

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. JRA*, 2022 NSPC 34

Date: 20221014
Docket: 8454062
Registry: Kentville

Between:

His Majesty the King

v.

JRA

Restriction on Publication: s.486.4

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	November 29, 2021, January 6, 2022, May 3, 2022, June 15, 2022, June 16, 2022, and July 7, 2022, in Kentville, Nova Scotia.
Decision	October 3, 2022 (oral) November 1, 2022 (written)
Charge:	s. 271 of the <i>Criminal Code of Canada</i>
Counsel:	Nathan McLean, for the Crown Thomas Singleton, for the Defendant

By the Court:

Introduction

[1] The complainant O.M., consumed alcohol in combination with prescription medication, rendering her intoxicated to the point of vomiting and passing out. Asleep on a cot, she says she awoke to JRA sexually assaulting her and, while she blacked out a number of times during various sexual acts, says she consented to none of them.

[2] JRA says he was asleep on the living room couch when the complainant woke him by “playing with my penis.” He says they engaged in various consensual sexual acts including intercourse until she uttered her boyfriend’s name, and he ceased all activity and went back to bed.

[3] Both the Crown and JRA called evidence at trial. The Crown called the complainant, O.M., her mother, B.A., and brother, L.M., a friend to JRA, M.A, the responding officer, Cst. Jones, Cpl. Davidson, Sgt Kelly, Janice Hebb, Christine Downes and Dr. Lisa Surette, who conducted the sexual assault examination of O.M.

[4] JRA testified in his own defence.

[5] It is not the intention of this Court to parse ever word of testimony, nor refer to testimony that was not relevant to an issue in the case, however the Court listened carefully to all the witness testimony. In assessing the evidence of the witnesses, the Court considered whether it differed as between direct and cross examination, whether it was plausible, consistent,

balanced, or suffered from a personal interest. The Court also considered the witness' ability to observe, recall and communicate what they observed. Ultimately, the Court can accept some, none, or all of what any witness says on the witness stand.

Issue

[6] The sole issue is consent- whether the Crown proved the complainant did not consent (*actus reus*) and that JRA knew she did not consent (*mens rea*).

Decision

[7] After carefully considering all of the evidence and applying the criminal law as it relates to the offence of sexual assault, the Court is convinced there was no consent provided by the complainant to engage in the specific sexual activities, and as a result the Crown has established the *actus reus* of the offence, including a proven lack of consent.

[8] Even if the Court accepted JRA's evidence that the complainant first touched him for a sexual purpose while seated next to him on the couch, there was no evidence she consented to the sexual acts that occurred thereafter, either on the couch or on the cot. Lying down on a cot, whereupon JRA engaged in sexual touching, and reaching toward him, in the circumstance of this case, cannot in law constitute providing consent to the sexual acts committed by JRA. As well, those actions could not, in the mind of JRA, constitute consent to engage in the subject sexual acts.

[9] Before setting out the facts of the case, it is prudent to address the law that guides the Court.

The Burden of Proof in Criminal Trial:

[10] Every person charged with a criminal offence is presumed innocent. The Crown carries the burden to prove the offence charged beyond a reasonable doubt. This criminal burden is the heaviest in our justice system. The onus of proof never switches from the Crown to JRA asking him to instead prove that he did not commit the offence with which he is charged. Following careful consideration of the whole of the evidence, I may only convict him if I am satisfied that the Crown has established beyond a reasonable doubt the complainant's lack of consent to the sexual activity and the *mens rea*.

[11] 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"¹. Instead, the Crown's burden of proof lies "much closer to absolute certainty than to proof on the balance of probabilities"². Finally, 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."³

[12] In assessing the reliability and credibility of the witness testimony, the Court considered such things as their general capacity to make specific observations, ability to recall what was observed or heard, and to interpret what was perceived and testify accurately about what they

¹ *R v. Lifchus*, [1997] 3 S.C.R. 320

² *R. v. Starr*, [2000] 2 S.C.R. 144

³ *R. v. J.M.H.*, 2011 SCC 45 (CanLII)

recollected. The assessment also considers whether the witness was sincere, candid, biased, reticent, or evasive.⁴

[13] I also address the credibility of JRA's evidence in accord with the Supreme Court of Canada's direction in *R. v. W.D.*⁵. It makes sense to start with his testimony, although it is worth noting that I did not make findings of fact before considering all the testimony from all the witnesses.

Assessing the evidence of JRA:

[14] JRA was neither a reliable nor credible witness as it related to the sexual activity with O.M. While his evidence about the majority of the sexual acts was consistent with that of O.M., the Court found unpersuasive and implausible his testimony about her touching him first. His testimony lacked detail about that touching, and provided scant evidence with respect to the commencement of his touching of her occurring thereafter. His testimony was evasive and presumptive about O.M.'s purported consent. This despite being a careful witness with respect to most noncontentious issues upon which he appeared to speak confidently- amount of alcohol consumed and by who, conversations between the group, and the walking order to the car when leaving the beach. However, his evidence was less detailed about the sexual activity that he says lasted, in his estimation, between 30 and 45 minutes. At times he appeared to be creating answers on cross examination as it seemed impossible to

⁴*R. v. D.D.S.*, 2006 NSCA 34

⁵ [1994] 3 SCR 521

believe he would leave out such detail on direct examination given the careful and expert probing questions posed by his own counsel. As a result, JRA's answers on direct and cross examination often differed on important aspects such as location and timing. It appeared he was not being candid with the Court or at all sincere with respect to the details of the sexual activity and where it took place. Finally, JRA made unsupported assumptions about O.M.'s consent. It is useful to review that evidence now.

