

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R v. C.M.*, 2023 NSPC 58

**Date:** 20231220

**Docket:** 8453174

**Registry:** Bridgewater

**Between:**

His Majesty the King

v.

C.S.M.

**Restriction on Publication: Section 486.4 Criminal Code**

**Judge:** The Honourable Judge Paul Scovil  
**Heard:** April 14, 2023, July 25, 2023, August 22, 2023, and October 18, 2023, in Bridgewater, Nova Scotia  
**Decision:** December 20, 2023  
**Charge:** 271 Criminal Code  
**Counsel:** David Hirtle, K.C., for the Accused  
Alex Keaveny, for the Crown

**A ban on publication of any information that could disclose the identity of the victim and/or witness.**

**By the Court:**

C.S.M., a youth, is charged with one count of Sexual Assault contrary to section 271 of the **Criminal Code**. The sexual assault is alleged to have occurred on or about February 25, 2017, at or near New Germany, in the County of Lunenburg, Nova Scotia. The trial took place over several days. All witnesses and the complainant were youths. As they were youths, I will refer to them by their initials.

**FACTS**

[1] Some general facts were consistent throughout the testimonies of the various witnesses.

[2] The witnesses were all grade 12 high school students and were close to graduation. On Friday evening, February 24, 2017, J.P., had invited several of his close friends to a get together at his home. Included in the group was the complainant R.J. and the accused C.S.M.; also V.B.; A.M.; A.W.; an exchange student C; and L.A.

[3] J.P.'s home had a basement apartment where his grandparents lived. As they were away, J.P. and his friends used that area for the party. Everyone at the party had been consuming alcohol.

[4] All witnesses agreed on the layout of the bedroom located in J.P.'s basement. The layout of the bedroom was put into evidence as Exhibit #2. The witnesses generally described the party winding down after A.M. had become sick. In the bedroom, A.W. and V.B. occupied one bed. All witnesses agreed the other had contained R.J. and C.M. Some witnesses described C as being in the bed at first, some did not.

[5] The next morning everyone left except J.P., whose home it was.

**EVIDENCE OF R.J.**

[6] R.J.'s evidence – throughout I will refer to R.J. as they or them as it is their preferred pronoun.

[7] R.J. recalled arriving at about 9:00 p.m. They had driven themselves there. They also had a foreign exchange student, C, with them who also lived with R.J.'s family.

[8] The grandparent's basement apartment had one bedroom, a bathroom and an open style living room-kitchen. R.J. was downstairs during the entire period. Everyone there was consuming alcohol to varying degrees, including R.J.; they indicated they were drinking vodka together with shots. They did not recall anyone consuming cannabis. They did testify that they had a lot of alcohol to drink.

[9] The group was also playing the drinking game, beer pong. R.J. testified that when they went to bed in the bedroom, they "was very drunk and that C had helped me to bed." C had tucked them into bed, and they were fully clothed. A.M. indicated the bedroom had two beds and that A.W. and V.B. were in the other bed. R.J. was unable to remember if A.W. and V.B. were in the other bed when they went to bed. R.J. reported that once in bed the room was spinning, and they were "in and out of blackouts."

[10] R.J. said that at some point after C left C.M. came in and got into bed with them. They recalled C.M. nudging them with his arm. He then put his hand on their vagina. They asked C.M. to stop but received no reply from him. C.M. then pulled down R.J.'s pants and put his penis in their vagina. They could not recall if he was saying anything to them.

[11] R.J. could not recall in their testimony if C.M. was on top, under or beside them. They recall telling him to stop because they had a boyfriend. C.M. ejaculated in them and then the assault stopped. They said they could not recall exactly as they were very drunk.

[12] Later in their testimony R.J. said they were trying to push C.M. off them. C.M. had his shirt on during this but his pants pulled down.

[13] R.J. then got up, grabbed a bottle of vodka, and left the bedroom. This was, according to them, 3:00 or 4:00 am. They stated they were crying. C.M.'s response was to chuckle to himself. R.J. then called J.B. who resided in Germany and had been an exchange student with R.J.'s family. R.J. had called her calculating that J.B. would be awake given the time difference.

