*R v Tsetta*, 2019 NWTSC 35 S-1-CR-2018-000002

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**PETER CHARLIE TSETTA**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Transcript of the Decision by Honourable Justice L.A. Charbonneau, sitting in Yellowknife in the Northwest Territories, on the 9th day of August, 2019.**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**APPEARANCES:**

A. Piché: Counsel for the Crown

E. McIntyre: Counsel for the Defence

**--------------------------------------------------------------------------**

Charges under s. 271, 279(2) of the Criminal Code of Canada

**There is a ban on the publication, broadcast or transmission of any information that could identify the complainants pursuant to s. 486.4 of the Criminal Code.**

**INITIALS USED TO PROTECT THE IDENTITY OF THE PARTIES AT THE**

DIRECTION OF THE PRESIDING JUDGE

**I N D E X**

 **PAGE**

**REASONS FOR JUDGMENT** 3

**RULINGS, REASONS**

Order re ban on publication, s. 486.4 2

Order re using initials of complainants 2

THE COURT: Now, we are here this morning for me to deliver my decision on Mr. Tsetta's case. As counsel know, this was a trial that lasted over a number of days. There were extensive submissions made and there are a lot of issues that I have to address in order to discharge my duty to provide full reasons for my decision. And because of that, I will have to speak for quite a while this morning.

I expect it's going to take me around an hour and a half, actually, to say all the things I feel I must say. And because I don't want to leave those who are interested in this case, Mr. Tsetta and others, wondering for that hour and a half, what I'm going to I am going to give my decision now, just so that everyone knows where I'm going.

And so I will say now, Mr. Tsetta, that I am finding you guilty of sexual assault of C. G., guilty of unlawful confinement of C.G., and guilty of sexual assault of M. A. I am finding you not guilty of the unlawful confinement of M. A.

Now, I can start now, counsel. If anyone needs -- unless you would like a moment with your client, Mr. McIntyre?

E. MCINTYRE: Could I have a minute to --

THE COURT: Yes.

E. MCINTYRE: -- speak with my client before you begin?

THE COURT: We'll stand down for 10 or 15 minutes, whatever is needed.

THE CLERK: All rise [indiscernible].

(ADJOURNMENT)

THE CLERK: All rise. Supreme Court is now reconvened. You may be seated.

THE COURT: Did you have enough time, Mr. McIntyre?

E. MCINTYRE: I did. We're ready to proceed.

THE COURT: Thank you. Before I start, I'm going to just remind everyone that there is a publication ban in effect that prohibits the publication or broadcast of any information that could identify either victims in this matter. I am ordering a transcript of my decision today. It will be submitted to me for review before it's filed and it may be edited.

I'm directing that initials be used for both complainants’ names, although I will refer to them by name in this decision. And the publication ban under s. 486.4 of the *Code* should be noted on the front page. I'm going to refer to a few cases. I will not give the citations but, Madame Clerk, I will give you a list of the citations and I am directing that they be incorporated in the transcript.

Now, as I said earlier, this is going to take me some time to get through. I would invite counsel to interrupt me if anyone has a need for a break at any point because I'm going to try to get through this in one stretch, but if there is a need to take a break, I am certainly prepared to do that.

Peter Tsetta faces charges of sexual assault and unlawful confinement of M. A. on May 14th, 2017, and sexual assault and unlawful confinement of C. G. on June 17th, 2017. I am not going to refer to all of the legal principles that apply in this case in the same way that I would in a jury charge, obviously. I have instructed myself about those principles and I have applied them. But before I get into my analysis of the evidence, I do want to underscore some of those principles in a summary way.

First, obviously, the standard of proof is on the Crown, and it is a standard of proof beyond a reasonable doubt and there are certain consequences that flow from that. Because this is a case about facts and credibility, the law about the interplay of reasonable doubt and credibility assessment is of central importance. There is a lot of law on this issue.

There is the well-known Supreme Court of Canada decision in *R. v. W (D),* [1991] 1 S.C.R. 742, frequently referred to in criminal cases. In that case, the Supreme Court of Canada suggested a sequential approach to the examination of evidence. This had led to some issues and confusion I will not get into now, but it has been the subject of much commentary.

