Date: 2016 08 30
Docket: S-1-CR-2014-000062

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and-

CODY DUROCHER

RULING AS TO FACTUAL BASIS FOR SENTENCING

I) INTRODUCTION

[1] Cody Durocher was charged with sexual assault, sexual interference, and the unlawful confinement of J.S., in relation to events alleged to have occurred in an apartment at the high rise building in Hay River on January 11, 2014.

[2] Mr. Durocher chose to be tried by a Court composed of a judge and a jury. His trial proceeded in March 2016. On March 9, 2016, the jury returned verdicts of guilty on the charges of sexual assault and sexual interference and a verdict of not guilty on the charge of unlawful confinement.

[3] The sentencing hearing was adjourned because the Crown advised it intended on applying to have Mr. Durocher declared a dangerous offender. The Crown needed time to file the necessary materials to initiate this application. An issue has now arisen between Crown and Defence as to what the factual basis for the sentencing hearing should be. On August 26, 2016, I heard submissions on

that issue.

II) THE ISSUE

[4] In her evidence at trial, J.S. alleged that Mr. Durocher kissed her on the lips, pulled down her pants, and had anal intercourse with her. The sexual interference charge was particularized in such a way that it referred to the alleged kissing. The factual basis for that finding of guilt is clear. But the sexual assault charge is a different matter. The jury could have found Mr. Durocher guilty on that count based on J.S.'s testimony that he pulled her pants down, even if the jury was left unsure about whether the alleged anal intercourse took place. The verdict could also have been based on a finding that forced anal intercourse took place.

[5] The position of the Defence is that the verdict leaves no ambiguity and that it is clear that the jury found Mr. Durocher guilty on the basis that he pulled down J.S.'s pants, and nothing more. Defence says this is an inescapable conclusion given the not guilty verdict returned on count #3 and the problems with J.S.'s trial evidence.

[6] Defence argues that if I find there is ambiguity arising from the verdict, I should find that all that has been proven beyond a reasonable doubt is that Mr. Durocher pulled J.S.'s pants down. Defence argues that this is so because that is the "lowest common denominator" of the accounts of events that J.S. gave at different times, and is what she initially disclosed to the police officer when she gave her statement.

[7] The Crown's position is that the verdict on count #1 is ambiguous. The Crown argues that I should accept J.S.'s trial evidence that Mr. Durocher had anal intercourse with her, or at the very least, that the sexual assault that Mr. Durocher committed on J.S. involved some form of penetration.

III) THE TRIAL EVIDENCE

[8] The Crown called J.S., Gary Martel, Norma Harris and Cst. Jonathan Newcombe at trial. The Defence did not call evidence.

[9] I do not propose to recount all the details of what each of these witnesses said. However, it would be difficult to address the issues that were raised during

counsel's submissions without referring to the evidence to some extent.

1. The evidence of J.S.

[10] J.S. was 13 years old in January 2014, and 15 at the time of the trial. She testified outside the courtroom through a close-circuit television system, and with her sister acting as a support person.

[11] She testified that on the day in question she went to the downtown area of Hay River. She got someone to go to the liquor store and buy her a mickey of vodka. She then went to Gary Martel's residence. There, she consumed the vodka and also smoked some marijuana. She phoned the residence of a man she knew as "L.V.", who lived in an apartment at the high rise building in Hay River. She knew L.V. because she used to buy marijuana from him. She had been in his apartment on a few occasions.

[12] Mr. Durocher answered the phone. She had met him a few times and knew him as L.V.'s friend. He invited her to come over and said he would pay for her cab. J.S. went to the high rise in a cab. When she got there Mr. Durocher was waiting. He paid for the cab and they went inside the building together.

[13] J.S. testified that once in the apartment, Mr. Durocher offered her some vodka. She took a few shots from the bottle. Then, as she was taking another shot, he squeezed the bottle, making more alcohol go into her mouth.

[14] She explained that at one point Mr. Durocher called her "baby" and tried to kiss her. She told him not to touch her. He persisted and kissed her on the lips. He pulled her pants down; she tried to get up from the couch and fell; he placed her back on the couch; he then put his penis in her anus. She punched him a few times in the face to make him stop.

