

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R v. R. R.* , 2021 NSSC 376

**Date:** 20210127

**Docket:** Syd. No. 494235

**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

R. R.

*Defendant*

**Publication Ban: S. 486.4; 486.5; 539.1; 278.9**

**Judge:** The Honourable Justice Patrick J. Murray

**Heard:** November 9, 2020, in Sydney, Nova Scotia

**Oral Decision:** January 27, 2021

**Counsel:** Rochelle Palmer for the Crown  
Christa Thompson for the Applicant, Mr. R.

## **Section 486.4 - 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

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

### **Mandatory order on application**

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

### **Child pornography**

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

### **Limitation**

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

## **Section 486.5 - Order restricting publication — victims and witnesses**

**486.5 (1)** Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

### **Justice system participants**

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not

be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice

**Section 539.1 - Order restricting publication of evidence taken at preliminary inquiry**

**539 (1)** Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

**Section 278.9 Publication prohibited**

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under section 278.3;

(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

**By the Court:**

**Introduction**

[1] The Accused, R. R., is charged with sexual assault on his [...], P. R., contrary to s. 271 of the *Criminal Code*. He is also charged with assaulting P. R. contrary to s. 266(a).

[2] The indictment as amended alleges that these assaults occurred on or about December 28 and December 30, 2018. The trial in this matter was held on December 8, 9, and 14, 2020.

[3] I will first deal with the sexual assault charge, then move on to deal with the assault charge.

**Background**

[4] The Accused and the Complainant, who are now separated, resided in what had been the home of the Complainant prior to their [...] in [...]. Both were employed with the same employer, [...], where Mr. R. held a supervisory position. According to his testimony, he assisted P. R. in obtaining her job.

[5] The Accused and P. R. went to Halifax during the Christmas holidays in 2018, primarily to visit his family during an annual “get together”, combined with business. They did marketing work for their employer, and while in Halifax they distributed marketing materials and spoke with prospective customers.

**Halifax to Truro**

[6] P. R. testified that she was not feeling well by the time they left Halifax, and felt progressively worse during the return trip to Sydney. They had to stop in Truro due to bad weather. She gave evidence that on December 27, the couple stayed in a big hotel, white in color. She could not remember the name, but described its location and size. She said the weather was “really bad” and the roads were like a “sheet of ice”.

[7] P. R. gave evidence that when they were leaving Truro, Mr. R. kept driving around a “sexual store,” so called, asking her to go in and buy a dildo. She refused, saying she was not feeling well. He kept insisting, she said, she just wanted him to stop asking. P. R. said it was sunny and still icy when they left.

[8] Mr. R.’s recollection was very different. He said they checked into the hotel first and then drove into Truro. He testified that it was the day they arrived in Truro when they drove past the adult shop. They then went to a liquor store and bought Bailey’s and some weed. They coincidentally passed the adult store a second time. He testified that both times he asked if she wanted to stop there, she declined, and he said “no worries.” He said he had no recollection of asking her to buy a dildo. They “celebrated” in Truro that night, he said, and there was “zero” indication from Ms. R. that she was not feeling well.

## **Truro to Sydney**

[9] P. R. testified that Mr. R. wanted her to go into the adult store as they were leaving Truro. She said she didn't want to, that she was sick and did not feel well. She testified that Mr. R. said he wanted sex when they got home, and to drink and smoke some weed. When she told him she was sick, she said, he answered that she would feel better with some coffee, food, and rest. She responded again that she was not well and needed to rest. P. R. testified that she had esophagus reflux disease. She gets diarrhea in reaction to foods, does not have a good immune system, and can't have stress. She said her immune system was "shot" and she had to be careful over Christmas not to eat the wrong things.

[10] Mr. R. testified that he wanted to get home to Sydney that day, and they left Truro early. He said on the drive home Ms. R. seemed "more tired" than anything. He said they discussed continuing the celebration when they got home, but it was not a big topic of conversation, and would see when they got there.