The recent Alberta Court of Appeal decision in *R. v. Ryon*, 2019 ABCA 36, addressed some of these issues. I found this to be a very helpful case, because it goes back to basics and restates fundamental core principles and the objectives of this area of the law.

There are a number of implications and practical consequences of proof beyond a reasonable doubt applying to the issue of credibility.

What I'm about to say is not intended to be an exhaustive review of those principles, but I do want to underscore a few. They are not new, but they are important to keep in mind in every case.

One, the decision-making process in a criminal trial must not be approached as a credibility contest between Crown witnesses and defence witnesses.

It is not a question of which version I prefer. It may well be that I am unable to decide what or who to believe. In particular, when examining exculpatory evidence, as was explained in *Ryon* at paragraph 38, aside from confident acceptance or confident rejection of exculpatory evidence, there is a third alternative. The trier of fact may simply be left unsure. If that is the case, there is a reasonable doubt and the accused must be found not guilty.

Two, even if the evidence of the accused is outright rejected, that cannot be used to bolster the Crown's case or be taken as proof of guilt. In other words, if the defence evidence is rejected, I must go to the next step which is to consider whether the evidence that I do believe persuades me beyond a reasonable doubt of Mr. Tsetta's guilt. If not, I must find him not guilty even if I disbelieved him.

Three, the instruction proposed in *W(D)* has often been interpreted to mean that the accused's testimony must be assessed first. Some suggest that this is the best way to avoid reversing the burden of proof. But that approach has also been criticized as suggesting that the analysis of the accused's testimony can be done in a vacuum, somewhat artificially and in isolation from the rest of the evidence.

Justice Martin refers to this in *Ryon* at paragraphs 41 to 47 and demonstrates how this could lead to absurd results in some cases. I agree with him. The accused's evidence must be examined in the context of the whole of the evidence. There is no magic in assessing it first and sometimes that can lead to an incomplete analysis. What is important to keep in mind always is that the burden of proof is on the Crown, that the accused does not have to prove anything, and that, if there is any reasonable doubt about the accused's guilt that arises from credibility issues, the accused must be found not guilty.

There are other important principles I have kept in mind. The assessment of the witness' credibility or reliability is not an all-or-nothing exercise. I may accept some, all, or none of the witnesses' evidence. Decisions in criminal cases must be based on the evidence and applicable legal principles, never on sympathy for anyone or prejudice against anyone. It is very important to apply an even level of scrutiny when assessing the evidence of different witnesses.

In addition, because I have dismissed the Crown's similar fact application, the Crown's case on C. G.'s allegations cannot be used to bolster the Crown's case on M. A.'s allegations and vice versa.

 I have also reminded myself that, because the burden of proof is on the Crown and never shifts from the Crown, an accused does not have to prove anything. In particular, an accused does not have to prove that a complainant has a motive to fabricate the allegations . The accused does not have to explain away the case against him. He has no burden to prove anything.

Finally, there were many elements of prejudicial evidence that came out during this trial. This evidence needed to be adduced because it was intertwined in aspects of the narrative. For example, there was evidence about Mr. Tsetta's reputation, about an earlier crime of violence he had committed against Ms. A.; about the fact that, at one point, he faced other charges, was under investigation for similar allegations. Given how the trial unfolded, Crown and Defence recognized that this evidence had to come out.

This evidence cannot be used as evidence of propensity that Mr. Tsetta is the type of person to commit these types of offences or crimes in general and that this makes it more likely that he committed the offences he is now on trial for. He is on trial for charges he faces here, not anything else. I have been cautious to use the prejudicial evidence only to assist in understanding aspects of the narrative, provide context for some of the conversations that took place, for example, and not for any improper purpose.

I have reviewed the transcripts of all of the evidence and I have considered it all. I'm not going to refer to it all. I will start with a general overview of the Crown and Defence cases and then go into more specific aspects of the evidence as I go through my analysis.

First, the Crown's case on the allegations regarding C. G. In support of the allegations on those counts, the Crown called her, her spouse, Dion Ouellette, the DNA expert, Jane Neufeld, and Constable Gossman. Ms. G. testified that on the morning of June 17th, she had been drinking at home with Mr. Ouellette. They ran out of alcohol and she wanted to continue drinking, and she went out and walked around the downtown core in Yellowknife.