[15] J.S also said that at one point while she was in the apartment she got up to leave. She went to the door and opened it but Mr. Durocher was right behind her and he closed the door. Her thumb was still on the side of the door and got bruised.

[16] J.S. testified that after the assault she left the apartment. She got out of the building through a side door and walked back to Mr. Martel's house. There, she

laid on a bed and passed out. A short time later the police arrived and arrested her. At the police detachment she told Cst. Newcombe that Mr. Durocher had sexually assaulted her. She was placed in the drunk tank and released the next day.

[17] Defence counsel cross-examined J.S. about various things she had said in her statement to police, and at the preliminary hearing, which were not consistent with her trial evidence.

[18] One of the areas of inconsistency was the nature of the sexual assault that Mr. Durocher committed on her. J.S. acknowledged that in her statement to the police, she had not disclosed that there was intercourse. She acknowledged that at the preliminary hearing, she testified that Mr. Durocher had forced vaginal intercourse with her and that her vaginal area was sore afterwards. She acknowledged that these were deliberate lies. She also acknowledged that the first time she disclosed that Mr. Durocher had anal intercourse with her was only a few days before the trial, when she told the Crown prosecutor. She said that she was embarrassed to tell the truth to the police officer and at the preliminary hearing. During her testimony at trial she never wavered from her assertion that Mr. Durocher had anal intercourse with her.

[19] A number of other inconsistencies between J.S.'s trial evidence and her earlier statements were put to her on cross-examination. I will not review them in detail, but there were several.

[20] J.S. asked for breaks at various points during her evidence, once during her examination in chief and twice during cross-examination. After the second break during cross-examination, Crown counsel advised that J.S. had expressed that she was tired and she was asking that the continuation of her evidence be adjourned to the following day. I adjourned proceedings until the following morning and directed J.S. to return for the continuation of her cross-examination.

[21] The next day, J.S. did not return. Before going into what transpired from that point on, I will briefly outline the rest of the evidence adduced by the Crown.

2. Other evidence adduced by the Crown

[22] Norma Harris worked as a cab driver at the time. She remembered her last fare that night was picking up a young girl at "the Singles", which what witnesses

called the housing complex where Mr. Martel lived. She drove the young woman to the high rise. This was Ms. Harris' last fare of the night and she said it occurred between 6:00PM and 7:00PM. An excerpt of her log book was filed as an exhibit, as well as the receipt for gas she purchased at the end of her shift. These documents support Ms. Harris' testimony as far as the general timeline and particulars of this fare.

[23] Ms. Harris testified that once she arrived at the high rise a man came out and paid the young girl's fare.

[24] Gary Martel's evidence was not particularly detailed but he confirmed that J.S. came to his residence that evening, stayed a while, and left. He also testified that she returned to his residence some time later, in a very intoxicated state.

[25] Cst. Newcombe testified that on the night in question he was on night shift. Just after 10:00PM, he did a curfew check with respect to J.S. She was not home. He and another officer went to Mr. Martel's house to look for J.S. because that was a place she often frequented. They found her there, in a highly intoxicated state. Cst. Newcombe had dealt with J.S. numerous times when she was intoxicated but had never seen her as intoxicated as she was that night. He and the other officer had to physically carry her to the police vehicle.

[26] Cst. Newcombe took J.S. back to the RCMP detachment. He explained that during the booking procedure, J.S. told him that Mr. Durocher had sexually assaulted her. He said that her demeanor was different from anything he had ever observed on the many other occasions when he had dealt with her. He said in those other dealings she was typically angry, extremely rude, would swear and make racist comments. This time she was crying and sobbing.

[27] Cst. Newcombe felt that J.S. was too intoxicated to give a statement. He placed her in the drunk tank. She remained in cells until he came back on shift the following evening. He then released her from custody and asked if she wanted to talk about what she had disclosed to him the previous night. She did not want to talk to him at that point, but agreed to come back the next day. The next day, she attended the detachment and he took a statement from her.