[15] As I said, JRA's recollection of the day up to the point where O.M. laid down on the cot in the living room was fairly reliable and consistent with that of the Crown witnesses. He recalled the day at the beach where O.M. drank four to five cans of her alcoholic beverage, he also had one, and he drank six of a 15 pack of Busch beer bought for sharing with L.M.

[16] Asked to employ the 10/10 drunkenness scale frequently referred to during criminal trials, JRA concluded he was probably a 4 or 5/10 when they left the beach, believes L.M. was higher than that- "probably a 6/10", and O.M. was 5 or 6/10. He explained that all three young people were "walking fine" on their way to the car. On cross examination JRA agreed with the Crown's suggestion that he was 4-5/10 and, when asked what that looked like, said "a little bit of a buzz on".

[17] JRA recollected two "pee stops" on the drive home. The first saw all three young people leave the car, and O.M. return to ask her mother for her bag in order to change her clothes. He says O.M. took the bag and changed clothes on her own, an account that accorded with the evidence of B.A. I pause to say that the Court did not accept the evidence of L.M. who testified that B.A. left the car to help her daughter change clothes, preferring instead the

recollection of B.A. who was sober and says she did not assist her otherwise intoxicated daughter.

O.M. gets sick:

[18] JRA says after he and O.M. returned to the car after the second pee stop, she complained of an upset stomach. Otherwise, the drive home was marked by the three young people laughing, carrying on, and having a good time. Both his evidence and that of B.A. matched in that regard, although O.M. says she recalls little from the drive home, save passing out a few times.

[19] JRA testified that upon arriving at the house, O.M. got out of the car, vomited and he “got her something to get sick in”, as well as water, and steadied her as she went into the house. He says B.A. went to the cot with her daughter. On cross examination he explained that while he assisted O.M. into the house, “she did not really need much help, I was just worried she might slip, I was steadying her ...to be a gentleman”. He provided water because he thought she was dehydrated from the beach and not feeling well, but primarily due to dehydration.

[20] On cross examination JRA did not agree with the evidence of B.A. and L.M. that O.M. was “visibly intoxicated” when she arrived at the house, he believed she vomited because she was sick from the sun, a couple of drinks, and the drive home.

Inside the House:

[21] JRA believes the group returned to the house at approximately 9 pm. B.A. gave her daughter water and put her on the cot in the living room and sat there rubbing her back for 10-15 minutes. JRA testified that some people went into the kitchen, and he sat on the couch. Soon his father and L.M. went to bed and JRA dozed off sitting on the couch. He recalled his father being adamant about L.M. going to bed because he needed to drive the siblings to the airport that next day.

[22] On cross examination JRA elaborated, testifying that he was on the couch just after they all came home, B.A. was sitting with O.M. on the cot, and he thinks not long after arriving home, between 10-10:30, they all went to bed. Later, on cross examination he added that the group, other than O.M. who did not speak, were all telling L.M. he needed to go to bed. He also agreed with the Crown that before going to the couch, he entered L.M.'s bedroom to say goodbye due to the early flight, having not spoken of this on direct examination. L.M. testified that JRA came to his room, in his opinion, to see if he was asleep before assaulting his sister. L.M.'s evidence was largely opinion and at times did not accord with that of other witnesses and the Court places little weight on it.

[23] JRA also explained to the Crown the location of the cot in relation to the couch- the couch faced the door and not the cot, which was located to the side of the couch; the pieces were 4-5 feet apart from one another.

[24] On cross examination JRA reconfirmed B.A. was rubbing O.M.'s back while seated on the cot and O.M. was starting to doze off. Asked why B.A. was doing so, he testified that it was because she is a mother, and O.M.'s stomach was upset. Also on cross examination, he

explained, somewhat confusingly, that he could not really recall what the others were doing because he did not really plan to fall asleep, but B.A. was *not* on the cot, as she was only there with O.M. “for 10 or so minutes”.

[25] B.A. testified that O.M. was on the cot in the living room, threw up again, she rubbed her daughter’s back and shortly after O.M. passed out, she covered her daughter with a blanket and got ready for bed.

[26] JRA testified on direct examination that he fell asleep on the couch while sitting up. It was not clear to him, nor clear from his evidence, if B.A. was still on the cot with her daughter when he drifted off to sleep. He explained that it was not his plan to do so, he simply fell asleep while sitting there. As a result, he ultimately has no specific memory of what was going on in the living room when he fell asleep.

JRA is awoken:

[27] JRA, who described himself as “a pretty heavy sleeper”, says he awoke to O.M. sitting next to him on the couch “playing with my penis”.

[28] On cross examination he explained that he was lying down at that point and concludes he slid over while asleep. While his penis had been inside his swimsuit when he went to sleep, it was now outside his swimsuit. He denied being intoxicated but says he was aware that he had consumed alcohol, “if that makes sense”. Asked for the first time on cross examination if anything was said, JRA testified that he said to O.M., “What are you doing?” and she replied,

“Don’t worry about it”. He was unsure which hand she used to touch his penis and that was the sum total of his evidence with respect to O.M.’s purported actions involving his penis.