At the time, this was something she did regularly. There was a group of people referred to by some of the witnesses as "street drinkers" or "street friends" who would hang out and walk around the downtown Yellowknife core and drink. She ran into Mr. Tsetta. She said they had been good friends for many years and hung out with him on the streets. He suggested that they go to his place to continue drinking. They went down to his house in Ndilǫ by taxi.

Once they got to his house, they continued drinking. She blacked out. Her next memory is him on top of her, raping her. She said this went on for some time. She tried to fight him but was not able to get him off. At one point, she got up and tried to get away and get out but the door was locked and she could not open it. He dragged her back to the bed and continued sexually assaulting her. He forced her to give him oral sex. Eventually, he agreed to let her leave.

She said he reached up to the top of the door. She heard a click and the door opened. She believes there was a latch or other form of locking mechanism on top of the door frame that was keeping it locked and that Mr. Tsetta unlocked when he reached up.

Ms. G. left on foot and started walking home. She was not entirely sure if she walked all the way home or if she got a ride from someone at some point. Once she got home, Mr. Ouellette questioned her as to where she had been. She had a conversation with him but did not tell him what happened. She just wanted to go to sleep.

The next day, when she woke up, she was sore in her genital area. She told Mr. Ouellette what had happened and they called the police. She was taken to hospital, and a sexual assault examination was done.

Mr. Ouellette testified that Ms. G. had gone out drinking that day. He became concerned because she did not return at the time she normally would. He described his observations of her when she returned home that night, and the conversation they had. He also testified about what happened the next morning and how her disclosure came to light.

Constable Gossman testified about her dealings with Ms. G. that day and her demeanour at the hospital and during the taking of the statement.

Jane Neufeld testified about the results of the DNA testing and the reports she prepared. No male DNA was found on the exhibits that could be compared to Mr. Tsetta's. She explained the various factors that have an impact on whether DNA can be identified through forensic examination and testing.

Aside from the testimony of these witnesses, there were admissions about a number of matters, including the injuries observed on Ms. G. during the examination at the hospital and the particulars of what she said to the emergency call operator when she reported the matter shortly before noon on June 18th.

Constable Kristy Costache testified about Mr. Tsetta's arrest, which occurred on June 19th. She explained that she and her partner were tasked with conducting a curfew check at his house and were instructed to arrest him for sexual assault if he was home. They found Mr. Tsetta at home and he was arrested.

Constable Costache testified about things Mr. Tsetta said upon being told he was under arrest. He said, “what is forcible confinement,” or words to that effect and said he was already before the courts for that. He also asked her who these new charges were in relation to. Constable Costache said that he appeared confused. This evidence was led by Defence in cross-examination of Constable Costache. The Crown took issue with the admissibility of what Mr. Tsetta said at the time of his arrest and I will address this issue later in this ruling.

Turning next to the allegations regarding M. A., M. A. died in December 2018. I ruled the statement she gave to police on July 13th, 2017, admissible for its truth.

In that statement, Ms. A. says she was drinking on the day in question and bumped into Mr. Tsetta downtown.

She said he invited her and another woman, whom she did not know, to go back to his place to continue drinking. They did that and went to his house and drank there. She says she blacked out and woke up on Mr. Tsetta's bed. He was on top of her, having forced intercourse with her. She screamed, hoping to get the attention of a friend who lives nearby. Then there was a knock at the door and Mr. Tsetta placed his hand on her mouth to prevent her from screaming.

Mr. Tsetta got off her and seemed to doze off. She gathered her clothes. He woke up. She asked him to let her leave and promised she would not tell anyone about what happened. He let her go.

Ms. A. had no recollection of the other woman leaving Mr. Tsetta's house, but she was not there when she woke up to the sexual assault.

Ms. A. went from Mr. Tsetta's house to the Vital Abel Boarding Home. She spoke to the night receptionist. He called the police but she left before they arrived.

She went to her friend, Nora Martin's. Ms. Martin also lives in Ndilǫ.

In addition to presenting Ms. A.'s statement, the Crown called a number of witnesses.

Steven Mansley was working at the Vital Abel Boarding Home that night. He testified that a woman came to the door. He thought this was around 4:30 a.m. She came to the door, either knocked or used the buzzer, but got his attention. He did not know her.