[11] P. R. testified that on the way home, she was leaned over to the side with her head on the passenger window. When asked what symptoms she experienced between Truro and Sydney, she said she felt as if her head was "foggy", flu-like, and felt unwell when she turned her head. She testified she felt "just really drained and exhausted emotionally and mentally." She was asked in direct examination to rate how she felt on a scale between 1 and 10, with 1 being extremely unwell and 10 being extremely well. P. R. said she felt progressively worse. In Halifax, she was still feeling well at 7, but as she passed things out and kept pushing herself it went from a 6 to a 5. By the time they got to Truro it was a 5. She then began to feel "half sick, half depleted" and on the drive to Sydney she was really sick. She said "it was more like a 3".. She said she kept updating the Accused as to how she felt. She did not remember buying or taking anything for her illness such as Tylenol. She stated she took Imodium on the 30<sup>th</sup>, in Sydney, she said, [...] Mr. R. bought it for her.

[12] Mr. R. testified that he wanted to get back to Sydney before it was late. He said there was no indication of P. R. being ill. She was resting her head to the side, he said, because she was tired. Both P. R. and Mr. R. testified that P. R. went straight to bed upon arriving home.

## **The Alleged Sexual Assault**

[13] P. R. testified that it was "irrelevant" to Mr. R. when she told him repeatedly on the drive home that she was too sick, and feeling very unwell. She was feeling so drained and went straight to bed. She said she felt guilty about leaving the unpacking and other chores to him, but she was too sick.

[14] P. R. testified that the assault occurred in their bedroom. She testified that she changed into a nightdress and got under the covers. She could hear him at times, going about the house and shovelling. She said she was at about a 2 to 3 on the wellness scale at that point. She said she only remembered crawling into bed and few other details.

[15] P. R. said she saw Mr. R. come into the room and go to the closet to retrieve a red bag with the “sexual things in it.” She said she was lying to the left on the bed, facing the closet door. She drew a diagram, entered into evidence as Exhibit #1. She had the covers or blankets pulled up to her neck. She was half asleep and half awake, she said. The lighting in the room was dim.

[16] In describing the assault, P. R. was first asked whether Mr. R. said anything to her when he came into the room. She said she had no memory of that, but had a clear memory of him in front of the closet. P. R. referred to having “these snap shots of things.” She was further asked whether she said anything to him, and the following exchange occurred:

Q: Did you say anything to Mr. R. as he came into the room and this is before he gets to the closet?

A: Okay, I may have said to him at that time I’m feeling sick, but I don’t think I would have at that time, I may have said that I’m not feeling good, but I don’t think I’d tell him what he already knows at that moment until later.

Q: How sure of you of that on a scale of 0 – 100 in terms of a percent?

A: I don’t know, I’m not sure at all on that to be honest with you, my brain is like in broken pieces of memories.

Q: Now once Mr. R. gets to the closet, what does he do?

...

A: Okay thank you. Okay so he goes to the closet and he gets a red bag out of the top of the closet that had adult things, toys in there, and took them out of there. And I said to him, I’m sick right now, I don’t feel good, I don’t want to do that, I don’t want to do that right now. And should I just continue?

Q: Yes please.

A: So he comes over to me anyways and he pulls the blankets down and starts doing what he’s doing, but I’m like stop, I don’t want to do that, stop, and he’s like oh you’ll be fine, it’ll make you feel better or you’ll like it or some kind of coaxing words. And I’m like no I just need to rest, I’m just really, really tired and I don’t feel good. I just remember I was feeling really sick. And he said no, and he put his head on my head and then he was using the dildoes and pretending like it was like one person and then another person and him watching them or like a scenario thing, a fantasy thing. And I’m like whimpering and I’m crying, and I’m like no why are you doing this to me, I’m [...], it’s not him its you, and I was saying it in a lower voice and I just kinda gave in and I gave up because I needed some kind of peace, I needed some quiet, I needed to rest. And that

lasted for approximately 10 minutes and so he went to go and to have a tea, a cigarette, which he did quite often in the fan down by the stove.

### **Evidence of R. R.**

[17] As was the case in other respects, Mr. R.'s evidence is at variance with that of P. R. He stated that in Truro, he gently asked or suggested the sex shop, and continued on when Ms. R. said no on both occasions. He testified when they arrived in Sydney, he did chores, shovelling, laundry, and went out to get Imodium, which he said P. R. requested that day, being the 29<sup>th</sup>, not the 28<sup>th</sup> as originally stated by P. R. He also drew a bath for her and made soup for her, he said.

