Date: 2017 02 17
Docket: S-1-CR-2015-000 118

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

MATTHEW JAMES KUPTANA

Publication Ban: Restriction on Publication: By Court Order, there is a ban on publishing information that may identify the person/persons described in this judgment as the complainant/witness. See the *Criminal Code*, s. 486.4.

MEMORANDUM OF JUDGMENT
(SUPPLEMENTAL REASONS FOLLOWING SENTENCING HEARING)

I) INTRODUCTION

[1] On January 17, 18, and 19, 2017, Matthew Kuptana's sentencing hearing was held in Inuvik, on a charge of sexual assault. The Crown's allegations were disputed. Two witnesses testified at the hearing: M.K. (the victim named in the Indictment) and Mr. Kuptana.

[2] At the conclusion of the sentencing hearing I made findings of fact and heard submissions as to sentence. On January 19, 2017, I imposed sentence on Mr. Kuptana and gave oral reasons. *R v Kuptana*, 2017 NWTSC 11. I indicated at the time that I would file Supplemental Reasons to explain my findings of credibility and address other issues that arose during the hearing. These are those Reasons.

II) PROCEDURAL HISTORY

[3] The events leading to the charge occurred in the early morning hours of April 26, 2015. M.K. made her complaint to the police that evening.

[4] Mr. Kuptana was charged and had a number of appearances before the Territorial Court. He initially elected to have a jury trial and to have a preliminary hearing. He later waived the preliminary hearing and re-elected to be tried by a judge of this Court, without a jury.

[5] On December 4, 2015, Mr. Kuptana's counsel at the time, Michael Martin, wrote to the Court indicating that Mr. Kuptana wished to plead guilty to this charge and another unrelated sexual assault charge. An appearance was arranged in Yellowknife for that purpose.

[6] On December 14, 2015 Mr. Kuptana entered guilty pleas to the two charges. At the time the guilty pleas were entered, Mr. Martin confirmed that the pleas were voluntary, fully informed and met all the requirements set out at section 606(1.1) of the *Criminal Code*.

[7] The sentencing hearing for both matters was scheduled to proceed on April 18, 2016. It was scheduled to proceed in Inuvik, at Mr. Kuptana's request. There was no indication, at that point, that any of the Crown's allegations would be disputed.

[8] The sentencing hearing, as it turned out, did not proceed on that date. Mr. Martin arranged to have Mr. Kuptana appear before the Court in Yellowknife ahead of the hearing date. On April 13, 2016, Mr. Kuptana's matters were spoken to in Yellowknife. Mr. Martin told the Court that Mr. Kuptana was asking to be represented by a different lawyer. Mr. Martin asked to be removed as counsel of record and this request was granted. Mr. Martin told the Court that he understood that Jay Bran, another defence counsel, might be taking over as Mr. Kuptana's counsel.

[9] Mr. Bran was present in the courtroom and confirmed that he would be taking over the legal representation of Mr. Kuptana. He also indicated that Mr. Kuptana might bring an application to have the guilty pleas struck. Crown and Defence agreed that the April 18, 2016 sentencing hearing in Inuvik should be cancelled to give counsel the time needed to obtain instructions and determine what the next steps should be.

[10] Counsel eventually confirmed that there would be an application to withdraw the guilty plea with respect to the charge involving M.K.

[11] The application to strike the guilty plea proceeded on August 8, 2016. It was dismissed on August 23, 2016. *R v Kuptana*, 2017 NWTSC 4.

[12] On a subsequent appearance, counsel advised that the facts would be disputed at the sentencing hearing and that *viva voce* evidence would have to be called. The hearing was scheduled to proceed in Inuvik commencing on January 17, 2017.

III) EVIDENCE ADDUCED AT THE SENTENCING HEARING

[13] At the start of the sentencing hearing, no specifics were provided as to what aspects of the Crown's allegations were in dispute. At the conclusion of the evidence, it was apparent that there were a number of things with which Mr. Kuptana did not actually take issue.

[14] At the time of these events, M.K. lived in Ulukhaktok. In April 2015 she went to Inuvik for a visit and stayed at the Kuptana residence. M.K.'s aunt is Mr. Kuptana’s common law spouse of many years. M.K. considered Mr. Kuptana to be her uncle.