She told him she'd been sexually assaulted. She pointed the direction where it happened. She appeared distressed, so he let her inside the building. He called the police. She told him she was a diabetic and asked him for some juice, so he gave her some. The woman decided to leave before the police arrived. He tried to talk her into waiting for the police but she left.

He watched her for as long as he could to make sure no one was following her. She walked in between the two schools that are in the vicinity and are shown on some of the maps marked as exhibits.

Mr. Mansley described his observations of Ms. A.'s emotional state and her state of sobriety. He said she was visibly upset and sobbing.

As for her state of sobriety, he said he didn't smell alcohol on her. Her speech and demeanour did not suggest excessive drinking. He acknowledged he told the police that she had been drinking for sure but now thinks, in hindsight, he may have confused signs of intoxication with her having had low blood sugar levels.

He was cross-examined about this and challenged about his current thinking that maybe Ms. A. was not drinking that night. He was asked what he observed at the time that caused him, initially, to tell police that she had been drinking for sure. Mr. Mansley could not remember but he maintained that she was not highly intoxicated. She was not slurring her words. She was coherent and she was not staggering.

Nora Martin testified that M. A. was her “drinking buddy”. She recalled two nights during the spring of 2017 when Ms. A. came to her door in the middle of the night. She said both times she was sober and Ms. A. was half cut. On one of those occasions, Ms. A. told her she was coming from Mr. Tsetta's house. Ms. Martin was upset about this because Mr. Tsetta had physically hurt Ms. A. in the past. Ms. Martin said that Ms. A. told her Mr. Tsetta did not do anything to her. The next morning she left Ms. Martin's house without having breakfast.

Crown also called several police officers who were involved in this investigation. Constable Sturgeon responded to the call, which came in around 4:00 a.m. After attending the boarding home and speaking with Mr. Mansley, he made patrols in Ndilǫ, but was unable to find Ms. A.

Constable Hemeon saw Ms. A. on a few occasions after the night of the initial call. He first saw her on May 20th sitting on the steps of the Safe Harbour Shelter. She was intoxicated.

He asked her if she had given a statement. She provided some information to him at that time about what happened including the identity of the perpetrator. She became visibly upset and started crying when she recounted the details. The details of what she told him are not admissible for their truth, but the evidence about her demeanour is. Constable Hemeon told Ms. A. it was important that she provide a statement and left it at that.

Because she was intoxicated, he did not attempt to take a statement from her.

He saw her again on May 28th, walking around downtown Yellowknife. She was sober. He asked her if she had provided a statement and she said she had not. He again expressed that it was important that she did, and she agreed to go to the detachment on the condition that she could speak to a female officer.

He gave her a ride to the detachment. There was a female officer on duty that day, but she was busy dealing with something else. After about 10 minutes, Ms. A. became impatient and left. Both Constable Hemeon and another officer, Corporal Fage, tried to convince her to stay, but she left.

Corporal Fage testified, that he was on shift on the night that the complaint was made. He made patrols in Ndilǫ to try to find the complainant when he learned she had left the boarding home. He testified about trying to convince M.A. not to leave the detachment on May 28th, but after she left that day, he felt Ms. A. had made it clear she would not cooperate with police and wanted to keep the matter private, so he told the lead officer on the file that the file could be closed. When the file was eventually re-opened, it was not Corporal Fage's decision. By that point, his understanding was that the matter was being taken over by the general investigation section.

Constable Derek Young is with the general investigation section. In July 2017, he was asked to attempt to locate Ms. A. He met her for the first time on July 12th at the women's shelter. She was sober. He explained why he was there and asked her if she was willing to provide a statement to police. An appointment was scheduled for later that day at the detachment, but she did not attend.

He spoke with her again the next day. He found her at the day shelter. She was again sober. She was apologetic about having missed the appointment from the previous day. He offered her a ride to the detachment. Once there, another officer was tasked with taking the statement, so he had no further dealings with Ms. A.

Constable Alward testified about taking the statement from Ms. A. She testified that their entire interaction was recorded. Ms. A. was sober. Initially, she seemed a bit apprehensive and anxious, but then became more at ease. They had no trouble communicating. Constable Alward testified that Ms. A., at times, became upset during the statement. In particular, she was crying towards the end when recounting some of the details of the event.