[18] Mr. R. testified that when he went to up to see P. R. she was lying on her side of the bed, to the right, as shown by him on Exhibit #2, not the left side, or his side, as she testified. He said he asked her if she wanted to do anything, and she responded by moving over toward him, (on the left side of the bed) and positioned herself in such a way that it was apparent to him that she was agreeable to sexual activity. Her body was exposed, and she communicated consent not by words, but through her body language. Mr. R.s stated in direct evidence as follows:

Q: I'd like you to describe in detail for the court, your recollection of the exchange you had once you referenced the sex toys.

A: Ah, yeah, well when I entered the room, um, she was on her side of the bed. So on the diagram that she drew, hers would be furthest from the entry to the bedroom and close to the bedroom. Um, and she was laying under the covers. At that point I would not know what she had on, whether that was a nightie, whether it included a bra and underwear or what it would have. I just mean that she was laying under the covers. Um, her response to that...

Q: Sorry, you said her response to that. Can you just start by...

A: Her response to the question of would you like me to retrieve the toys....

Q: ...Ok thank you...

A: Ah was affirmative, or it was a yes, but not with the words yes, but with the paraverbal and body change, so....

Q: Can you describe that for the court so that the judge knows what you mean

A: So, it was sort of like a nod again, kind of and a movement into my side of the bed. Movement of covers, changing of her legs to be in an open position so that her vaginal area was exposed, at which point there were no underwear on.

Q: Ok

A: I have no recollection of seeing nor withdrawing or assisting her to remove any underwear.

Q: Okay.

A: I then began by sitting my left hip, I have two artificial hips by the way. I had a quintuple open heart, and I'll go on more about my medical conditions if you like, but in any event, I began sitting, um, on the edge of the bed. Now again, this would be closet to the door and this would be considered my side of the bed. Again, closest to the closet. Um, barely on the bed, just my hip, my feet are on the ground. I'm angled such that I am now facing the closet, so I'm facing the head of the bed, she's on her back her legs are open. I lay the toys near her vaginal area on the bed. So, although for me, a formal kind of asking someone, I don't even, I don't know if I've ever considered the word consent in anything in my life before, it's sort of like, consent, well yes, I'm asking for consent, but I really never think of that word. Like, is this is something you want to do...

Q: Ok.

A: ...you know. So...

Q: I'm just asking...

A: So in essence, I say...what I'm doing is I say I check consent before and I am checking all through. If the consent changes at any point, if someone's not feeling up to continuance of something its not going to happen. I'm not going to force myself.

[19] In cross-examination, the Accused was questioned on this evidence. At that time he offered that Ms. R. did say something, it was "um hmm", which he understood to mean "okay", or that she was agreeable. I will speak more to this evidence later.

[20] I will add that Mr. R. gave evidence that sexual activity would produce a "chemical reaction" in the brain, and consequently P. R. would feel better. He testified she appeared to him to be enjoying the activity and gave no indication, that she did not wish to participate.

[21] I pause here to reflect on the law, which states clearly that positive affirmation of consent is required for the Complainant to have voluntarily agreed to participate in the sexual activity, as stated in s. 273.1 of the *Criminal Code*.

### **Position of the Crown**

[22] The Crown submits the evidence of P. R. was consistent and credible on substantive things such as the details of the alleged sexual assault. The Crown says inconsistencies on peripheral points, such as dates, should not affect her overall credibility and reliability. For example, staying at Mr. R.'s sister's, instead of a hotel, was something she did not give much thought to.

[23] The Crown further says the Complainant presented as credible. Demeanour is valid consideration in assessing credibility. The Complainant's testimony bore the hallmarks of truthfulness, argues the Crown. Her evidence was internally and externally consistent.

[24] In relation to the Complainant's evidence that she had "fact checked" some things, following her direct testimony, the Crown submits that this was only an attempt to be helpful to the Court and ensure the accuracy of her testimony in Court. The main thing was a hotel receipt.



This was a non-contentious item. She did not do this for her entire testimony. The Crown asks that her evidence be treated fairly.

[25] Crown says the evidence of the Accused on the critical issue of consent was vague and misleading. He suggested that there was positive affirmation of consent by the Complainant, but the Crown says this evidence is not credible. Further, on cross-examination, the Accused suggested that the Complainant used the words “ok” to express consent. This was not his evidence in direct.