[15] On the evening of April 25, 2015, M.K., Mr. Kuptana and his spouse spent the evening socializing, first at the house and later at the Trapper's Bar. They consumed beer throughout the evening. Everyone had a good time. There was no evidence of anyone having become grossly intoxicated.

[16] They stayed at the bar until closing time and then returned home. A short time after their return, everyone went to bed. Mr. Kuptana and his wife went to their room and M.K. went to her room.

[17] It was undisputed that some time after this, Mr. Kuptana came out of his room, went into M.K.'s room, and had sexual intercourse with her. The central issues at the hearing were how this sexual contact came to happen, and whether it was consensual. I now turn to the evidence relating more specifically to those issues.

1. M.K.'s evidence

[18] M.K. testified that after they returned from the bar she passed out in her room. She woke up to Mr. Kuptana on top of her, having sexual intercourse with her. She tried to push him off but he was too heavy. She did not want him to do this and kept telling him to leave but he just "kept going". She did not remember if he touched her anywhere else on her body. All she remembered Mr. Kuptana saying to her during this was "you're so tight nobody fuck you, you're so tight nobody fuck you".

[19] When he was done, he got off her. She curled up and went to sleep. The next morning she left the house. She went walking around for a while. During the day she returned to the Kuptana residence a number of times. The last time she was there she started feeling "uneasy and yukky" and left. She went to see her friend Diane and told her about what happened. She then went to the hospital to visit some relatives. While she was at the hospital, she reported the matter to the police.

[20] M.K. did not remember how much she had to drink that night but said she remembered the evening up until when she went to bed and passed out, and then waking up to Mr. Kuptana on top of her.

[21] She said she tried to push Mr. Kuptana off for a while and eventually gave up. She was not sure how long she tried to push him off. She acknowledged that she did not hit him or kick at him.

[22] She acknowledged that she did not scream or call out for help while Mr. Kuptana was on top of her, even though she knew her aunt was in a room across the hall. On Cross-Examination, it was suggested to her that the reason she did not scream for help was because she was consenting to what was happening. She denied this.

[23] M.K. acknowledged that she returned to the Kuptana residence a number of times during the day despite what had happened. She also acknowledged that throughout the day, she saw various people. She agreed with the suggestion, put to her on Cross-Examination, that there was nothing stopping her from telling those people what happened to her.

[24] M.K. testified during her Examination-in-Chief that she went to bed fully clothed, and that when she woke up the clothes on the lower half of her body had been removed. She also said that she went to the bathroom before going to bed. In Cross-Examination she was asked if it was possible that, after she went to the

bathroom, she did not put her underwear and leggings back on before going to bed. Defence counsel put a few questions to her about this topic:

> Q. Is it possible after you [went to the bathroom] you simply didn't put your clothes back on from the waist down and you went to bed only with your top on?
> A. No, I don't remember that.
> Q. So by not remembering it is possible that when you went to the bathroom and you took off your leggings and your underwear to use the washroom to urinate it's possible that you came back to bed without wearing that clothes from your waist down, right?
> A. Oh God.
>
> *Excerpt of the Sentencing Hearing (Evidence of M.K.)*, p.34 lines 15-25.

[25] M.K. was becoming very upset and emotional at this point. I asked her if she understood the question. She said she did. I repeated counsel's question, asking whether it was possible that she did not put her clothes back on after going to the bathroom. M.K. answered "It could be possible".

[26] At the very end of the Cross-Examination, it was suggested to M.K. that when Mr. Kuptana came into her room, she invited him on to the bed to have sex with her. She answered "I don't, I don't recall that".

2. Mr. Kuptana's evidence

[27] Mr. Kuptana testified that a few minutes after he retired to his bedroom with his spouse, he came back out because he needed to use the bathroom.

[28] Before going back to his room, he peeked into M.K.'s room. She was lying on the mattress on the floor, naked from the waist down. As soon as he peeked in she lifted both her legs up in the air towards her head; she opened her legs, exposing her genitals to him. He took this as an invitation to have sex. He took off his shorts and began having intercourse with her. He was positioned in front of her, on his knees, holding her legs. He was not lying on top of her. She did not try to push him away.

[29] There was no verbal exchange between him and M.K. before, during, or after the sex. M.K. appeared to enjoy what was happening. She made the kinds of noises people normally make when they are having consensual sex.