Constable Alward said she saw no need at the time for this statement to be a sworn KGB-type statement. She had no information suggesting that this witness may die before the end of the proceedings and she was not aware, until it was disclosed in the statement, that Ms. A. and Mr. Tsetta had, in the past, been in a domestic relationship.

All the officers who had contact with Ms. A. testified that to the extent they were aware of other investigations involving Mr. Tsetta, they did not say anything about those to Ms. A., and they did not use these other matters to try to persuade her to give a statement.

Aside from the testimonial evidence, a number of maps were marked by witnesses and filed as exhibits. These are basically maps of Ndilǫ that show the location of the Vital Abel Boarding House, Ms. Martin's house, and Mr. Tsetta's house.

Turning now to the defence case, Mr. Tsetta testified in his defence and he also called his sister Shirley Tsetta.

Ms. Tsetta testified about things she did to secure Mr. Tsetta's house after his arrest and about photographs she took inside the residence and outside the residence in September 2018 as well as while the trial was going on in May 2019. These photos were made exhibits. They showed the layout of the house and the furniture. There are pictures of the door, including the top of the door frame. The photos show that there is not a latch on the top of the doorjamb.

Ms. Tsetta also said that she looked at the doorjamb when she took the second set of pictures and she did not notice anything unusual about it.

Mr. Tsetta acknowledged that he knew Ms. G. but said they were not close. They saw each other around the street but did not hang out much. He recalls meeting her in the downtown area in June, inviting her to come back to his place to drink, and getting to his house by cab.

He denied that any sexual contact took place. He said that they drank for a period of time at his house. He had a bottle of Private Stock wine that he had bought at the liquor store that day. They drank it all. At one point, Ms. G. became tired and needed to rest. He said she rested her head on the side of the couch and closed her eyes. He went to his bedroom and dozed off.

Sometime later, he heard her calling his name from the living room, so he got up. She asked for more alcohol, and he told her he did not have any. She asked for a cigarette, and he told her he did not have any. She wanted to go back to town to continue drinking and wanted him to come with her, but he did not want to go. He suggested that she stay and that he would walk her back to town the next morning but she did not want to do that, so she left.

Mr. Tsetta testified there was no sexual contact between them and that he did not use any force whatsoever against her. He did not see any injuries on her, and she did not complain about being sore or injured while she was with him.

With respect to Ms. A., Mr. Tsetta said he has known her for a long time. They had been friends and began a relationship around 2010. That relationship ended in 2013. It is undisputed that it ended following a serious assault he committed on her for which he was charged and sentenced to a jail term. After he returned to Yellowknife, they hung out. They were friends. They got along.

He was walking around downtown, hanging out with, in his words, "the street drinkers." He saw Ms. A. at the drop-in centre and again later that night at around 9:00 p.m. He was keeping track of time because he was on conditions and had a curfew. He had to be in his house by 10:00. He told her he was going to go home and drink, and she said she would go with him. He said no one else went with them.

They took a cab to his house. Once they got to his place, they sat on the couch and drank some Private Stock wine. He said he had a full bottle of Private Stock and another that was three-quarters full. They finished the one that was three-quarter full and opened the other one.

By the time Ms. A. left, he said there was less than half of the second bottle left. He thought they drank for about four hours and he said they were both high.

At one point, Ms. A. noticed a bag on the floor near the couch. She asked him whose it was, and he told her it was his sister's, who sometimes stays over. Ms. A. opened the bag, saw that there were women's clothes in it and got very upset, started to swear at him, telling him that this bag was not his sister's, but was "some fucking bitch's."

He tried to tell her again the clothes were his sister’s but she kept getting more angry and swearing at him. He said they argued for about 10 minutes, and, eventually, he had enough. He told her to leave. He grabbed her by the shoulders and pushed her out the door. He said she kicked at the door from the outside and that was the end of it.

I will not repeat what I have said already about the principles I must apply in approaching this evidence, other than to say that if I believe Mr. Tsetta, or if his evidence or the evidence of his sister leaves me with a reasonable doubt about his guilt, I must find him not guilty. I will deal with his evidence first, keeping in mind that it must be assessed, as I've already said, in the context of the whole of the evidence.