JRA’s account of the subsequent sexual activity between he and OM:

[29] JRA says upon waking and finding O.M. playing with his penis, he “started to kiss her boobs, well feel her boobs with my hands, kiss them, and went down and ate her out... *at that point she had laid back and wrapped her arms around my neck and pulled me closer and that was the point we started to have sex*, and she pulled me on top of her with her legs, and we were having sex, and she called me by Kelly’s name and that threw me off and I stopped and sat back on the couch.”

[30] Asked where O.M. was located when he sat back on the couch, he testified that “she was on the cot... I had asked her if she wanted a cigarette and she said no, and she got up and went up to the bathroom and I fell back asleep still sitting up.”

[31] In response to a defence question about O.M.’s evidence of blacking out and whether he noticed this, JRA said, “absolutely not or I would have stopped then too”.

[32] Later, on cross examination, JRA says he recalled a light on in the kitchen, and other than asking O.M. what she was doing and hearing her reply, “Don’t worry about it”, “there was not much said”, at one point, “I asked her if she liked my penis in her vagina”.

[33] Also on cross examination, JRA reconfirmed that O.M. was initially sitting next to him on the couch, she laid down and he was touching her breast and her vaginal area, “and she is on her back, and she pulled me by my neck”. Interrupted at that point and asked to explain

where he was lying, he said he was unsure how he was lying on the couch, and thinks he slipped down while sleeping. Ultimately it was left unclear to the Court when or if JRA ceased lying on the couch during the activity alleged to have occurred there.

[34] Asked at what point after she touched his penis, he decided to continue sexual relations with her, JRA says when she wrapped her legs around him and pulled him to her, as close as you can get- presumably during the intercourse, but not made clear. He did not agree with the Crown that the relationship between he and O.M. gave him pause, adding “not in the moment”.

[35] Asked on cross examination how the two moved from the couch to the cot, JRA was not sure what the Crown meant. He said, “I did not, she laid down by me”. Then he added, “no sorry, after [oral sex], when she laid back it was on the cot”. Asked if her sickness and behaviour from earlier gave him concern, he said “not at the time”. He agreed he did not ask her if she was feeling ok. Asked if he could see her face, he said “yes, she was looking at me for most of it”. Asked about her demeanor and whether she looked tired, he disagreed adding there nothing else about her demeanor he noted.

[36] On cross examination JRA was asked what O.M. was wearing and he testified that her bathing suit top remained on “the whole time except” when he pulled it down. He explained that she had shorts on that he took off before the *oral sex*. *The Crown asked if that was on the couch and JRA testified that “she had just moved over to the cot, and I went to undo them, and she picked herself up so I could slide them off”*. He agreed there was no discussion about the oral sex that he now seemed to suggest occurred on the cot and not the couch.

[37] JRA agreed there were two intercourse position, and in total the entire encounter lasted, “not very long, a half hour, 45 minutes”, ending with her saying ‘Kelly’ while they were having sex. He says he replied, “What”, stopped and went to sit on the couch where he “dozed off to sleep quite quick”. Pressed for more detail about the offer of a cigarette, he agreed to asking O.M. if she wanted a cigarette after he dozed off and then woke up. He stood up to go for a cigarette, she said no, and he did not end up going out for a cigarette, instead he returned to sleep. Asked when that occurred, the final “back to sleep”, he answered “not very long”.

B.A.’s earlier visit to the living room:

[38] B.A. testified that sometime during the night she left her bedroom to check on JRA and O.M. She says as she looked in, JRA “had, kind of, it looked like, he grabbed a blanket and kind of threw himself back on the couch and he said, ‘I don’t know if I can sleep here tonight because this couch is pretty short’, I said ‘well its up to you’”. She told him he could sleep in the trailer, but he declined. She noticed her daughter was “lying a little bit different, like sprawled side to and the blankets way over her head”. B.A. thought O.M. did not normally sleep that way but figured she was passed out and had been drinking so did not think much of it. B.A. went back to bed until 3 am when O.M. came running to her mom.

[39] JRA was asked to recall B.A.’s testimony about coming out to the living room during the night. He says she did so prior to the sexual activity between he and O.M. He recalled talking about the couch with B.A. adding he was not sure if he wanted to sleep there because it was short and not very comfortable.

[40] On cross examination JRA testified reconfirming the conversation with B.A. regarding the short couch. He said it was a “little tight”, does not recall replying to an offer to sleep in the trailer, and thinks she started the conversation as he was pretty much falling asleep, adding his memory is not great regarding the conversation with B.A.

[41] Asked on cross examination about B.A.’s account of observing a jumping motion, he does not recall that, adding he might have moved a bit when she came in. He says he may have moved his arms a little. He agreed O.M. was on the cot and recalled she had blankets but could not recall where they were positioned.

Assessing the reliability and credibility of O.M.:

[42] O.M. was a reliable and credible witness. She was emotional and uncomfortable providing details but was able to provide a fairly high level of detail for the portions of the assault when she was conscious.

[43] O.M. testified that she vomited while sitting on the cot in the living room, her next memory was waking to find J.A. touching/grabbing her breasts and placing his mouth on her vagina. There was no indication from her evidence that she consented before any of these actions occurred, she testified that she said nothing and did nothing to convey consent. She blacked out once again.