[30] After he was done he stood up to put his shorts back on. She turned around and positioned herself on her hands and knees with her buttocks towards him. He left the room and went to sleep on the couch.

IV) ANALYSIS

[31] My findings of fact were, obviously, driven by my assessment of the credibility and the reliability of the evidence of these two witnesses. Before I explain those findings, I want to briefly address the legal framework that applies in these circumstances.

1. Legal framework

[32] Crown and Defence disagreed about many things at this hearing, including aspects of the legal framework that governed it. One thing they did agree about was that this was a very unusual sentencing hearing.

[33] A sentencing hearing is not a trial. A guilty plea, in law, constitutes an admission of the essential elements of the offence. It relieves the Crown of its evidentiary burden to prove those elements. An accused who has pleaded guilty no longer benefits from the presumption of innocence. *R v Duong*, 2006 BCCA 325.

[34] Because of this, the rules of evidence, at a sentencing hearing, are more relaxed than they are at trial. The Court has a broad discretion in deciding what information will be relied on and how that information will be presented to the Court:

> 723 (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.
>
> (2) The court shall hear any relevant evidence presented by the prosecutor or the offender.
>
> (3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.

> (4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.
>
> (5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
>
> (a) has personal knowledge of the matter;
> (b) is reasonably available; and
> (c) is a compellable witness.
>
> 724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
> (…)
>
> *Criminal Code*, R.S.C., 1985, c. C-46, ss. 723 and 724(1).

[35] When a fact is in dispute, the burden to prove that fact is on the party wishing to rely on it. The burden of proof that generally applies is proof on a balance of probabilities. However, any aggravating fact that the Crown wants to rely on and is disputed, and any past conviction that is disputed, must be proven by the Crown beyond a reasonable doubt. *Criminal Code*, *supra*, Subsection 724(3).

[36] What was unusual about this case was that the key disputed facts were not aggravating facts; they were the facts making out essential elements of the offence (M.K.'s lack of consent and Mr. Kuptana's knowledge of her lack of consent).

[37] This gave rise to the issue of what standard of proof I should apply in making factual findings. Not surprisingly, that issue is not addressed in the sentencing provisions of the *Criminal Code* because a sentencing hearing is not supposed to be about proof of the elements of the offence.

[38] I understood the Crown to be arguing that because of the guilty plea, the standard of proof that I should apply was something less than proof beyond a reasonable doubt. The Crown did not refer to any cases in support of this position. In the alternative, the Crown argued that the guilty plea should give rise to an adverse inference against Mr. Kuptana. No case was referred to in support of this position either.

[39] Mr. Kuptana's counsel argued that the standard of proof should be proof beyond a reasonable doubt. Again, I was not referred to any case in support of that position.

[40] Considering that, even at the sentencing stage, the standard of proof beyond a reasonable doubt is the one that applies to disputed aggravating facts and disputed criminal convictions, I find it difficult to conceive how a lower standard could apply to facts that are at the heart of an essential element of the offence.

[41] With respect to the issue of adverse inference, I want to make it clear that in this case, I would have rejected Mr. Kuptana's evidence irrespective of his guilty plea. My reasons for that are outlined below at Paragraphs 44 to 68.

[42] That being said, I agree with the Crown that it would have been open to me to draw an adverse inference against Mr. Kuptana's credibility under these circumstances. I will return to that issue later in these Reasons. But first, I will explain why I came to the conclusions I did in my assessment of the credibility and reliability of the testimonies of M.K. and of Mr. Kuptana.

2. Assessment of credibility

[43] In assessing the evidence, I have taken into account, among other things, the inconsistencies in the evidence, the plausibility of the witnesses' accounts of events and the demeanour of the witnesses. I have exercised caution in my consideration of demeanour, acknowledging that findings of credibility should never be based on that factor alone.

[44] I rejected Mr. Kuptana's evidence for a number of reasons including: the implausibility of his narrative; subtle - and sometimes not so subtle - shifts in his evidence during Cross-Examination; and, generally speaking, his manner of responding to questions when he was challenged on certain aspects of his testimony.

[45] On the whole, I found Mr. Kuptana's evidence about his interaction with M.K. self-serving, implausible and unreliable. I did not believe his version of how the sexual contact between him and M.K. unfolded, and his evidence did not raise any doubt in my mind.