[26] The Crown says his evidence was self serving. For example, in relation to the alleged sexual assault, the Crown submits that it did not serve the Accused to know the Complainant was not feeling well. He downplayed this and claimed not to know how unwell she felt, saying she only appeared tired and needed some rest.

[27] In summary, the Crown submits that the Complainant’s evidence is believable and asks the Court to accept it as credible. Based on all the evidence, the Crown submits that it has met the burden of proving beyond a reasonable doubt that the Accused is guilty of the offence of sexual assault.

### **The Defence Position**

[28] The Defence submits that the Court must be cautious in regard to the Complainant’s evidence, arguing that on direct she was sure of herself, but on cross-examination she became defensive and combative when challenged. For example, she accused Defence counsel of attempting to “trick her”, and blamed the justice system in her responses. She also said “Nice try”, referring to the Defendant. The Defence says her focus was on winning, instead of simply telling the truth, and points out that she had to be cautioned by the Court several times.

[29] The Defence questions the reliability of the Complainant’s memory, citing examples of wrong dates. He submits that but for the fact of her checking certain points in her evidence during the overnight pause in cross-examination, it is unknown what her evidence would have been. In addition, the Defence says, her evidence is lacking in details of the sexual assault, such as the removal of underwear, which the Complainant stated she was wearing. Also, when describing the Accused’s actions at trial, she added more detail than appeared in her evidence at the preliminary inquiry, where she simply described his basic position on the bed. Further, the defence questions whether it would even be practicably possible for the Accused to have been sitting on an angle, with his head on hers, while the event was occurring.

[30] The Defence submits the Complainant’s evidence was neither credible or reliable, and that the Accused’s evidence was. The Defence asks the Court to acquit the Accused, applying *R v. WD*, [1991] 1 S.C.R. 742.

### **Analysis**

[31] The critical issue, in terms of the elements, is consent, and determining whether the Crown's burden is met will depend on my assessment of the evidence as a whole. The credibility and reliability of the witnesses is central. There are two distinct versions of the events, but it must be said, the Court must not simply choose one version or another. A favourable finding as to the Complainant's credibility does not mean that the Accused is guilty. Credibility and guilt are two separate findings. A trial judge must not leap from credibility to a conviction but instead apply the principles related to reasonable doubt. The Accused is presumed innocent. The Crown has the burden of proving each element of these offences beyond a reasonable doubt.

[32] The Accused testified in his own defence. The Court therefore must apply the principles in *R v. WD*. (See also *R v. Minuskin* (2003), 181 C.C.C. (3d) 542 (Ont. CA)). In *R v. S.L.*, 2020 NSSC 95, this Court stated:

83. In this case as in many others, there are no witnesses as to what transpired between P. C. and S. L. in their home in November 2015. The Court is therefore left to consider their evidence, which is at odds on the key points. There is no question that they engaged in sexual activity and the critical question is whether or not P. C. did so by consent.

...

84. In turning my mind to these issues and the findings to be made I must not start with any presumptions that certain types of witnesses are inherently credible or reliable, nor may I employ stereotyped myths or flawed assumptions.

[33] This considerations are similar in this case.

[34] I have considered carefully the entire evidence of both the Accused and the Complainant. In her testimony on the central issue of consent, the Complainant testified in a manner that showed resolve and for the most part withstood challenges raised on cross-examination. There were few inconsistencies in her evidence about the alleged assault. She described the Accused continuing while she said "no, no, no." In effect she gave up, she said, once it started. That said, while the Complainant's evidence bore the hallmarks of being truthful, the Court must be cautious where demeanour alone is used in assessing credibility.

[35] The Court must be similarly cautious in dealing with evidence that consent was communicated through body language. Only clear affirmation of consent will suffice, as earlier discussed. Much depends on the circumstances of the specific case and on the evidence of the parties.

[36] In this case, the Accused gave evidence in his own defence. He has no burden whatsoever to meet and I am mindful of that consistently throughout this decision. His counsel submitted that the Accused gave his evidence in a clear forthright manner. I concur. In many respects his evidence as to the events, dates and times was presented in a confident and credible manner.

[37] That said, I found his evidence on the issue of consent, less believable, particularly as given on cross-examination. In his direct evidence Mr. R. described Ms. R. moving into position, but not expressing consent by words. When challenged on cross-examination, he said he “thought [he] heard an okay.” When pressed further he described it as an “uh hmm” sound. There was even a third variation where he said, “put a yes to that”. The Crown submits that the Accused was vague, and evasive in his evidence on this point. I concur.