[44] O.M.’s next memory is waking to find JRA having sexual intercourse with her. She says she also did not consent to this sexual touching.

[45] The context for her evidence requires an examination of what occurred prior to her arrival on the cot in the living room.

[46] O.M. testified that she has no memory of a large portion of the day after she consumed four to five clamato coolers at the beach over a four-to-five-hour period before a two-hour car ride back to [edited] house. She does remember being at the beach that day and, at the end of the outing, “being taken to the car... passing out in the car and waking up again and then passing out again and waking up when I was being taken into the house”. She says she can “barely remember it”, knows she was drunk and “was kind of messed up”. She recalls not being able to focus on anything, having blurry vision and stumbling.

[47] On cross examination O.M. elaborated testifying that she believes she passed out on the drive home, “I mean I was drunk, so you could call it sleeping or you could say that I was drunk and that I blacked out, I wasn’t able to remember most of it afterwards”. Asked to explain “blacked out,” she testified that she became unconscious because she does not remember willingly falling asleep. She explained that she has blacked out on two other occasions, once when she ate little and fainted at a wedding and another when she “drank so much alcohol” that she blacked out. Finally, O.M. explained that ‘blacked out’ is the same as ‘passed out.’ The Court, however, is not so sure blacked out actually is the same as passed out, suggesting unconsciousness, and reaches that conclusion on the evidence of O.M.’s mother and brother.

[48] O.M.’s mother, B.A., testified that O.M. was chatty and flirty in the car, and allowed that her daughter slept during some portion of that trip. While O.M.’s mother also recalled her

daughter being variously tipsy and “out of it” in the car, she also testified that O.M. requested two stops to pee and left the car without assistance. At one such stop, O.M. asked A.B. for her bag so that she could change her clothing, and B.A. says O.M. changed her clothes without assistance. Of all this, O.M. professes no memory of any words spoken with respect to stops nor actions attributed to her by her mother, brother, or JRA.

[49] I find O.M. was not ‘unconscious’ in the car during the times she was talking nor when she requested to leave the car twice to pee and change her clothes. The Court concludes, on her evidence, that she experienced a black out (loss of memory), during the periods of time for which she lacks memory of what she was clearly volitionally doing, as witnessed by the others.

[50] Later at the house, O.M. recalls neither getting out of the car nor vomiting outside the house. Her mother says she did both. While O.M. testified that she recalled being assisted into the house, she later testified that she does *not* remember being brought into the house, noting she was heavily under the influence and nauseous.

[51] Inside the house, O.M. recalled being offered water and believes JRA held a cooler into which she vomited. JRA confirms he did both, believing O.M. was simply dehydrated from the day at the beach and sick from the long car ride. It was not clear whether JRA gave her the cooler in the house or outside it, but nothing really turns on this information- she did vomit.

[52] O.M. says those are her last memories before waking to the sexual activity.

[53] O.M. also believes JRA removed her shorts, did not know if she was dreaming, was really confused, scared, and could not move her body. While she was “willing” herself to move, she guesses she was frozen. She also recalled JRA putting his mouth on her vaginal area but cannot remember anything after that point, which she attributed to another black out/pass out.

[54] O.M. says her next recollection is of JRA having sexual intercourse with her. She recalled two positions, although not the order. One occurred when he grabbed her legs and pulled her toward him. On cross examination she explained that he had her legs up on his chest and she was lying on her back. The other involved a memory of being slipped/flipped on her side and JRA “coming in from behind and missing at one point” hitting her rectum and causing her to feel pain. O.M. explained that she was not fully awake, was still drunk, scared and confused. She blacked out a final time.

[55] O.M.’s next awareness was waking with the sexual activity over and JRA asking her if she wanted a cigarette. She believes that occurred at approximately 5 am, and she was 3/10 or 4/10 on a drunkenness scale. O.M. says she declined the cigarette, went to the bathroom, called her boyfriend, and then went to mother’s bedroom. B.A. recalls O.M. entering the bedroom at 3 am.

[56] Returning to the sexual activity, O.M. recalled the cot moving while she was being assaulted, words spoken by JRA, his touching of her body, and her unsuccessful efforts to try to speak or move. She recalled at one point JRA “throwing the covers” over her, leaving, coming back, and starting again. She did not suggest this occurred when her mother visited

the living room. She was also frank and balanced in her testimony that she regained consciousness and JRA asked her if she wanted to do it again, she was not quite awake and did not know what he was talking about. Her body check later in the bathroom confirmed for her that she had been assaulted.

[57] O.M. sounded sincere in her worry about her mother's reaction yet pressed her to call the police, adding she could not get a rape kit without a report. B.A.'s evidence did not allow for running out to the living room to confront JRA, yet O.M. believes that occurred. She says JRA was sitting on the couch, B.A. demanded an answer, and JRA responded and ran out. The Court does not conclude the inconsistency is significant given the general upset and chaos that ensued after O.M. went to her mother. It is possible either O.M or B.A got it wrong.

[58] On cross examination O.M. was asked to recall her report to B.A., and concluded her answer saying that she was "feeling off in the bathroom" and noted pain, adding, "and to be honest with you, I smelled off too".

[59] O.M.'s evidence was internally consistent, and she did not appear argumentative or confrontational with defence counsel. She clearly and frankly answered his questions as well as those of the Crown. She is a very young woman and testified in a manner consistent with her age. The Court accepted her evidence as both reliable and credible. It had the ring of truth.