[46] Inconsistencies in the evidence are to be expected, especially when someone testifies about events that occurred a long time ago. Not all inconsistencies mean

that someone is being dishonest or does not remember the events. Inconsistencies may well arise from innocent mistakes.

[47] But other times, inconsistencies, even about minor points, may indicate that the witness is making things up, is exaggerating, is attempting to tailor the evidence to suit his or her particular needs, and is getting caught in lies. I found some of the inconsistencies and shifts in Mr. Kuptana's evidence did not arise from innocent mistakes.

[48] In some instances, it seemed that when Mr. Kuptana was challenged on Cross-Examination about something, he added more and more details to bolster his evidence. And as he did, contradictions emerged and his evidence became weaker.

[49] Some of this happened when he was being questioned about relatively innocuous topics. For example, Mr. Kuptana was asked a series of questions in Cross-Examination about the effect that drinking alcohol had on his perceptions that night:

> Q. And would you agree with me that your perception is a little different if you're sober as opposed to after having five to seven drinks?
> A. Doesn't make any effect to me about how much beer I had because I'm, I'm a heavy drinker. I can drink beer all night.
> Q. You can drink beer all night?
> A. Yeah.
> Q. So the amount of beer that you had that night didn't affect you at all?
> A. Not that much.
> Q. What did it do to you?
> A. Just made me want to dance on the dance floor.
> Q. And was that something you would do if you were sober?
> A. Yeah. I would do that if I was sober, dance a few times, yeah.
> Q. And what did you do differently - -
> A. Nothing different
>
> *Excerpt of Sentencing Hearing (Evidence of Matthew James Kuptana)*, p.32 line 9 to p. 33, line 4.

[50] The questions put to Mr. Kuptana were clear and pertained to a simple topic. He seemed very reluctant to admit that the alcohol he consumed had any effect on him that night. When he did, he was careful to minimize the impact that alcohol had on him. He vacillated between the alcohol having had no effect at all, to it having had only a little effect, eventually going back to saying it had no effect at all.

[51] Something similar happened when he was pressed about why he knew that his daughter was not home when they returned from the bar:

> Q. And was Sandy's door closed or open?
> A. Sandy's door was open because she was not home.
> Q. How do you know she was not home?
> A. Because her shoes and parka were not there when we arrive and there was nobody in the house.
> Q. Did you ever look in her room?
> A. Yeah. I know when she's home. She always have her runners there and her jacket hanged up in the porch.
> Q. Did you see her? Did you look in her room?
> A. Yeah. She was not in her room when we arrived.
> Q. Did you look in the room?
> A. Yes, I did.
> Q. And when did you look in the room?
> A. When I was upstairs.
> Q. When was that?
> A. Like I said, when I went upstairs you could see her room. When we go to the bathroom it's open and she's not in her room.
> Q. Okay. Which time because you went upstairs twice you told us now - -
> A. Yeah. The first time. The first time I went upstairs you could see her room when we go to the bathroom or into our room. You could see her room open and nobody was in there.
> Q. Did you look inside?
> A. No. You can see inside the room there. She was not home.
> Q. But you didn't look inside?
> A. No, I looked inside. I could see inside. You could see the whole room in there but there was nobody inside the room.

Excerpt of Sentencing Hearing (Evidence of Matthew James Kuptana), p.40 line 17 to p.41 line 21.

[52] On this topic Mr. Kuptana was consistent that his daughter was not home. But again, his reasons for being sure about that fact shifted and evolved as he was pressed on the issue. Initially he said he knew she was not home because her shoes and clothes were not in the porch. As the questioning went on he eventually said that he looked into her room and saw that she was not there. If that is the case, it seems strange that this was not the first answer he gave when he was asked how he knew she was not home.

[53] Another example was in Mr. Kuptana's answers when it was suggested to him that he is much larger than M.K. He seemed reluctant to acknowledge even that. In his initial answer he agreed he is larger than M.K. now, but specified that

he gained a lot of weight since being in custody. When the Crown pressed the issue and asked him about his weight back in April 2015, he said he weighed about 195 pounds. He eventually conceded that even back in April 2015, M.K. was much smaller than him. It seems clear that at all relevant times, Mr. Kuptana was much larger than M.K. His reluctance to simply acknowledge that the first time he was asked struck me as odd.