[14] R.J. then passed out. When they woke up, they got C and told her they were going home. The accused, C.M., asked if he could get a lift home with R.J. and they agreed.

[15] R.J. indicated the only person they told was C and nobody else.

[16] An instant message was identified by R.J. that went between them and C.M. In that they said to C.M. as follows:

*ICH*

C idk if you realize what ya did to me at J's party all those years ago but I definitely wasn't consensual and I would really prefer you noooooot contact me. Sorry it took me so long to have the balls to say it.

*Identifier*

lol you can easily block me if that's true, you're just pissed cause I asked a touchy subject ffs

*Identifier*

Nah C, it literally keeps me up at night after three fucking years that when i was drunk and said to you,, no i don't want to, no i can't" you fucking ignored that so fuuuuuk you bud.

[17] In cross-examination R.J. estimated that the assault occurred between 1:00 a.m. and 4:00 a.m. R.J. in cross examination indicated that several years after the event they had returned from living in Germany. R.J. saw C.M. on the street which triggered their mental health to deteriorate to the point they were hospitalized. It was at the hospital that R.J. gave their police statement.

[18] When asked in cross-examination, R.J. stated they forget if C was in the bedroom with them or not. R.J. stated C probably helped me into bed, but R.J. indicated they were not sure of it. R.J. testified that C.M. was on top of them when the assaults occurred. When it was suggested to them by defence counsel that they were on top of C.M., they said that he may have flipped them and that it was possible he put them on top.

[19] R.J. denied that they initiated the sexual contact between themselves and C.M.

[20] R.J. identified A.R. and A.Q., as friends from high school. Neither of those individuals were at J.P.'s party that night. R.J. was unsure if they told either of those individuals about the incident. They denied having told either of them that they had sex with C.M. the Monday after the incident at school.

[21] R.J. could not recall if A.M. became sick and vomited at the party after playing beer pong.

### **EVIDENCE OF J.P.**

[22] J.P. testified that it was at his home in a basement apartment where the get together occurred.

[23] He described the layout of the apartment, and particularly the bedroom.

[24] The guests arrived between 7:00 and 8:00 p.m., and people went to bed around 1:00 a.m. He and A.M. retired upstairs. In the downstairs bedroom A.W. and V.B. were in one bed. R.J. and C.M. were in the other. R.J. and C.M. were in bed fully clothed. C slept on the couch in the living room.

[25] J.P. reported that when he and A.M. went to bed everyone was "buzzed." The party wound down after A.M. threw up after playing beer pong. A.M. apologized to everyone. J.P.'s recollection was that R.J. was not so drunk that they needed assistance when they went to bed.

[26] No one had to remove their shoes when they went to bed as everyone took their shoes off at the door when they came in the home. C had slept on the couch.

[27] When J.P. got up late the next morning everyone had left.

### **EVIDENCE OF V.B.**

[28] V.B. testified as well. She described arriving after dark and that everyone was consuming alcohol. At the end of the evening, she and D.W. slept in one bed in the bedroom while R.J., C.M. and C were in the other. She described everyone as having a moderate level of intoxication.

[29] When everyone was first in bed, they were all chatting until they turned the light out and went to sleep. No one required assistance in getting to bed. She

described A.M. as not being overly intoxicated, but she did throw up. Then they all got up and left.

[30] She testified that much later R.J. reached out to her asking who was there that night and what the date was.

#### **TESTIMONY OF A.W.**

[31] A.W.'s testimony was similar to other witnesses who were not directly involved with the assault. He described arriving after dark. He described playing beer pong and that everyone went to be at the same time. He and V.B. were in one bed while R.J. and C.M. were in the other.

[32] A.W. described all of them as being drunk. Having said that he testified no one needed assistance in getting into bed. He did not recall anything going on in the bed with R.J. and C.M., or anything out of the ordinary.