[28] Through Cst. Newcombe, the Crown introduced video footage from security cameras at the high rise building. The recorded images show a man pacing in the

lobby of the high rise, then exiting, coming back inside with a young woman, and getting into the elevator with her. J.S. saw this footage and confirmed the people seen on the images are her and Mr. Durocher. Footage from later in the night shows J.S. walking in the hallway, staggering, and exiting the high rise.

3. Exhibit #5

[29] As I indicated already, J.S. did not return for the continuation of her cross-examination. The trial record will reflect the discussions that took place and the submissions that were made at that time as to what the next steps should be. What follows does not purport to be an exhaustive account of those discussions and submissions, but simply a summary to provide adequate background for the issues that now arise.

[30] Crown counsel did not seek a warrant for J.S.'s arrest. She argued that in light of the principles set out in *R.* v. *Hart* 1999 NSCA 45 (leave to appeal to SCC dismissed [2000] S.C.C.A. No.109), the trial could continue despite the premature end to the cross-examination because some remedial actions could be taken to preserve Mr. Durocher's fair trial rights.

[31] I heard submissions as to what those possible remedial actions might be. Defence counsel submitted that the premature end to his cross-examination of J.S. had prevented him from bringing out several inconsistencies between her account of events at trial and things she had said on earlier occasions, during her statement to police and during her evidence at the preliminary hearing. The possibility of providing the jury with the excerpts of J.S.'s earlier statements that revealed those inconsistencies was discussed.

[32] On March 4, 2016, I made a preliminary ruling dealing with the consequences of the premature end to J.S.'s cross-examination. *R* v. *Durocher*, 2016 NWTSC 17. I concluded, based on the submissions I had heard up to that point, that Mr. Durocher's fair trial rights could be preserved despite the premature end to the cross-examination. I left it open to the parties to bring any further applications that they saw fit to make when the trial resumed. In the end, no further applications were made.

[33] When we reconvened, counsel advised that they had discussed what excerpts of J.S.'s previous statements should be given to the jury to establish

inconsistencies that Defence had not been able to bring out before the cross-examination was interrupted.

[34] There were a few areas where counsel were not in complete agreement as to what excerpts should be included. I heard submissions and made rulings about those areas. The excerpts that I found should be given to the jury were consolidated in a document that was, on consent, entered as Exhibit #5 before the Crown closed its case.

[35] Before the document was marked as an exhibit, I heard submissions from counsel as to what the jury should be told about the use they could make of it. That issue arose because in the normal course of things, a prior inconsistent statement can be used in two ways by the party adverse to the witness. The first is to establish the inconsistency and use it to call into question the credibility and reliability of the witness. The second is to go a step further and attempt to get the witness to adopt the earlier statement, so that it becomes part of that witness' trial evidence. As we routinely tell juries, if the witness adopts the previous statement as true then it becomes part of that witness' trial evidence and can be used for its truth, not just to assess credibility.

[36] The decision as to how Defence will use a prior inconsistent statement made by a Crown witness on any given case depends on many factors, such as whether the witness' earlier version is seen by Defence as more helpful to Defence than the trial version, along with other factors. Ultimately, the decision as to how to best use a prior inconsistent statement is a matter of trial strategy and is up to counsel.

[37] In this case, Defence counsel took the position that Exhibit #5 should be available to the jury both to assess J.S.'s credibility and reliability, and also for the truth of the earlier statements. The Crown took no position on the use of Exhibit #5 except to say that, because the document was intended to be a remedial measure as contemplated in *Hart*, Defence should be permitted to have J.S.'s out of court statements used as he saw fit.

[38] Accordingly, I instructed the jury that J.S.'s out of court statements could be used to assess her credibility and reliability as a witness, as well as for their truth.

IV) ANALYSIS

1. Legal Framework

[39] Juries provide verdicts. They do not give reasons. Sometimes, a verdict leaves no room for uncertainty about the factual conclusions that led to it. But that is not always the case.