[38] The trier of fact cannot approach a trial with the assumption the complainant is telling the truth or that a lesser standard applies to a particular witness: see *R v. Nyzik*, 2017 ONSC 4392. I may accept all, part or none of a witness’s evidence.

[39] When I consider the evidence as a whole, I have concerns as to the Complainant’s ability to recall details of the events clearly and accurately. By her own admission, she was originally mistaken as to the date the parties arrived in Sydney from Truro, and thus as to the date of the alleged event. This was changed upon checking sources following her direct testimony, after the Court cautioned her not to do so. I accept that it was the Complainant’s intention to assist the Court by providing accurate information, but it does raise a concern as to credibility and reliability.

[40] In addition, the Complainant was adamant that she stayed on the couch downstairs in the living room for two days after the sexual assault. She repeated this a number of times. If the sexual assault occurred on December 29, 2018, then her evidence that she stayed on the couch for two days is clearly wrong and not credible.

[41] I am aware the Crown has referred to these matters as peripheral details, and that the indictment was amended to read “on or about” the 28th. Nonetheless, at some point, these details add up, and in particular, where the Complainant had herself acknowledged having memory difficulties. It is critically important the evidence be fairly judged, not piecemeal, but as a whole. With great respect to the Complainant, she testified to having certain vivid memories, and recalling “snap shots” of things. There were many occasions where she could not recall.

### **Decision – s. 271**

[42] The standard of proof in a criminal case is proof beyond a reasonable doubt. It is the highest standard of proof in a court of law.

[43] I reiterate that the details of the assault as conveyed by the Complainant are consistent in her description being sick on the way home and going up to bed right away, resulting in her reasons for saying, “no, I’m sick.” While I find the Complainant to be credible, however, I have concerns about the reliability of her testimony.

[44] With respect to the evidence of the Accused, while I have difficulty accepting his testimony, I am left with a reasonable doubt by it. This doubt is reinforced by a consideration of the entire evidence. I do not find the evidence of Ms. R sufficiently reliable to sustain a conviction on this charge.

[45] Respectfully, and for the reasons given, I conclude that the Crown has not met the burden of proof beyond a reasonable doubt. The Accused is therefore acquitted of the charge against him under 271.

### **Assault - s. 266**

[46] According to the evidence there was a physical altercation between Mr. and Ms. R. on or about the 30<sup>th</sup> of December, 2018. Again, each gave different versions of what occurred.

[47] Ms. R. testified she was sitting on her bed with her cat [...]. Mr. R., she said, returned from purchasing her, her medication, Imodium. She earlier said her diarrhea was getting worse. An argument ensued as to why she was unhappy. She alleged he began lunging at her from behind her by the closet. She drew the arrows showing this on Exhibit #3. Initially she said the Accused was standing to her right while she was sitting on the right side of the bed. She said she was down from the head of the bed by “about a third”. She said there had also been a discussion about him having to retrieve the medicine versus her suggesting a courier. As he was flailing his arms, she moved hers to protect her cat and as she did she swung her right arm over in front of her chest touching her left arm and ended up “swatting” him. She may have touched him, she thought, and then instantly received a punch to the back of her head. It was fast and hard.

[48] According to Mr. R.’s testimony, he came into the room to check on Ms. R. He made a motion, leading in with his hands to move onto the bed next to her. His knee led first but he never really got seated he said as he noticed through his vision something coming at him and it was a fist in the face near his left eye and temple area. He said it came out of nowhere and did not hit him hard because he was retreating at that point away from Ms. R. As he did his left hand grazed Ms. R.’s head. He testified he had no intent to strike her. He said he then withdrew. He was asked about any conversation and said there was none.

[49] He marked on Exhibit #3 with a “P” in a square where Ms. R. was sitting and he marked an “R” to show where he had moved toward the bed. He was asked about Ms. R.’s testimony of him advancing towards her physically, lunging at her with flailing arms. He replied that he did not know where this is coming from. He disagreed with that evidence.