#### **TESTIMONY OF A.R.**

[33] A.R. was called by the defence. She was not at the party that night but was a classmate of those at the party and close friend with R.J. The Monday after the party A.R. described R.J. as telling her how they had "hooked up" with C.M. at the party. A.R. described R.J. during the conversation as casual and bubbly.

[34] A.R. several years later was told by R.J. that C.M. had sexually assaulted her.

#### **TESTIMONY OF C.M**

[35] C.M. took the witness stand on his own behalf. He is 23 years of age and was a graduate of New Germany Rural High School.

[36] He agreed he attended the party at J.P.'s house. He was driven there by a friend. He could not recall exactly who was in attendance that night, but he knew them all through school.

[37] C.M. described the evening's activities much the same as the others in attendance who testified. He described everyone as being intoxicated to a degree except for the exchange student.

[38] The party wound down sometime after midnight. He described going into the bed in the bedroom and that R.J. and the exchange student were in the bed with him.

[39] He testified he fell asleep to a degree. It was not deep sleep. At some point the exchange student got up and moved to the couch. At some point he recalled someone rolling over and getting “comfy.”

[40] C.M. stated that the person “felt him up” and was touching his genital area. He and R.J. then engaged in consensual sex. He recalled her being on top of him.

[41] In the morning he had asked R.J. for a ride home. There was nothing noteworthy being said on the ride home.

[42] C.M. denied the accusation testified to by R.J. and that the incident was consensual. He agreed that he was intoxicated in the evening.

#### **LAW:**

[43] 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.

[44] 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.).

[45] The question of what reasonable doubt as a standard of proof is 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.

[46] 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 but 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 the evidence of the accused, before I can convict, I must 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.

[47] 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 Mathews states 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)

**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.



[48] 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. Avetysan*, [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.

[49] The test for determining credibility was discussed in the case of *Farnya and Chorney*, [1952] 2d L.R. 354 at 357. Justice O'Holleran, speaking for the British Columbia Court of Appeal stated, "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 a story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of truth of the story of a witness, in such a case, 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." (see also *R. v. Logan* (1999) N.S.J. No. 473 N.S.S.C.)

## **APPLICATION OF W.D. TO C.M.'S EVIDENCE**

[50] For the most part C.M.'s testimony accorded with those witnesses who testified except for the complainant. His evidence also was internally consistent. He readily admitted to having a somewhat blurry recollection due to alcohol consumption, which is of some concern, as well as the fact that he is accused of this offence.

[51] When C.M. described that R.J. made initial advances and that they engaged in consensual sexual intercourse I can not reject that scenario got out of hand. This following the admonitions found in *W.D.*, while I may have some questions regarding C.M.'s sobriety and its affects on memory on the whole I cannot reject

his evidence and it does raise some doubts regarding the proof of the charge. It would be dangerous to convict C.M. given the same.

[52] That is not the end of my reasoning, I will also assess the credibility of R.J.

[53] R.J.'s evidence was that they were very drunk and passed out and in and out of consciousness. While that in and of itself may raise concerns, I also have considered their description of being so intoxicated they had to be assisted to the bed. That does not accord with the evidence of other witnesses, none of whom describes that level of intoxication.

[54] There were also inconsistencies in R.J.'s description of the event itself. These inconsistencies, if viewed alone, might be understandable but when viewed alongside the whole of the evidence it is troubling.

[55] What also raises issues with R.J.'s credibility is that they advised their close friend the following Monday at school that they "hooked up" with C.M. at the party. This would potentially imply a consensual sexual encounter consistent with C.M.'s testimony.

[56] R.J.'s reaching out to V.B. to give her names and the date would also suggest a faulty memory of details from the event. This would include the fact that all the witnesses had clear recollection that A.M. becomes sick which signaled the wrapping up of the night, yet R.J. had no memory of that significant fact.

[57] It is clear that R.J. and C.M. engaged in sexual activity that night but it is far from clear that the evidence leads to a determination of guilt beyond a reasonable doubt.

[58] Accordingly, the section 271 charge is dismissed.

Paul Scovil, JPC