[40] The legal framework that governs the responsibilities and role of the sentencing judge to find facts following a jury's verdict was summarized by the Supreme Court of Canada as follows:

> The sentencing judge (...) must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.
>
> Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (*Criminal Code*, s. 724(2)(*a*)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown*; *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).
>
> Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(*b*)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: (ss. 724(3)(*d*) and 724(3)(*e*); see also *R. v. Gardiner*, [1982] 2.

R. v. *Ferguson*, 2008 SCC 6, Paragraphs 16-18.

[41] The first question, therefore, is whether the jury's verdict gives rise to any ambiguity. Defence counsel argues that the not guilty verdict on the count of unlawful confinement necessarily means that the jury rejected J.S.'s claim that the

assault involved anal intercourse. Defence argues that the jury could only have reached its verdict of guilty on the sexual assault charge on the basis of Mr. Durocher having pulled down her pants, and nothing else.

[42] I do not agree with this interpretation of the verdicts. First, I do not see how the interpretation advanced by Defence can be reconciled with the verdicts on counts #1 and #2. Second, I do not agree that Defence's interpretation necessarily flows from the verdict on count #3.

[43] The jury returned a verdict of guilty on the sexual interference count. The only evidence in support of that count was J.S.'s testimony that Mr. Durocher kissed her on the lips. The jury could not have found him guilty on that count if it had rejected J.S.'s evidence completely because the only evidence that kissing took place came from her.

[44] Similarly, the only basis for a conviction on the sexual assault count, whatever the underlying facts may have been, had to be a finding beyond a reasonable doubt that Mr. Durocher applied force of a sexual nature to J.S. in addition to having kissed her. Again, the only evidence that any force of a sexual nature was applied against J.S. aside from the kissing came from her testimony. There was no corroboration of any of the sexual acts that she alleged took place in the apartment.

[45] As for the verdict on count #3, I do not think it *necessarily* signals a rejection of any aspect of J.S.'s testimony, for the following reason.

[46] J.S. testified that Mr. Durocher closed the door as she was trying to leave. She was asked further questions about how this made her feel:

> Q So after he shut the door did you leave?
> A No.
> Q And how did it make you feel when Cody pushed the door while you were trying to leave?
> A I don't know. I don't know how I was feeling.
> Q Why did you not leave?
> A I don't know.
> Q Did you feel that you could leave?
> A I don't know.
> Q Do you understand my question?

A Yeah, I understand.

Examination in Chief and Cross-Examination of J.S., p. 34 lines 11-21.

[47] This evidence as to J.S.'s perception of whether she felt Mr. Durocher's actions were preventing her from leaving was one aspect of the evidence for the jury to consider in deciding whether the charge of unlawful confinement had been proven beyond a reasonable doubt.

[48] The jury may, of course, have found Mr. Durocher not guilty on count #3 because the jury did not accept (or had a reasonable doubt about) J.S.'s evidence that he closed the door as she was trying to leave. But it is equally possible that the jury was left with a reasonable doubt on count #3 for other reasons, including J.S.'s answers to the questions about the effect that Mr. Durocher's conduct had on her, her perception of whether she could leave or not, and whether his actions in fact prevented her from leaving.

[49] The only thing that is absolutely clear from the verdicts, and in particular the verdicts on counts #1 and #2, is that the jury rejected the Defence's position that J.S.'s evidence should be entirely rejected and disregarded because of its inconsistencies and flaws. The verdicts on those two counts could only have resulted from the jury having accepted at least some of J.S.'s evidence.

[50] As I already noted, the factual basis for the verdict on count #2 is clear. As for the verdict on count #1, I am unable to see anything, in the evidence or as a matter of logic, that can make clear what parts of J.S.'s evidence the jury accepted to come to the conclusion that Mr. Durocher's guilt on that count was established beyond a reasonable doubt.

[51] Given this, the verdict on count #1 does give rise to ambiguity as to its factual basis. It is up to me, as the sentencing judge, to determine the facts necessary for sentencing.