Assessing the evidence of L.M. and B.A.:

[60] As can be inferred, the evidence of L.M. suffered from personal interest and unchecked speculation. Nothing he testified to was overly important in addressing the issues at trial. In addition, he was intoxicated throughout and not reliable in his reports where they did not match the evidence of B.A. or, even to some extent, that of JRA.

[61] B.A., on the other hand, was accepted as a reliable and sober historian. The Court accepts her evidence about her daughter's condition and her interactions in the car and at the house, it was plausible and largely unchallenged. Even if she confronted JRA, nothing turns on this minor point. Defence counsel says of all the Crown witnesses, B.A., benefited from the best recollection. She was the only 'place and time witness' who was completely sober. She recollected the trip to the beach where the others consumed alcohol, the trip back to the house, stops along the way including one where she provided her daughter dry pants and underwear, and the arrival at the house where her daughter vomited. She recalled putting her daughter to bed on a cot in the living room, comforting her and eventually leaving her there in the living room where JRA would sleep on the couch. She was also reflectively troubled by her check on the two later that night.

Testimony of other witnesses:

[62] The testimony of a number of witnesses called by the Crown with respect to the sexual assault examination conducted on O.M., proved uncontentious given JRA's subsequent testimony that he engaged in vaginal intercourse with her. As such, the Court will not refer to the testimony of the following witnesses other than to say Cst. Jones responded to the complaint at 4:30 am, Dr. Lisa Surette conducted the sexual assault examination at 9:16 am,

Cpl. Davidson collected the assault kit at 10:20 am, Sgt Kelly transferred the kit to Janice Hebb of the Kingston RCMP, who provided it to the courier to take to the lab and Christine Downes testified that the results of the kit, including a DNA analysis of a sample taken from JRA, established the presence of JRA's DNA on samples taken from O.M.'s vaginal and anal areas.

Position of the Defence:

[63] Defence counsel says there is no doubt the two had sexual intercourse, JRA does not deny it, but says the contact was initiated by O.M. when he was asleep on the couch. She was a full participant, as was he, until she uttered her boyfriend's name, and JRA ceased the activity and went back to sleep.

[64] JRA acknowledges that they both consumed alcohol at the beach, he had only met her a day or so previous and was somewhat surprised she came on to him. Despite [edited], he did not consider her a [edited]. The Court is asked to conclude his evidence was both reliable and credible.

[65] Defence counsel did not mention B.A.'s evidence of a return to the living room sometime later where she believed JRA jumped up and she noted her daughter's head covered by a blanket. The Court recalls she also testified that she regretted not examining the situation more closely and is filled with remorse.

[66] With respect to the evidence of O.M., defence points out she says she was intoxicated and blacked out at times. On cross examination she agreed with defence counsel that she did not

see JRA's face and accepted the characterization of what she did see as "faint memories" of his hands and hips when he was moving her. Comparing her testimony on direct examination to that on cross examination, the Court is asked to conclude her evidence was not overly reliable.

[67] Defence counsel identified the key issue permeating the case- whether the complainant was so intoxicated that she could not consent to the sexual activity that occurred. He asks the Court to follow the decision of the Nova Scotia Court of Appeal in *R. v. Al-Rawi*⁶, at paragraphs 34-42, 110-115. In that decision Duncan J. considered capacity and unconsciousness and asked what impairment of cognitive ability short of loss of consciousness voids capacity to consent. After rejecting some suggested approaches, the Court concluded it was an "error of law to equate incapacity only with unconsciousness". Considering whether the ability/capacity to effectively communicate voluntary agreement is required, the Court concluded there is nothing in section 273.1(1) that suggests the Crown need establish communication of a voluntary agreement at the *actus reus* stage, rather communication of a voluntary agreement, or lack thereof, is highly relevant to the issue of *mens rea*- that the accused knew the complainant did not consent to the activities. After all s. 273.2 requires that an accused took reasonable steps to ascertain the existence of consent.

[68] Defence counsel says it is not a matter of accepting that the complainant could not consent because she blacked out, that simply means there is no memory for a time. The Court is asked to compare her testimony about the sexual incident with her testimony about going

⁶ [2018] NSCA 10

to the washroom shortly thereafter of which she provided a high level of detail. On cross examination she recalled getting up, seeing JRA asleep sitting on the couch, not saying anything to him, going to the washroom, seeing where she was going, noting a light may have been on in the kitchen, finding her way to the bathroom, switching on the bathroom light, and remaining there for between 10-15 minutes.

[69] Defence says she has “a pretty excellent memory” of what happened almost immediately after the sexual incident during which she says she was blacked out, but the Court must ask if it can accept, based on her evidence of blacking out, whether she was unconscious. An important distinction because unconscious of course means she could not consent.

[70] While there was evidence of the complainant drinking, getting sick at the house, vomiting into an empty cooler, and B.A. comforting her on the cot, vomiting simply does not equate with unconsciousness or being so intoxicated as to be unable to provide consent to sexual activity. Ultimately the Court is asked to apply *Al-Rawi*, and find a reasonable doubt exists O.M.’s evidence⁷.

