At this point, he put either his finger or his penis in her mouth and guided her head back and forth for not even a minute. She remains unsure if it was his finger or his penis he placed in her mouth because, for the most part, she had her eyes closed. She knows it was Mr. Andrews because she could hear his voice.

[38] After that ended, he started tugging her arm to take her to the bedroom and she kept saying no and trying to shove him away. He put his hand on her mouth telling her Nick and his girlfriend could not know about this. She recalls him putting his arms under her body to pick her up and that is the last she recalls from the loveseat.

***In Mr. Andrews' Bedroom:***

[39] Her next recollection is standing in Mr. Andrews' bedroom doorway. She was exhausted and he was guiding her, steadying her into the bedroom where he closed the door behind them.

[40] The bedroom light was on and she recalls him laying her down on the bed where he said the word "condom". She tried to explain to the Court that while she was passed out, she could still hear "in a sense" although she is not sure about any other words surrounding "condom". On cross examination she also conceded that in her statement to police she may also have told them she heard words about STIs.

[41] She next remembers Mr. Andrews on top of her, vaginally penetrating her and thrusting. Her shorts she says were off and her shirt was pulled up. She has no memory of how her clothes came to be in that state.

[42] She came to and realized what was happening and said “No, no”, and he cupped his hand over her mouth telling her she had to be quiet, Nick and his girlfriend could not find out. She says her voice was muffled by his hand.

[43] At one point in time he got off her to take a break telling her he had to apologize because she was tighter than his girlfriend. She explained that while hearing him say these words she lay there unable to move due to shock and not knowing what to do. The break lasted as long as it took Mr. Andrews to say those words and he got back on top of her continuing to vaginally penetrate her with his penis. She says she tried to shove him off but was too weak due to alcohol, weed and being tired.

[44] She could not tell if he used a condom or if he ejaculated. Likewise, she is unsure how long this situation lasted before he finished, got off her, and “chucked” her shorts saying, “Nick can’t find you here”. She could not manage to get her shorts on due to exhaustion, her body and mind being drained from what happened, and being up all day and night. He helped her with the shorts and her next memory is waking in the living room at 9 or 10 am to the sound of her previously set phone alarm. She had to work at 1 pm.

[45] She turned off the alarm, woke Nick, and told him they needed to go. They left quickly walking on the roadway, returning to the tent for her belongings. She did not tell Nick what occurred because she was still processing and did not know him well enough to confide in him.

[46] She was home by 11 am and arrived at work at 1:30 pm. Her best friend was there, and when they saw each other she broke down saying she needed to talk to a manager. After telling the manager what had happened, she was supported to call and report to the RCM Police, and she went to the hospital. Ultimately her clothing was seized and sent for a forensic examination.

[47] She had never met Mr. Andrews before this date, never saw him again and did not identify him in court. She says she knew it was him who sexually assaulted her in the living room because she recognized his voice.

[48] The forensic report: underwear, mixed profile of biological material from two males. DNA was taken from Mr. Andrews and considered. The results “could not be compared”. The inconclusive result does not establish that Mr. Andrews had sex with the complainant, nor does it rule that out.

*Analysis:*

[49] Aware that I may accept some, none, or all of what a witness says, in considering the testimony of the complainant I note, on direct there were no significant inconsistencies as she testified. She was slightly red-faced when she spoke of the assault.

***The Complainant's Evidence:***

[50] Her manner was firm, clear and matter of fact. She was polite and pleasant, she exhibited neither fear, embarrassment nor shame. Her evidence was balanced and plausible.

[51] She was consistent throughout, and where her evidence was challenged during a lengthy cross examination, she fairly answered those challenges in a manner that left her account strengthened, not weakened in any regard. For example, conceding that she may have said more to the officer in the case of Mr. Andrews using the word STI. However, she was firm, she did not reply to him, because she was in and out of consciousness.

[52] Defence counsel argued the complainant testified as though she was trying to speak in a manner that was tailored to the forum in which she was giving evidence. For example, saying "stated" instead of "said". She says it is not the job

of a witness and raises questions marks about, and shows she can tailor, her evidence for better or worse.

[53] I do not accept that the complainant's formalistic use of the words "stated" v. "said" suggests tailoring of her evidence. She carefully explained on cross examination that her word choices reflected her effort to communicate.

***Identity:***

[54] I discerned no animus, no axe to grind. That she did not recognize Mr. Andrews sitting in the courtroom does not weaken her testimony, rather her failure to identify him is neutral and very much makes sense in my opinion. After all, it is noncontentious that she met the accused only one time, at night, one year ago. They spent really very little time together and throughout she was impacted by drink, drugs and exhaustion, and therefore not in position to commit his face to long term memory. Also not contested, she left right away in the morning without benefit of sober light of day contact with Mr. Andrews.