[52] In doing so, my task is to make those findings of facts that are necessary for deciding the appropriate sentence. Whether the sexual assault was limited to J.S.'s pants being pulled down or progressed to an act of anal or vaginal intercourse will be a significant factor on sentencing. An act of forced intercourse represents a more serious sexual assault than pulling down someone's pants. I am required,

therefore, to make a finding as to whether the more intrusive conduct has been established beyond a reasonable doubt.

[53] *Ferguson* stands for the proposition that a sentencing judge should not attempt to follow the reasoning process of the jury but rather, must independently assess the evidence. Defence counsel invites me to adopt a different approach in this case. He argues that, in making findings of facts, I should take into account the last question that the jury asked during the deliberations and the fact that the verdict came relatively soon after that question was answered. Defence argues that I should conclude from this that the factual basis for the conviction had to have been the allegation that Mr. Durocher pulled down J.S.'s pants, and that allegation only. Otherwise, he argues, the jury's last question makes no sense.

[54] What Defence counsel invites me to do is in direct contradiction with the direction of the Supreme Court of Canada in *Ferguson* that the sentencing judge should *not* attempt to follow the logical process of the jury. Defence counsel argues that a different approach is nonetheless warranted in this case because this trial did not proceed in the ordinary course. Defence points to the premature end to the cross-examination of J.S. and the number of inconsistencies and problems that arose in her evidence, including the inconsistencies that are established through Exhibit #5.

[55] It goes without saying that the principles set down by the Supreme Court of Canada are binding on me. Defence counsel did not refer me to any authority in support of his position that a departure from the approach prescribed in *Ferguson* is justified in the present circumstances. I am not aware of any such authority. In short, I know of no legal basis that would permit me to engage in the kind of analysis that Defence counsel urges upon me without offending the rule of *stare decisis*.

[56] Even aside from that, in my view, attempting to unveil a jury's reasoning process through questions, their timing, the length of deliberations, or timing of verdict in relation to a question being answered, is fraught with dangers. Juries ask questions for a variety of reasons. Trial judges must do their best to understand what a question means when it is asked, so that it can be answered in a manner that will assist the jury. But going beyond that and attempt to elucidate, after the fact, what the question reveals about the jury's deliberations is an exercise in speculation.

[57] The Supreme Court of Canada had occasion to comment on this issue in the context of discussing when the doctrine of issue estoppel is engaged by a jury's verdict. In that context the Court offered the view that questions asked by the jury or the timing of the jury's verdict are not directly relevant to whether the jury resolved an issue in favor of the accused. What the Court said leaves little doubt about its view about the wisdom of judges attempting to elucidate a jury's reasoning process:

> "[a]n approach that encourages judges to inquire into the jurors' mental deliberations and reasoning processes should be rejected".

R. v. *Punko* [2012] S.C.J. No.39, Paragraph 8.

2. Application of principles

[58] I conclude that, in accordance with the principles in *Ferguson*, I must make my own independent assessment of the evidence to decide the nature of the sexual assault that should form the basis of Mr. Durocher's sentencing.

[59] Without question, there were problems with J.S.'s trial testimony. Within her trial evidence and from Exhibit #5, a number of inconsistencies emerged. She failed to return for the continuation of her cross-examination. She acknowledged that she was not truthful about some things in her statement to the police and at the preliminary hearing. Importantly for present purposes, one of the things she admitted being untruthful about in earlier statements was precisely the question I must now decide, namely, the nature of the sexual assault perpetrated on her.

[60] The issue that I must now decide is whether, despite these problems, the version of events given by J.S. at trial establishes beyond a reasonable doubt that Mr. Durocher had anal intercourse with her.

[61] In this analysis, I am required to accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty on the count of sexual assault. This means, as already noted, that the starting point is that sexual contact took place beyond Mr. Durocher kissing J.S. The issue is what type of contact has been proven to the required degree.

[62] Defence argues that I should conclude that the sexual contact consisted only

of J.S.'s pants being pulled down because that is what Defence called "the lowest common denominator" in the versions of events J.S. provided at different times, and it was what she originally disclosed to Cst. Newcombe. Crown argues that I should accept J.S.'s explanations for having made those earlier inconsistent statements, and I should find that the sexual contact did not stop at her pants being pulled down. Crown argues that I should accept J.S.'s trial evidence and conclude that the sexual assault involved penetration.