Position of the Crown:

[71] The Crown disagrees with the defence counsel’s characterization of O.M.’s testimony, adding she testified that she did not consent, *and* she was intoxicated so could not consent. O.M. explained that she was not fully awake and awoke to being sexually assaulted. She was confused and did not think it would happen, that is why she said it was like a dream. As to

⁷ *Supra* at 6

reliability, the Court is asked to assess her evidence in that light. O.M.'s details were as expected from one in her position- seeing the fireplace mantel, noting him touching her on the chest and going to her vaginal area and the two sexual positions. She recalled all that while blacking in and out of consciousness due to intoxication from alcohol in combination with Paxil and trying throughout to will her body to move. (Note: The Court cannot recall if the name of her antidepressant was Paxil or another drug.)

[72] The trip to the washroom was described by defence counsel as occurring "soon after the sexual incident," but the Crown disagrees the timing was clear from her testimony. While JRA says that occurred after sexual intercourse, O.M. believed it occurred at 5 am, and she did not say it occurred close in time to the assault- she was blacked out, woke later, and went to the washroom. As such, there is nothing available on her evidence allowing an inference of immediacy.

[73] Overall, assessing her testimony, a fair amount is similar to that of JRA. B.A.'s evidence is significant, O.M. was ill. The complainant says she did not consent, and in the morning, she did not run to police, she wanted a SANE kit to confirm for herself what had happened. That can be interpreted two ways: she could not believe it happened and wanted proof or she took seriously making such a report without certainty.

[74] The tell-tale signs of O.M.'s intoxication noted by the witnesses included: trouble getting into the house, vomiting, blacking out, B.A.'s evidence that O.M. was intoxicated in the car on the way home from the beach, she peed on herself, had to change clothing, she was still

intoxicated when she went to bed on the cot. Even the police officer who saw her that morning said she appeared intoxicated.

[75] The Court is asked to reject JRA's evidence. He minimized helping O.M. into the house, saying she did not need it, he did so as gentleman, and his conclusion she was parched and had "a few drinks", did not include knowledge that she had combined alcohol with a prescription drug. His lack of concern when she allegedly woke him touching his penis despite what occurred earlier in the day, should give the Court pause.

The law relevant to sexual assault and consent:

[76] The relevant sections of the *Criminal Code*:

Sexual Assault

271. Everyone who commits a sexual assault is guilty of

(a) in indictable offence

[...]

Assault

265.(1) A person commits an assault when

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

[...]

(2) 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) 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 [...]

[...]

(4) 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.

Meaning of "Consent"/Where no consent obtained

273.1(1) Subject to subsection (2) [...] "consent" means, for the purposes of section 271 [...], the voluntary agreement of the complainant to engage in the sexual activity in question.

(1.1) Consent must be present at the time the sexual activity in question takes place.

(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

(2) For the purpose of subsection (1), no consent is obtained if

[...]

(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.

Where Belief in Consent is not a Defense

273.2 It is not a defence to a charge under section 271 [...] that the accused believed that the complainant consented to the activity that forms the subject matter of the charge where,

[...]

[77] In *R. v. GF*,⁸ the Supreme Court of Canada took the opportunity to “clarify the relationship between consent and the capacity to give consent”, concluding “capacity and consent are inextricably joined. Subjective consent to sexual activity requires both that the complainant be capable of consenting and does, in fact, consent.” (para. 2) “Only if subjective consent exists, or if there is a reasonable doubt as to subjective consent, does a trier of fact need to go further and ask whether that consent is otherwise vitiated.” (para. 4)

[78] In *R. v. Barton*,⁹ the Court said, consent of the complainant is subjective and must be determined by reference to the complainant’s subjective internal state of mind towards the touching at the time it occurred. The complainant’s testimony that she did not consent is a matter of credibility to be weighed in light of all the evidence, including any ambiguous conduct.

[79] Also in *GF*, *supra* at para 1 “[i]t is now indisputable that consent is a subjective state of mind, entirely personal to the complainant. There is no room for implied consent in Canada, and the range of mistaken beliefs an accused may lawfully hold about the complainant’s consent are tightly restricted by the Code”.

[80] The *actus reus* of sexual assault requires the Crown to establish three things: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent: *R. v. Ewanchuk*¹⁰, at para. 25; *R. v. Chase*¹¹. The first two elements are determined objectively,

⁸ 2021 SCC 20

⁹ 2019 SCC 33

¹⁰ [1999] 1 SCR 330

¹¹ [1987] 2 S.C.R. 293

while the third element is subjective and determined by reference to the complainant's internal state of mind towards the touching: *Ewanchuk*, at paras. 25-26.

[81] Establishing *mens rea* requires the Crown to establish that (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting, or was reckless or wilfully blind as to the absence of consent: *Ewanchuk*, at para. 42. The accused's perception of consent is examined as part of the *mens rea*, including the defence of honest but mistaken belief in communicated consent: *R. v. Barton, supra*,¹² at para. 90.

Final analysis:

[82] Establishing conviction for sexual assault, requires the Crown to prove beyond a reasonable doubt that JRA touched O.M. for a sexual purpose, proof of which was clearly established on the evidence of both JRA and O.M. Both witnesses agree he touched her breasts with his mouth and hands, and inserted his penis into her vagina. All of these actions constitute touching for a sexual purpose.

[83] The Crown is also required to prove the above noted touching occurred without O.M.'s subjective consent. O.M. testified that she did not consent to the touching, but in considering evidence of the *actus reus* of the offence, the Court is also required to "take into consideration all of the evidence including the accused's evidence in deciding that issue."