[54] These examples relate to topics that were not crucial to the determination of the most important areas of dispute at the sentencing hearing. But they are examples of how Mr. Kuptana came across on Cross-Examination, and how he reacted when he perceived his account of events was being challenged.

[55] In addition, there were points in his Cross-Examination where Mr. Kuptana appeared to be grasping at straws. In denying that M.K. tried to push him off, he added that if she had tried to push him he would have had bruises on him, and that the police did not have any photographs showing bruises to his body. I found this evidence somewhat peculiar. The force that M.K. described using was not the type of the force that could reasonably be expected to leave bruises on her assailant.

[56] Mr. Kuptana also seemed to remember a lot of innocuous details about the evening, and in particular what happened when they returned to the house. He described in detail his spouse going to their bedroom; his spouse going to the bathroom; M.K. going to the bathroom; and himself going to the bathroom, all of this over a period of about fifteen minutes. He was adamant he remembered who went where and in what order.

[57] When he was asked on Cross-Examination how he knew where people went, he said that from the living room area, he could tell, by the sound, when people were going inside the bathroom and when they were going inside a bedroom. And he seemed quite sure about who went where when.

[58] In the context of this case, nothing turns on who went to the bathroom or bedrooms or in what order. But I found the progression of Mr. Kuptana's evidence, as he perceived that some of his assertions were being challenged, very telling. As more questions were being asked, he claimed to be very sure about these innocuous details, and offered additional reasons for why he was so sure about these things.

[59] Mr. Kuptana’s counsel made the point in submissions that Mr. Kuptana’s testimony was precise. I found that it was in fact a little too precise, especially

about things that were minor details of an evening that had been, up to that point, uneventful. I found the level of detail in his recollection surprising and suspicious.

[60] Those are all examples of things that, taken individually, may not have much of an impact on my assessment of Mr. Kuptana's credibility. But cumulatively, they suggested to me that Mr. Kuptana was tailoring his evidence, trying to make it better and more persuasive, instead of simply recounting events that he actually remembered.

[61] Quite apart from my concerns about those somewhat peripheral aspects of his evidence, there were problems in his evidence on topics much more directly connected to the facts in issue. In particular, there were serious problems with his account of his interaction with M.K. when he went into her bedroom.

[62] In his Examination in Chief, when he was describing peeking into M.K.'s room after he came out of the bathroom, Mr. Kuptana's counsel asked him whether he made eye contact with M.K. Mr. Kuptana's answer was "I can't remember but I think I did".

[63] When he was confronted on Cross-Examination about the lack of verbal communication between them before the sexual activity started, Mr. Kuptana acknowledged there was no verbal communication, but he was insistent that their communication took place through their eye contact. He referred four times to eye contact having been the way they communicated after he peeked in her room. This is a major inconsistency on a central topic: Mr. Kuptana went from "not remembering" and "thinking" they had eye contact to being very firm that they made eye contact and that was how they communicated.

[64] Mr. Kuptana was also somewhat inconsistent in his evidence about how exactly he came to be in the room. He alternated between saying he "peeked" into the room and saying he "walked" into the room. His counsel argued that perhaps Mr. Kuptana was using those words interchangeably and that to him, they mean the same thing.

[65] I accept that this could be the case, especially considering that English is not Mr. Kuptana's first language. But Mr. Kuptana himself did not say he was using the words interchangeably. When pressed, he maintained that he peeked into the room. When reminded he had earlier said that he walked into the room, he did not say that he was using the two words interchangeably or that they meant the same thing to him. Instead he became defensive and accused Crown counsel of putting words in his mouth:

> Q. I'm going to suggest to you that you in fact went in the room and took her clothes off, took her underwear and pants off. What do you say to that?
> A. No, I don't agree with that. When I walked into the room she had no pants on and no panties on. She was laying on the bed and he put her legs up in the air.
> Q. Well, that's something interesting you just told us there. You said when you walked into the room. I thought you peeked in?
> A. Yeah. That's what I mean. I peeked in.
> Q. Peeked in or walked in?
> A. Peeked in.
> Q. You just told me you walked in - -
> A. You're just putting words in my mouth. I said I peeked in.
> Q. Those in fact are your words sir. So did you walk into the room - -
> A. I peeked in. Yeah. I peaked in the room there.
> Q. And do you think you did this or do you know - -
> A. No, I know I did.
>
> *Excerpt of Sentencing Hearing (Evidence of Matthew James Kuptana)*, p.49 line 25 to p.50, line 19.