[55] It was argued that it makes no sense that she says she drank a normal amount of alcohol and yet says she was progressively more intoxicated over the course of the night. I am asked to consider why it would "take hold later"? I agree there was no medical evidence called in the case to explain so I must rely on the evidence. I

accept and find that it accords with the circumstances in that time and place that the complainant drank a substantial amount of alcohol - up to  $\frac{3}{4}$  of a pint- and smoked some drug given her by Mr. Andrews late at night. The entire event occurred late in the evening and in the overnight hours. While it is not clear exactly how long the whole night lasted from first drink to the incident in the bedroom, her ability to function under these circumstances accords with many, many witnesses I have heard testify over the past few years. Hers was not out of the ordinary. I have no evidence of how long she was awake that day, whether she was taking anxiety medication to treat her panic attacks, etc. However, I find she was impacted by a significant amount of drink, some drug consumption and exhaustion based on her evidence.

[56] Throughout her testimony I discerned no possible interest other than to tell what she remembered in as much detail as possible. Her ability to do so was impressive. She recalled, unchallenged, details of the property, the layout inside the house and the location of various furnishings, all lending credence to her testimony. Overall, she was an exceedingly credible witness.

[57] Her reliability was likewise impressive. Her testimony sat very firmly on the foundation of Mr. McInnis'. I say this acknowledging his was admittedly seriously impacted by drink. Where their evidence differed was on relatively immaterial

aspects of the evening. He was able to identify Mr. Andrews and supported her testimony that the three were the only ones in the basement that night, and despite the possibility of an upstairs brother who nobody, in any event, says came downstairs, I accept Mr. Andrews interacted with the complainant.

[58] Her explanation on cross examination of suffering a panic-induced state, as explained to the officer, was careful and considered. She was clear that panic did not alter her ability to appreciate what she could not stop happening to her. Her reliability was sound.

***The evidence of Mr. McInnis:***

[59] With respect to Mr. McInnis, he is in many ways an interested witness who was clearly terrified while he testified. I watched as he faced Mr. Andrews flanked by whom I can only surmise were parents seated together in the courtroom behind the lawyers. I watched this most anxious witness redden increasingly and look as though he might variously vomit or faint. I say this not as a criticism but to impart how incredibly difficult testifying was for him. In *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 at para 27, the Court dealt with interested witnesses:

The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such cases must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

[60] Mr. McInnis told the court that he was surprised to say the least when he heard of the assault allegation, and he and Mr. Andrews “reminisced” about the night a number of times before the trial date.

[61] In considering his testimony, I find he was simply too intoxicated to recall time spent in the trailer that night. However, he quite fairly, did not rule it out. I find he is mistaken and cannot recall that he took a hit on the bong. On the evidence of the complainant he was passing out when he was given it and could be expected to forget he had done so while in the company of a friend with whom he frequently smoked. Also his testimony about there being times in his life when he was not using and that this was one of them, asserted as the reason for saying so, did not impart a real sense of reliability since he says he recalls so little of the night and he was already impaired by alcohol. I also note he was a military reservist at the time of the alleged assault and that drug was illegal at the time.

[62] In my final assessment, Mr. McInnis was an interested witness who was trying to support his friend. I do not think he has any idea what occurred that night

after he passed out, but his testimony that they left quickly in the morning was spot on with that of the complainant's own testimony.

[63] His testimony did nothing to diminish the reliability of the complainant's own. Rather it served to confirm opportunity to assault the complainant and established her level of impairment and vulnerability that night.

### ***The Essential Elements of the Offence of Sexual Assault***

[64] Despite recent clarity from the Supreme Court in *R. v. Barton*, 2019 SCC 33, *R. v. Ewanchuk* 1999 CanLII 711 (SCC), [1999] S.C.J. No. 10 remains the leading case on the elements of the offence of sexual assault. To be convicted of sexual assault, the Crown must prove beyond a reasonable doubt the "two basic elements", (1) that the accused committed the *actus reus* of unwanted sexual touching, and (2) that he had the necessary *mens rea*, intention to touch the complainant knowing she did not consent. (para. 23) The *actus reus* is established by proving there was intentional touching and the touching was sexual in nature. Both are assessed through an objective lens test. However, absence of consent must be subjectively assessed. (para. 25)

### ***The Actus Reus of Sexual Assault – Intentional Touching, the Sexual Nature of the Touching and the Absence of Consent***

[65] Whether touching was intentional requires the court to consider all the circumstances surrounding the act, including the nature of the contact and any words or gestures that may have accompanied it along with anything else that indicates the accused's state of mind at the time the touching occurred.

[66] In this case, I find the complainant became an object of interest once Mr. Andrews noticed her cut marks when Mr. McInnis was passed out. He made his move while she was out of the house away from Mr. McInnis. Her effort to put off his demands with the suggestion of a three-way that she knew would never materialize, created both negative and positive outcomes – it met with success in rebuffing his advances in the isolated van, but served to stoke his continued interest in her throughout the night.