[63] Inconsistencies are a relevant factor in assessing a witness' credibility. Assessing what they mean is not a mathematical exercise. It is not as though evidence must be rejected once a certain threshold in number of inconsistencies has been reached. It is always up to the trier of fact, in this case me, to decide what impact inconsistencies, even several inconsistencies, have on the weight to be attributed to the evidence of a witness. That assessment depends on several things, including the number and nature of the inconsistencies, the level of sophistication of the witness, how the questions are framed, and the subject-matter being discussed.

[64] The assessment of inconsistencies in a witness' evidence must be contextual. Here, the context includes J.S.'s age at the time of events and at the time of trial. It also includes her troubled background. It was obvious from the trial evidence that despite her relatively young age she had already experienced significant personal issues, including serious addictions. That she would spend a year and a half in residential treatment to address her addiction issues speaks volume about the difficulties she was having as a young teenager. The same is true of Cst. Newcombe's evidence about how frequently he dealt with her as part of his work as a police officer.

[65] The context also includes the circumstances when J.S.'s first disclosure was made to police. As I pointed out in the ruling referred to above at Paragraph 32, when J.S. first disclosed to police that Mr. Durocher had sexually assaulted her, she was not taken to a hospital, health center, or anywhere she could receive help: instead, at 13 years old, she was put in the drunk tank. She was left there not just until the next morning, but until the following evening. There was no evidence of any reason for delaying the process of her release until the evening aside from the fact that the officer who had dealt with her the previous night was coming back to work on the night shift.

[66] That J.S. would not be inclined to give that police officer a statement when he released her should be a surprise to no one. That she would not be comfortable telling that same officer all the details of a very intimate and traumatic event the following day is not particularly surprising either.

[67] However, J.S. did not tell the truth at the preliminary hearing either: although she described a more intrusive sexual assault at that point, she said Mr. Durocher had vaginal intercourse with her, not anal intercourse. And she said her vagina was sore afterwards, not her anus. She acknowledged that she said this and she acknowledged it was not the truth. At trial, she maintained that in fact, Mr. Durocher had anal intercourse with her. She said she was too embarrassed to say that at the preliminary hearing.

[68] In assessing the impact of an inconsistency in the evidence, the explanation provided by the witness for the inconsistency is an important factor. J.S.'s evidence when confronted with her earlier statements, and her explanation for why she did not tell the truth on these earlier occasions, must be carefully considered. The topic was broached with her both during her examination in chief and during cross-examination.

[69] During her examination in chief, she testified as follows:

> Q Do you remember that you gave a -- giving a statement to the police officer a few days, two days after what happened to you?
> A Yeah, I remember.
> Q Did you tell the police officer about Cody putting his penis in your anus?
> A No, I didn't.
> Q Why did you not tell him?
> A I don't know. It was like kind of embarrassing.[sic] Maybe if it was like a female cop giving me the statement I would have told the truth.
> Q So you were embarrassed because it was a male police officer?
> A Yes.
> Q Do you remember that you testified in court about this same incident a while ago, a few months ago? Do you remember that?
> A Yeah.
> Q Like last year. Yes?
> A Yeah.
> Q Did you tell the judge at the time about Cody putting his penis in your anus?
> A No.
> Q No? What did you say? What did you tell the judge happened?

A I told the judge that he put it in my vagina.
Q Why did you say that?
A I don't know, the same reason why. I was embarrassed.
Q When was it that you told for the first time that in fact Cody had put his penis in your anus?
A When I told you.
Q So that's when you told me two days ago?
A Yeah.
Q Is that right?
A Yeah, when I met with you.
Q And so why did you tell me?
A I don't know, I just wanted to get -- I don't know.
Q You said you wanted to get what?
A What?
Q You said "I just wanted to get --".
A I didn't say that.
Q I'm sorry, I misheard. So why did you tell me, J.?
A I don't know. I felt comfortable. I don't know.