[66] Finally, I found Mr. Kuptana's version of events implausible. M.K. is his niece. She was staying with Mr. Kuptana and his wife. The three of them had spent a normal evening socializing together. No one was grossly intoxicated. According to Mr. Kuptana's version, he looked into her room and, without any conversation or preliminaries whatsoever, after a moment of eye contact, she got into this very provocative pose, lifting both her legs up and showing him her genitals, to invite him, her uncle, to have sex with her, with her aunt across the hallway. More than that, after he was putting his shorts back on afterwards, she changed positions and adopted another provocative pose, presumably to invite him to continue.

[67] I find Mr. Kuptana's description of these events implausible and bordering on the grotesque. This is especially so when I consider M.K.'s evidence, and how she appeared and reacted when answering questions about what happened. Although the specific gestures attributed to her by Mr. Kuptana were not put to her on Cross-Examination and she did not have an opportunity to respond to those specifics, her reactions to the suggestion that she consented to this appeared to me to be genuine shock.

[68] A witness' evidence must not be assessed in isolation. It must be assessed in the context of all of the evidence. In this case, my assessment that Mr. Kuptana's evidence was not credible or reliable was bolstered by my assessment of M.K.'s testimony, which I found very compelling.

[69] M.K. evidence's was not perfect. There were things that she did not remember. On a few points, counsel referred her to the statement she gave to police and after having refreshed her memory, she confirmed certain details that she had not remembered at first. But none of those differences pertained to what happened in the bedroom. The areas where there were inconsistencies were for the most part peripheral and of little significance.

[70] For example, in her statement to police, she said that when she returned to the Kuptana residence the day after she was assaulted, everyone was sleeping. In Cross-Examination she was asked how she knew this. She answered that she saw Mr. Kuptana sleeping on the couch. For the others, she acknowledged that she did not go into their rooms and did not actually see them sleeping.

[71] Mr. Kuptana's counsel suggested on Cross-Examination that on this point, M.K. was not being truthful when she spoke to police. In my view that is making way too much of this aspect of her statement and of her trial testimony. There is no indication that she was asked, during the statement, if she actually checked the rooms and saw her aunt or her cousin asleep. My interpretation of the evidence is that she assumed that everyone was asleep because she did not see anyone up in the house. That is not an unreasonable assumption to make. I do not find this aspect of the evidence has any impact on M.K.'s credibility or the reliability of her evidence on other points.

[72] Similarly, when M.K. was cross-examined about returning to the Kuptana house the following morning, Defence counsel suggested that her luggage was still at the other house where she initially planned to stay during her visit to Inuvik. She answered that her luggage was at the Kuptana house, because she had taken it there once it was decided she would not be at the other house. M.K. acknowledged that she did not mention the move of her luggage in her statement to police. Again, there is no evidence that she was asked about this during her statement so I find this aspect of the evidence of no significance.

[73] It was suggested to M.K. that she saw various people that day, and that she could have told someone about this before she told her friend Diane. She agreed that there were others she could have told. I do not find the timing of the disclosure significant in this case, and I draw no adverse inference from it.

[74] Although the doctrine of recent complaint has been abolished for many years, it perhaps bears repeating that our law now recognizes that this aspect of the law of sexual assault, as many others, was rooted in myths and stereotypes about

how "true victims" of sexual assault victims would necessarily react. The abrogation of the doctrine of recent complaint and clear pronouncements by the Supreme Court of Canada make it clear that under our law, delayed disclosure does not in and of itself make a sexual assault complainant less credible. There are, of course, circumstances where the timing of disclosure may be relevant to the assessment of a complainant's credibility. But on its own, it means nothing. As we routinely tell juries, there is no rule in life or in law about how a sexual assault victim or a victim of trauma will react. *R v D.(D.)*, 2000 SCC 43, para 65.

[75] I also want to address the issue of M.K.'s motive to fabricate. The theory advanced by Defence was that M.K. falsely accused Mr. Kuptana of having sexually assaulted her as a form of "pre-emptive strike" to ensure that she would not get into trouble with her aunt if she found out that M.K. and Mr. Kuptana had sexual contact that night.