Mr. Tsetta has a criminal record. It can only be used to assess his credibility. In this case, I did not find the record to be a factor of any significance in assessing his credibility, so I will say nothing further about it.

I have serious concerns about Mr. Tsetta's evidence, about some issues that I find, in the context of this case, important. While he answered many questions without any apparent difficulty, on other topics, always topics that were important in the context of how the trial unfolded, it seemed quite difficult to get a straight or clear answer from him.

He was cross-examined about the furniture in the house. In many cases, furniture and its placement in a house would not be important, but in this trial, it was. It was a topic that Ms. G. was challenged about on cross-examination. Among other things, she was confronted with photographs that contradicted some of her evidence about the furniture and its placement.

 She testified initially that she had a clear memory of sitting at a little kitchen table when she and Mr. Tsetta got to his house. In the pictures taken by Shirley Tsetta, there is no kitchen table. There is a smaller table, more like a coffee table, near the couches. Crown counsel asked, in cross-examination, questions about that table. Was the table ever moved? Was the furniture always in the same place as is seen in the pictures? Mr. Tsetta had considerable difficulty answering these questions. At one point, he said he moved the table with the TV on it when he watched TV. At other points, he said the furniture was always positioned the same way.

His sister had testified about having seen the table not being exactly in the same position as is seen in the photos. When Crown counsel reminded Mr. Tsetta of his sister's testimony on that point, his answer shifted again. I found his evidence on this topic confused and confusing and I found this surprising. Mr. Tsetta has lived in this house for many years. He could be expected to know where his furniture was and whether it was moved. His is a relatively small house with a limited amount of furniture.

Even more significant were his confusing and contradictory answers about the locking mechanism on the door and how it worked. Again, having lived in that house for several years, I would expect Mr. Tsetta to be very familiar with how his door locks. He explained that the locking mechanism was a little lever on the doorknob but when Crown counsel asked him to explain how this mechanism worked, whether it locked the door from the inside and from the outside or just from the outside, Mr. Tsetta's answers, again, were confusing and contradictory.

In another case, this is a detail that might not matter. But, in this case, given that Ms. G.'s evidence on this point, given the importance of the locking mechanism and whether, in fact, a person could be locked in from the inside if they did not know how to unlock the mechanism, it is an important detail. Anyone sitting through this trial would know that. Mr. Tsetta's lack of clarity and waffling on such a simple point was very striking and disturbing in the context of this case.

Another odd detail was the fact that Mr. Tsetta claimed to not remember having a conversation with Ms. G. and Mr. Ouellette about them standing up for him in court. Ms. G. and Mr. Ouellette did not remember the details of this conversation, but they both said it took place. Mr. Ouellette recalled that Mr. Tsetta approached him and Ms. G. on the street sometime before these events. He said it could have been a few months before, but not years.

He said Mr. Tsetta asked them on the street one day to come to court for him. He also recalled Mr. Tsetta telling them he was charged with sexual assault and with locking his girlfriend in the house. Mr. Ouellette said he did not get involved in the conversation.

Ms. G. also recalled the conversation involving Mr. Tsetta and Mr. Ouellette where he asked them to come to court and stand up for him. She did not remember Mr. Tsetta saying anything about locking his girlfriend up but she did remember him saying he was accused of sexual assault. She said that "he was trying to tell me to give a different date."

Whatever issues there may be about Ms. G.'s credibility or reliability as a witness, I found Mr. Ouellette to be a very straightforward witness. He was not impeached in any substantive way.

We also know from other evidence, including Mr. Tsetta's own testimony, that he was facing other charges at the time of these events. He said he had been charged in March 2017 and was on conditions, so we know he did have a court case going on that spring. I find as a fact that this conversation took place and that sometime before June 17th Mr. Tsetta asked Mr. Ouellette and Ms. G. for help in relation to a court case. Of course, to the extent that this evidence brings into light other charges he was facing and cannot be used to bolster the Crown's case through propensity reasoning.

But the fact of the conversation is important for other reasons: the most obvious is that Mr. Tsetta claims not to remember having had that conversation. When he was asked if it was possible he had that conversation with them, he said, "I wouldn't know. I don't know." When he was asked if he asked other people to help him with his case, he said, "I don't think so."