[50] Once again, some of the details are “off”. First the date was shown to be December 30, 2018 on Exhibit # 2, the hospital record. There are some other things such as the date of the Imodium purchase. He said it was the previous day, she said she went to the hospital the day following the alleged assault. The hospital record stated “she was punched an hour ago,” the registration time being 22:10. In her evidence the Complainant stated this was in error, and that was prior to her learning of the December 30 date.

[51] There was also an exchange about the Complainant phoning the police and him saying that he would tell them she hit him. The hospital record details mostly accord with her being struck and the location, ie. the occipital area, being the base of the back of her head. In her testimony she described having been hit at or near the hairline at the back of her neck. She did end up phoning police although not right away. She admitted on cross she did initiate the hit

while in the motion of protecting her cat, and may have touched him, but said it wasn't anything hard.

[52] Although some of the details in evidence are inconsistent, there is additional and distinct evidence to consider in assessing the Complainant's testimony on this charge.

[53] There is the hospital record which has been referenced Ms. R. stated in cross-examination that also she kept a record of the incident in her diary. There is the evidence that she did eventually phone the police on January 1, 2019, and provided the police with two statements.

[54] Mr. R. says his hitting her was a reflex action in response to the force of her hit and that it was accidental and not intended. When asked about the force of the punch Ms. R. stated it was hard and really hurt. "As if a guy would hit a guy" was the force of it. She said she was shocked or stunned. Ms. R. says that her motion of touching him was only while covering up or protecting her cat.

[55] Ms. R. wanted to attend the hospital to be sure she had no concussion. There was a bump on the back of her head. After many hours of waiting she decided to leave. Mr. R. testified that he offered to stay stating their stay was not really that long, perhaps an hour or two.

[56] In cross-examination when asked about Mr. R. withdrawing, Ms. R. agreed his action was reflex but in a way that he was "waiting for something to react to".

### **Decision- s. 266**

[57] I have considered the evidence of the parties in relation to the assault alleged by Ms. R. In terms of credibility, I have difficulty accepting the evidence of Mr. R. Some of the reasons are as follows: That he was struck out of the blue without any prior warning or conversation between the parties. That he was struck by Ms. R. with her right hand while she was sitting with her cat on her lap and sitting slightly in the opposite direction away from the door where he entered. That his hand "accidentally grazed" the back of the Complainant's neck causing a bruise as he was withdrawing from the bed.

[58] Ms. R. was quite specific as to where she was punched, indicating the area on the back of her neck near her hairline. Once again, in her evidence Ms. R. gave the wrong date, December 31, for the hospital visit, initially stating that she slept overnight after the assault and went to the hospital the next day. The Defence says it at this point, she became very confrontational, in cross-examination. The Crown indicated that Ms. R. was frustrated but also adamant as to what she alleges occurred. The Court has considered that Ms. R. reported these events within a couple of days on January 1, 2019 in respect of these variances.

[59] There was no witness from the Cape Breton Healthcare Complex, to explain the Triage record. It clearly confirms a date of December 30, but also states under "Triage Information" that Ms. R. informed that she was punched in the lower base of her head "about an hour

ago". Ms. R. corrected this time frame in her evidence stating it was in error. The Court has scrutinized the entire evidence in this case in arriving at its findings.

[60] I must be satisfied beyond a reasonable doubt that the Accused, Mr. R., is guilty of the offence charged, which is the intentional application of force without Ms. R.'s consent. The burden to establish this is on the Crown and the Defence has no burden to meet.

[61] Applying the test in *WD*, I do not believe Mr. R., nor does his evidence leave me with a reasonable doubt. I do not accept this was simply a reflex action whereby the Accused accidentally brushed the Complainant as he was backing away. I concur with the Crown that is implausible, as was Mr. R. not knowing why he spent several hours waiting at the hospital with [...].

[62] On the basis of the evidence I do accept, I am satisfied the Crown has discharged its burden of establishing Mr. R.'s guilt beyond a reasonable doubt on the assault charge. In addition to her explanation of events, which I find credible, there is the Complainant's evidence in relation to the hospital visit and the record entered as Exhibit 2. I therefore find the Accused guilty on the charge of assault pursuant to s. 266 of the *Criminal Code*.

[63] I am not satisfied that s. 34 of the *Criminal Code* avails Mr. R. of a defence, having found what amounted to barely being touched by the Complainant who was primarily protecting her cat.

Murray, J.