[76] The problem with that theory is that there is no evidentiary basis for it. There is no evidence whatsoever that M.K.'s aunt found out, or was going to find out, about what happened. If M.K.'s goal was to protect her relationship with her aunt, accusing her uncle of sexual assault would not be the way to achieve it. Under the circumstances, I found Mr. Kuptana's position about M.K.'s motive to fabricate speculative and illogical.

[77] I conclude that far from suggesting a motive to fabricate, M.K.'s relationship with her aunt actually bolsters her credibility. M.K. stood to lose a lot by making this complaint. The fact that she did despite the risks that it would destroy her relationship with her aunt supports the notion that something serious did in fact happen to her.

[78] M.K.'s demeanour during her testimony is also consistent with something serious and traumatic having happened to her. I observed her during her testimony. The Inuvik courtroom is not large and the witness box is a few feet away from where the judge sits. The emotion that M.K. showed during her evidence, in particular when she was describing the act of intercourse, appeared very genuine to me. In addition to crying, there were points where she was shaking; on two or three occasions she heaved and it appeared that she would vomit. I find it difficult to believe that she was faking this. Her reactions and emotions did not appear to me to be fabricated, which they would necessarily have to be if she had an enjoyable and consensual sexual encounter with Mr. Kuptana and was lying when she was describing it as having been forced on her.

[79] I also note that although she became quite emotionally upset at times during her evidence, M.K. was not argumentative or defensive in her testimony. She readily acknowledged when she did not remember something. When she was asked to review her statement to police she acknowledged what she said in the statement. She made no attempt to justify or rationalize differences between her testimony and her statement.

[80] Counsel suggested to M.K. at several points during Cross-Examination that she wanted to have sex with Mr. Kuptana. She maintained she was forced. She was not shaken on this point.

[81] In deciding that M.K.'s evidence on lack of consent was not shaken on Cross-Examination, I considered carefully her answer to the last question on Cross-Examination, referred to above at Paragraph 26. I do not find that, in her answer to that last question, M.K. resiled from her earlier answers that she did not want to have sex with Mr. Kuptana. Something was suggested to her and she answered she did not recall that. She did not agree with the suggestion. That is consistent with her overall version of events that the sexual contact was non-consensual. On the whole, I found that M.K. was unshaken in her assertion that she did not consent to the sexual contact with Mr. Kuptana.

[82] M.K. acknowledged that she did not kick or scream during the sexual assault. She said she tried to push him off but was not strong enough and eventually gave up. This makes sense given their differences in size. I also do not find it difficult to understand that she did not scream, under the circumstances. Again, the suggestion that anyone being sexually assaulted would react by kicking and screaming is based on the stereotypical assumption that everyone undergoing a traumatic event will necessarily react in the same way.

[83] Defence counsel pointed out that there were several things that M.K. did not remember. I do not find this surprising given the passage of time. As I mentioned in my analysis of Mr. Kuptana’s evidence, under the circumstances, I find his level of precision far more suspect than M.K.’s inability to recall things like what day of the week she arrived in Inuvik; what kind of top she was wearing when she went to bed; whether Mr. Kuptana touched her anywhere else on her body, or with another part of his body, while she was being subjected to forced intercourse; how much she had to drink that night.

[84] Defence counsel noted that the Crown did not call any other witnesses, that there was no corroboration of M.K.’s version, no forensic evidence, and no

evidence of her demeanour when she disclosed these events to her friend Diane or when she gave her statement to police.

[85] Corroboration is not required in law. In some cases the absence of confirmatory evidence may give rise to a reasonable doubt. But I do not find this to be the case here. M.K.'s evidence was strong enough and compelling enough to satisfy me beyond a reasonable doubt that things unfolded as she described.

[86] In summary, I found M.K.'s evidence convincing and compelling. I concluded that Mr. Kuptana had forced sexual intercourse with her that night in the manner that she described, and that he knew she was not consenting.

[87] However, as I said in my oral ruling, I was left with a reasonable doubt about whether M.K. went to sleep wearing clothes on the lower part of her body. M.K. conceded on Cross-Examination that it was possible that she did not put her leggings and underwear back on after she went to the bathroom before going to sleep. To the extent that the removal of her clothing by Mr. Kuptana could be characterized as an aggravating fact, I concluded that this fact had not been proven beyond a reasonable doubt.

3. Additional Comments

[88] I will now briefly return to some of the other issues that arose during the hearing.