(See: *HMQ v. C.J.A.M.*¹³)

¹² 2019 SCC 33

¹³ 2021 NBQB 199 (CanLII) at para. 27

[84] O.M. testified that she vomited while sitting on the cot in the living room, her next memory was waking to find J.A. touching/grabbing her breasts and placing his mouth on her vagina. She testified that she said nothing and did nothing to convey consent and blacked out once again. O.M.'s next memory is waking to find JRA having sexual intercourse with her. She says she also did not consent to this sexual touching.

[85] The context for her evidence requires an examination of what occurred prior to her arrival on the cot in the living room. She testified variously that she mixed alcohol with a prescription drug, remembers "being taken to the car... passing out in the car and waking up again and then passing out again and waking up when I was being taken into the house", she can "barely remember it", knows she was drunk and "was kind of messed up", recalls not being able to focus on anything, having blurry vision and stumbling, "was drunk, so you could call it sleeping or you could say that I was drunk and that I blacked out, I wasn't able to remember most of it afterwards", she testified that she became unconscious because she does not remember willingly falling asleep and 'blacked out' is the same as 'passed out'.

[86] It seems somewhat evident that consumption of four to five coolers over the course of six to seven hours is not an extraordinary amount of alcohol such that it would account for the severe impact experienced by her. However, according to the unchallenged evidence of O.M.'s mother, she has a small kidney, and O.M. explained that she was also taking the prescription anti-depressant drug, Paxil, which is not meant to be used in combination with alcohol. It is available on the evidence to conclude there was an adverse interaction between these two substances, however there was no expert evidence led as to the risks or outcomes of combining Paxil with alcohol generally or specifically for O.M. The Court is left in

somewhat of a knowledge vacuum and it would be impermissible to speculate as to effect generally. Rather, accepting O.M. combined alcohol and the drug, which I accept as fact, the Court can rely on the evidence of the witnesses, as well as that of O.M. with respect to her subjective experience about what was objectively apparent to her mother, and brother to some extent- she was intoxicated/ “messed up.”

The sexual activity:

[87] The evidence of O.M. supports the conclusion she did not consent to sexual touching, but the evidence of JRA on that point differs and so must be considered.

[88] JRA was the only witness not so convinced that O.M. was particularly intoxicated.

While he was aware of the amount of alcohol she consumed, nonetheless he was not aware that she was using Paxil. He did, however, observe the indicia of impairment- vomiting outside the house- which he attributed to car sickness. He saw her mother put her to bed on the cot and rub her back, and he knew O.M. was not verbally communicative after she entered the house.

[89] While O.M. says she awoke to JRA touching her breasts and moving down to her vaginal area, he testified that was not the beginning of the sexual encounter between the two. He says O.M. woke him where he slept on the couch. He found her sitting next to him, playing with his penis.

[90] In turn he says he touched O.M. just as she described only *after* she laid down on the couch, after which she pulled him toward her with her arms and they had sexual intercourse on the cot.

[91] His evidence was interesting for what it did not include: how did O.M. get from the couch to the cot. There was evidence the coffee table was in front of the cot and the cot was to the side, closer to the fireplace, and 4-5 feet away. There was no evidence of how O.M. or JRA traversed the area to arrive at the cot. The Court recalls the evidence of O.M. that she awoke on the cot where she had been placed by her mother and all the sexual activity occurred there. She did not recollect anything happening on the couch and says she was unable to move her body.

[92] JRA testified that O.M. laid back, and he proceeded to touch her breasts and her vaginal area. There was no evidence of her consenting to that sexual touching. The Court is presumably asked to conclude that because she was “playing with his penis” on the couch, she consented to the specific sexual acts he performed there. Other than lying down on the couch, what evidence was there of consent to that touching? On the evidence of JRA, the two did not speak, other than his evidence on cross examination that she said ‘don’t worry about it’ in response to his question about touching his penis, otherwise O.M. did nothing to convey consent to his sexual touching of her. Likewise, there was very little evidence as to what he believed constituted her consent to touch her breasts and her vaginal area.

[93] Lying back is surely insufficient to communicate consent to two specific sexual acts- breast touching and oral sex from an otherwise silent woman. Did the earlier action on the

couch, attributable to O.M., support a conclusion she consented to those specific sexual acts?

What does the law say about such things.

[94] Consent is actual subjective consent in the mind of the complainant at the time of the sexual activity in question ¹⁴. Consent is defined under s. 273.1(1) of the *Code* as “the voluntary agreement of the complainant to engage in the sexual activity in question”. Consent must also be present at the time the sexual activity in question takes place: s. 273.1(1.) of the *Code*.

[95] On these facts there was really nothing in the evidence capable of supporting a conclusion JRA took any steps to ascertain that O.M. consented at the time of any of these activities, or that O.M. showed voluntary agreement expressed by conduct.

[96] O.M. recalls the touching, not consenting to it, and blacking out.

[97] With respect to the intercourse, he says she pulled him onto her, and they had sexual intercourse. O.M. says she came to when he was already inside her and has a dream like memory of two sexual positions and willing her body to move and her voice to speak. She recalls saying her boyfriend’s name and blacking out once again.