Transcript of Examination in Chief and Cross-Examination of J.S., p. 41 line 1 to p.42 line 21.

[70] During cross-examination, J.S. was asked questions about this as well:

Q And Constable Newcombe asked you if you remembered what happened, correct?
A Yeah.
Q Constable Newcombe asked "are you pretty sure he penetrated you?" And you said "I think so." Right?
A Yeah.
Q And then Constable Newcombe said "do you remember any of that?' And you said "yeah." Is that what you said when he asked you that question?
A Yeah.
Q And then Constable Newcombe said "you do?' And you answered "well not, no." Is that what you said to Constable Newcombe?
A Yeah.
Q So you lied to him?
A Yeah, I did.
Q Because you did remember something happening to you, correct?
A Yeah.
Q Constable Newcombe asked you if you had a pain in your vagina, right?
A Yeah.
Q And you told him "yes," right?

A Yeah.
Q And that wasn't true, was it?
A No, it was a pain in my anus instead of my vagina.
Q I can't hear what you're saying.

THE COURT: She said it was a pain in my anus, not in my vagina.

MR. HARTE: Thank you.

Q You told Judge Schmaltz at the preliminary hearing that Cody Durocher raped you, correct?
A Yeah.
Q And when Ms. Piché asked you what you meant by that you said "he forced his dick up my vagina," correct?
A Yeah.
Q That was a deliberate lie, right?
A Yeah.
Q You knew what you were saying to the judge was false?
A Yeah.
Q And you promised to tell the truth, the whole truth and nothing but the truth, and you chose instead to lie, correct?
A Yeah, but I wasn't thinking.
Q You weren't thinking about the fact that you were lying?
A I guess so, yeah.
Q So are you telling us that your promise to tell the truth wasn't something that you worried about very much?
A Can you say that again?
Q You promised to tell Judge Schmaltz the truth, correct?
A Yeah, I did.
Q So when I asked you about lying you said you weren't thinking about it. So were you not concerned about lying to Judge Schmaltz?
A I don't know.
Q The first time anybody heard anything about butts or anuses was on Sunday when you met with Ms. Piché, correct?
A Yeah.
Q And you told her and you told us that you were too embarrassed to tell the truth before now, right?
A Yeah.
Q Now, I'd like you to help me understand this. I would like you to tell me how is "he forced his dick up my butt" more embarrassing than "he forced his dick up my vagina?"
A I don't know, because like an anus is where you take a shit, you know. Like that's not right.
Q That's your answer, that's why it's more embarrassing to say one than the other?

A Yeah, that's my answer, yeah.

Transcript of Examination in Chief and Cross-Examination of J.S., p. 72 line 10 to p.75 line 9.

[71] Any time a witness admits to having been deliberately untruthful when testifying under oath, solemn affirmation or promise to tell the truth, this raises significant concerns about whether anything else the witness has said can be relied on. As we routinely instruct juries, and as the jury was instructed in this case, once it is established that a witness has lied in Court that is always a serious matter and it may well taint the whole of the evidence. Extreme caution is warranted under such circumstances. That being said, there is no absolute rule whereby all the evidence of a witness should be discounted for that reason.

[72] In this case, it is clear that J.S.'s evidence, despite its problems and frailties, persuaded the jury beyond a reasonable doubt about some things. The jury did not agree with the Defence's position that the inconsistencies made her evidence entirely unreliable and unbelievable. Having observed her during her testimony, having regard to the rest of the evidence adduced at trial, and considering the overall context, I understand why.

[73] I observed J.S. carefully during her evidence. She was a reluctant witness, and even, at times, a somewhat defiant witness. This was the case even when the Crown prosecutor was asking her questions.

[74] In my observations, she was at her most reluctant when she was asked to explain specifically what Mr. Durocher did to her. But at that point, she was anything but defiant. She struggled. She had difficulties answering questions. There were long pauses; some are apparent from the transcript, and others, not. At certain points she covered her face with her hands. She cried when talked about the anal intercourse. J.S.'s manner of testifying when she described these events was such that, to me, she appeared genuinely upset and hurt as she was describing what Mr. Durocher did to her.