[89] As noted above at Paragraph 33, in law, a guilty plea constitutes the admission, by the accused, of the essential elements of the offence. It relieves the Crown from the burden of proving them. It is a serious step that has meaningful consequences.

[90] It is precisely because of the importance of that step that Section 606(1.1) of the *Criminal Code* requires the Court to satisfy itself of certain things before accepting a guilty plea. The Court must satisfy itself that the plea is voluntary, and that the person offering it fully understands its consequences. Specifically, the Court has to be satisfied that the person offering the plea understands that the plea is admission of the essential elements of the offence. *Criminal Code*, s. 606(1.1)(b)(i).

[91] Denying an essential element of the offence at the sentencing hearing stage means resiling from the formal admission that the guilty plea represents. That contradiction can give rise to an adverse inference, particularly when there is no

explanation for it. Mr. Kuptana offered no such explanation in his testimony at the sentencing hearing.

[92] Moreover, several months ago, Mr. Kuptana applied to have his guilty plea struck and testified on that application. In that testimony, he did not give any indication that he was not admitting an essential element of the offence. The basis for his application was that he was confused at the time he entered his plea because he was grieving. He confirmed in that testimony that his plea was fully informed and that he understood its consequences. *R v Kuptana*, *supra*, pp. 8 to 13.

[93] It is well established in law that not having intended to admit an essential element of the offence or having a defence to the charge are among the grounds that can be raised when applying to strike a guilty plea. *Adgey v The Queen* [1975] 2 S.C.R. 426; *R v. K(S)* [1995] O.J. No.1627 (Ont. CA). Given this, one would expect that a person attempting to have a guilty plea struck and who claims to have a defence to the charge would put this forward as part of the grounds for the application to strike the plea.

[94] While there may be some strategic reasons not to reveal the particulars of the defence at that stage, it seems to me that there are also very real risks in holding back.

[95] The first is that if the application to strike the plea fails, as it did in this case, protestations of innocence made for the first time at the sentencing hearing stage may be viewed with more skepticism than might otherwise be the case.

[96] The second risk is that not putting the best case forward at the time of the application to strike the plea can be expected to reduce the chances of success of that application. And if the application fails, the person charged faces a sentencing hearing, not a trial. As already noted, a sentencing hearing does not contemplate the same procedural and evidentiary safeguards that a trial does. Sections 723 and 724 of the *Criminal Code* make that very clear. At a sentencing hearing, the presiding judge has considerable discretion to decide what information can be relied on and in what form it can be presented. In this case the Crown did not attempt to rely on the relaxed rules of evidence. It did not seek to present information to the Court otherwise than by in-Court testimony. But it could have. And it would have been within the Court's discretion to accept evidence presented through other means.

[97] Finally, at the hearing, I invited submissions from counsel about what should happen if I concluded that an essential element of the offence had not been

proven to the requisite degree. In answer to that question, counsel referred to various possibilities in their submissions (that the matter could be remitted to trial, that a judicial stay of proceedings could be entered, that an acquittal could be entered). But the submissions on this point were not particularly detailed and no one referred me to any caselaw. As it turned out, given my findings of fact, the issue did not arise. I think it is better left to be decided in a case where it actually arises, and with the benefit of full submissions from counsel.

V) CONCLUSION

[98] These were my reasons for concluding that Mr. Kuptana sexually assaulted M.K. in the manner that she described in her testimony. Crown and Defence agreed that on the basis of that version of events, this was a major sexual assault within the

meaning of *R v Arcand*, 2010 ABCA 363 and *R v A.J.P.J.*, 2011 NWTCA 2. In sentencing Mr. Kuptana, I followed the principles outlined in those cases.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
17th day of February, 2017

Counsel for the Applicant: Alexander Godfrey
Counsel for the Respondent: Jay Bran

S-1-CR-2015-000 118

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

MATTHEW JAMES KUPTANA

Publication Ban: Restriction on Publication: By Court Order, there is a ban on publishing information that may identify the person/persons described in this judgment as the complainant/witness. See the *Criminal Code*, s. 486.4.

MEMORANDUM OF JUDGMENT
(SUPPLEMENTAL REASONS FOLLOWING SENTENCING HEARING) OF
THE HONOURABLE JUSTICE
L.A. CHARBONNEAU