[98] At the risk of being repetitive, JRA’s evidence is interesting for many reasons but perhaps most significantly for what was not said. He described O.M. as the initiator of sexual touching of his penis while she was seated on the couch and while he was asleep, and the subsequent acts of him touching her breasts, performing oral sex, and having intercourse

¹⁴ *Ewanchuk, supra*

apparently flowed from her initial act. What he does not say is that O.M. consented to those various sexual acts, certainly not verbally and, accepting his evidence of her actions, barely by her actions. He simply says he performed the first two sexual acts. Next, she pulled him toward her while lying on the cot and he had intercourse with her. It was difficult to imagine how she laid back on the couch, described by him as short, and how she got from the couch to the cot was left unexplained other than she laid back on the cot. As I said, there was no evidence of verbal communication *about* any of the sexual acts committed by JRA.

[99] O.M. is said to have told him earlier not to worry about her touching of his penis, and the Court is asked to conclude she consented to the sexual acts that followed as a result of the initial touching and pulling actions. While consent can of course be inferred by actions, actions do not necessarily confer consent. The law is clear, affirmative communicated consent must be given for each and every sexual act. (See *R. v. Goldfinch*¹⁵ at para. 44 wherein Karakatsanis J. cited para. 27 of *R. v. Hutchinson*, 2014 SCC 19).

[100] After considering all of the evidence, I do not accept JRA's account as true with respect to O.M.'s purported consent to the sexual acts performed on her person. Rather, I find, JRA engaged in all these acts while O.M. was either unconscious or unable to move on account of mixing alcohol with medication. JRA did not ask the earlier sick and intoxicated O.M. if she wanted to engage in those acts, and she did not initiate sexual contact with him. All the acts occurred on the cot, and she did not communicate consent for any of them.

¹⁵ [2019 SCC 38](#), [2019] 3 S.C.R. 3

[101] While JRA appears to argue the acts between the two carried on in one continuous flow from O.M.'s initial touching through to her pulling him close before they engaged in intercourse in two positions, his testimony also supports a complete lack of awareness that she was in a black out prior to the acts occurring. His only awareness that something was off came when she uttered her boyfriend's name and he immediately ceased sexual activity.

[102] On his evidence it may prove difficult to deny that O.M. touched his penis while on the couch or eventually, on the cot, pulled him toward her. However, communicated consent for him to engage in breast touching, oral sex and intercourse requires proof of communicated consent. Even O.M.'s black outs do not allow for a conclusion that consent was communicated to JRA to engage in those particular acts, the Court is not prepared to accept that she provided the necessary consent. Some considerations: first, the purported touching on the couch was some physical distance from the cot, yet there was weak evidence as to how they got there. Secondly, there were no particulars as to what exactly O.M. was doing to his penis, how it stopped. Third, other than her lying on the cot, there was no clear understanding of how that represented a continuous flow of communicated consent to sexual touching. Fourth, the evidence of JRA regarding how her bottoms came off was less than satisfactory. He testified that he took them off before performing oral sex on the couch, but later in his testimony said they were removed on the cot where that touching occurred. Finally, to conclude the two were somehow engaged in a continuous flow of sexual activity, many questions arise such as: Did they walk to the cot together? Were they touching each other as they did so? Did O.M. lead him there? etc.

[103] As such, there is an information gap that disconnects the couch incidents from the cot incidents such that, in my conclusion, the inference O.M. consented to the sexual acts is rendered untenable. JRA's evidence, to which I listened carefully, almost suggests she simply lay back on the couch such that the impression was left the two pieces of furniture were touching or initially that all acts occurred on the couch and not on the cot at all. I find on the evidence of B.A. and O.M., that the cot was located to the side of the couch with a coffee table in front, and 4-5 feet away.

[104] JRA was aware of how much alcohol O.M. consumed over the hours at the beach. He was not aware she was also on prescription medication. He thought she was dehydrated and needed water and was ill because of the long car ride and was left asleep in the living room. Given what he did know, it was reasonable to expect him to ascertain a level of consent, such as by asking her if she consented to the various sexual acts.

[105] O.M. was an overall credible witness with respect to what she remembers. She was clear and I thought quite fair in her account of what occurred. She was even prepared to agree that she thought it all a dream until later in the bathroom. She could not believe the incident occurred. She simply has no memory of various points in the day or the evening. That said, a credible witness can nonetheless provide unreliable evidence, however the parts of the incident of which she has no memory match up to the evidence of JRA and he did not obtain consent to engage in the sexual acts committed on her.

[106] In the final analysis, without evidence of O.M.'s consent to the sexual acts, the Crown has proven lack of consent. There was no evidence she voluntarily agreed to the activity

affirmatively expressed by words or actively expressed by consent. The defence did not raise honest but mistaken belief in communicated consent, and in any event, there was no foundation to consider the defence. JRA did not engage in reasonable steps to ascertain O.M.'s consent in the circumstances of the case. He knew she did not communicate consent as he was reckless or wilfully blind to the absence of consent.

[107] Applying *W.D.*, (1) the Court does not believe or accept the exculpatory testimony of JRA; (2) his exculpatory testimony does not leave the Court with a reasonable doubt as to his guilt; and (3) based on the testimony that I do accept, namely, the credible and reliable evidence of O.M., the Court is satisfied beyond a reasonable doubt of JRA's guilt to the charge of sexual assault.

[108] Judgment accordingly.

van der Hoek PCJ.