[75] We know that the assessment of a witness' credibility should never be based on demeanour alone. But here, there is more. Many aspects of J.S.'s overall narrative of the evening are corroborated by other evidence.

[76] Ms. Harris testified that a man was waiting for J.S. at the high rise and paid

for her cab. The security camera footage confirms that Mr. Durocher was waiting for J.S. at the high rise, and took the elevator with her to the apartment.

[77] Ms. Harris did not notice J.S. to be particularly intoxicated when she dropped her off at the high rise. The security camera footage shows that she was walking normally when she arrived. It also shows that she could not walk straight when she left. J.S.'s level of intoxication after she left the apartment is confirmed by the observations of Cst. Newcombe when he dealt with her at Mr. Martel's house. This corroborates J.S.'s evidence that she was provided alcohol while she was with Mr. Durocher and that she was highly intoxicated by the time she left.

[78] Cst. Newcombe was familiar with J.S., having dealt with her on several occasions when she was intoxicated. He had never seen her as intoxicated as she was that night. But more importantly, when she disclosed the sexual assault to him, her attitude and demeanour were dramatically different from anything he had observed in the past. She was usually angry, rude and belligerent. This time she was crying and sobbing. That is consistent with something very serious having happened to her that night.

[79] I have reviewed Exhibit #5 carefully. In assessing the impact that the inconsistencies that this document shows, I have taken into account the number and nature of the inconsistencies, as well as the factors I have already referred to.

[80] Defence urges me to conclude that all that has been proven beyond a reasonable doubt is what J.S. disclosed to Cst. Newcombe, as opposed to what she disclosed to Crown counsel a few days before the trial, which is the version she maintained throughout her trial testimony.

[81] Considering the overall circumstances, it makes far more sense to me that J.S.'s initial disclosure to Cst. Newcombe was not entirely truthful, and that as time went on she became more able to divulge that she had been sexually assaulted in a far more intrusive manner than what she originally disclosed.

[82] I find that the explanations J.S. gave for her previous inconsistent accounts of what happened to her are understandable and plausible, as well as her explanation for disclosing the full truth to the Crown prosecutor when she did. What I find rather implausible is that she would, days before the trial, fabricate an allegation of anal intercourse if that was not in fact what happened to her. That

allegation was more embarrassing for her to talk about than anything else she had disclosed previously. It makes no sense that she would fabricate it at that point.

[83] I conclude that J.S. decided to be truthful at that point because, in her own words, she felt comfortable with the Crown prosecutor. And she told the truth to the jury about what Mr. Durocher did to her.

[84] For all these reasons, I am satisfied beyond a reasonable doubt that

Mr. Durocher had forced anal intercourse with J.S. on January 11, 2014 and his sentencing will proceed on that basis.

V) CONTINUATION OF SENTENCING HEARING

[85] This matter must now be scheduled for the continuation of the sentencing process. This should be done as soon as possible, as it has already been a number of months since Mr. Durocher was convicted of these charges.

[86] At the last Court appearance, the possibility of speaking to this matter again on September 26th, 2016 at 2:00PM was discussed. That date is still an option if counsel are available. If not, other possible dates include September 12 or 19, 2016, or October 24 to 28, 2016. Counsel should communicate with the registry as soon as possible to provide their availabilities and preferences for the date of the next appearance, along with an estimate of how much court time will be required for that appearance.

[87] Given the difficulties we have experienced with the videoconferencing system at the Yellowknife courthouse, including those we experienced when this matter was last spoken to on August 26th, 2016, I direct that once a date has been set for the next appearance, the Clerk of the Court will prepare the necessary documents to have a Removal Order issued to secure Mr. Durocher's personal attendance on that date.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
30th day of August 2016

Counsel for Applicant: Annie Piché
Counsel for Respondent: Peter Harte

S-1-CR-2014-000062

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

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-and-

CODY DUROCHER

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RULING AS TO FACTUAL BASIS FOR SENTENCING OF THE HONOURABLE L.A. CHARBONNEAU