[67] Other than the conditional offer, nothing in the complainant's behaviour, words or deeds communicated consent to engage in sexual contact with him. The kiss was not consensual and nor was anything done to her person afterward.

[68] Assessing whether touching was sexual in nature is also an objective exercise. I have considered the part of the body touched by Mr. Andrews, the nature of the contact, and the situation in which it occurred. I must consider the

words that accompanied the contact and all the other surrounding circumstances.

The purpose of the touching also sheds slight on whether it was sexual in nature.

[69] There is no doubt, and I find, all three acts were sexual in nature. Even placing an item in the mouth of a sleeping woman and moving her head back and forth is clearly sexual in nature whether it was done with his finger or his penis. All must be considered in the context- a sleeping woman earlier assaulted and then immediately carried into the bedroom while stating that neither Mr. McInnis nor his girlfriend could know. The kiss and the vaginal intercourse are all clearly sexual.

### ***The Mens Rea of Sexual Assault***

[70] Sexual assault is a general intent offence. The Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement (*Ewanchuk*). I have no difficulty finding that sexual touching occurred on the evidence. I have inferred intent from Mr. Andrews' actions, kissing, fellating and vaginal penetrative intercourse. It is worth recalling, as stated in *Ewanchuk*, “[c]ases involving a true misunderstanding between parties to a sexual encounter infrequently arise” (para 66)

### ***Consent:***

[71] Consent was addressed in *R. v. J.A.*, 2011 SCC 28, where the Court said, “consent requires a conscious operating mind throughout the sexual activity. An individual must be conscious throughout the sexual activity in order to provide the requisite consent.”

[72] For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said yes through her words and actions. (*Ewanchuk, supra*, at para. 47)

[73] It is argued the three-way offer demonstrated the complainant’s willingness to engage in a sexual activity. Despite her confidence that Mr. McInnis would not be roused, Mr. Andrews would not know that. They returned to the house with that objective.

[74] In my view, all is fair comment but ignores the facts, he forced the kiss before the words were said and she said “no”. I find that he was clearly rebuffed. Committing a sexual assault to test the waters is still a sexual assault. An error of law in that regard does not provide a defence to the charge.

[75] I find after meeting without success in attempts to wake Mr. McInnis, the offer was over. They did not discuss it again and in fact retired for the night. That

Mr. Andrews went to the complainant to propose a new plan is not illegal but persisting in the face of her “no” became so.

[76] Likewise, I reject the argument that the complainant pushed him away because she was not sure her words were being heard. While she did testify at one point, that she was not sure if she was communicating with words, she was clear he appeared not to be registering it. I accept her evidence that she said no repeatedly despite his persistence which in many ways mirrored his initial persistence in the van. He took her from the loveseat over her protests.

[77] Also, I do not accept that her recall of the words “condom” and “STI” represented a type of new partner conversation before engaging in sex. I find she was not in a conversation but had been carried off for an assault while in and out of consciousness. His stated words about condoms and STIs does not move this reality to that of a sexual encounter with consent. After all, carrying off your best friend’s romantic interest who happens to be drunk, I cannot find is other than reckless or wilful blindness on the issue of consent on these facts.

[78] Finally, I cannot give credence to the suggestion that consent may have occurred because the complainant did not simply leave Mr. Andrews’ house. I find she was impaired and did not have to leave to protect herself from a non-

consensual sexual assault. To give this argument consideration would be to engage in twin myths reasoning. A complainant is not expected to walk off into the woods in the middle of the night, whether by path or road, to find a tent to sleep in to protect herself from possible criminal activity. To do so would be reckless and dangerous in this rural part of the province.

[79] Likewise, that she did not cry out, get her phone, and call for help is also problematic but not for the reasons argued. I find that Mr. Andrews covered her mouth and her partner was passed out. That she did not scream out for help, is unfortunately not uncommon for complainants. I do not reject her testimony based on a failure to engage in stereotypical actions.

[80] Her words related to a three-some did not render her available to Mr. Andrews for the whole night for anything sexual.

***Decision:***

[81] After considering and weighing all the evidence, I conclude that the Crown has met its heavy burden and established Mr. Andrews' guilt beyond a reasonable doubt. The complainant did not consent to any of the three sexual contact incidents with him, and I accept her evidence in that regard. I find her conditional agreement to do so after the initial sexual assault was meant only to put him off as she knew

the condition precedent would never materialize. His actions afterward were not based on an honest but mistaken belief in consent, instead they represented a continuation of the first sexual assault, albeit magnified to a significant degree of seriousness. He was reckless as to consent and wilfully blind to it as well. She did not consent.

[82] Finally, her inability to recognize Mr. Andrews in court does not detract from the other reliable evidence of his identity. Mr. McInnis clearly identified Mr. Andrews and there was no rogue third party in their company that night.

[83] The Crown has proven its case to the criminal standard of proof beyond a reasonable doubt. I find Mr. Andrews guilty of sexual assault.

[84] Judgment accordingly.

van der Hoek J.