I find this claim difficult to accept. I acknowledge, as defence counsel rightly pointed out, that these events happened two years ago. Still, this is no routine or ordinary conversation. Asking someone to help with court or to stand in court for you when facing serious charges is not an ordinary day-to-day thing. It is something I would expect someone to remember.

The second reason I find this conversation interesting is that Ms. G. testified that when she and Mr. Tsetta were discussing going back to his house to drink, he told her she would be safe. That comment may, at first blush seem surprising, odd, considering she said they were good friends. But in the context of there having been this earlier conversation about charges he was facing, that comment makes a lot more sense.

A further interesting thing about the conversation is that it tends to support Ms. G.'s claim that she and Mr. Tsetta were quite good friends, which is something that Mr. Tsetta denied. He claimed they knew each other from the streets but did not hang out much. I find it more likely that Mr. Tsetta would turn to a good friend for help with his court case rather than to someone he just knows in passing. Similarly, if they were not good friends, it is also a bit odd that Mr. Tsetta would ask her, out of all the other men and women he may have seen on the streets that evening to go back to his house to share his bottle of Private Stock.

Mr. Tsetta explained that the first bottle that was consumed that day was shared by a group of people who had all chipped in, but the bottle he was taking home was one that he paid for. Ms. G. had not chipped in. Him inviting her makes more sense if they were, in fact, good friends. Again, on its own, nothing would turn on this. But I find that these are indications that Mr. Tsetta was not completely truthful in his evidence. He was downplaying his friendship with Ms. G. and he was not prepared to acknowledge he asked her to help with his court case.

Follow-up questions could have come from that, as to what kind of help he was actually hoping to get from them, actually. In that sense, not remembering the conversation was a very convenient way to avoid those questions.

The other striking thing is that Mr. Tsetta’s claimed lack of memory about this conversation, and also his lack of clarity about the basic setup in his house and how his door locks, is in sharp contrast with his extremely precise memory about certain other things; in particular, how much alcohol he had in his possession, what he had purchased, how much was consumed. He was very precise about those things for both days he testified about. Those were seemingly uneventful days from his perspective. They were days among many when he had spent time drinking with his street friends in the downtown core, chipping in to buy alcohol and sharing it.

Another aspect of his evidence that I found problematic is that, on certain topics, it took several questions before he would fully answer. One example was his evidence about Ms. G. having passed out from drinking. In his evidence in chief, he said at one point she was on the couch. She said she was tired. She leaned on the side and wanted to have a rest. He said her eyes were closed and that was when he went to his own room to lay down.

On cross-examination, it was put to him that she passed out on the couch. His answer was "I can't say if she passed out -- went to rest." He ultimately agreed with later suggestions that, yes, she was asleep and, yes, this was after drinking, but he seemed reluctant to acknowledge that she had actually passed out.

Similarly, it took a few questions to get Mr. Tsetta to acknowledge that Ms. G. was not injured when he first saw her downtown. His initial answer to the suggestion that she was not injured before going to his house was "I don't know." He eventually agreed that she did not seem injured, that he did not see in her any injury in that she did not complain about pain or being injured.

There are large portions of Mr. Tsetta's evidence that do line up with Ms. G.'s account, including the fact that they met downtown, went back to his house by cab and they continued drinking at his house, that they were alone, and that she drank to the point where she would not have the capacity to consent to sexual activity, and that she eventually fell asleep.

But as to what happened after Ms. G. passed out, I am unable to accept Mr. Tsetta's account. The combined effect of his evasiveness on certain points, his claim that he does not remember the conversation about helping him with the court case, and the contrast between his precise memory of certain innocuous details and his lack of clarity on others, leads me to the conclusion that he was not entirely truthful with the Court. I reject his evidence that there was no sexual contact with Ms. G. and his evidence does not leave me with a reasonable doubt.

I also have difficulties with his evidence in relation to what happened with Ms. A. He claimed his reason for wanting to go back to his house and drink there with her was that he was on a curfew but, on his own admission, he was also on conditions not to drink, yet it is clear he was drinking on the streets earlier that day.

His stated reason for wanting to return to his house at that particular point in the day when he ran into Ms. A. rings a bit hollow. It does not make much sense. If he was concerned about his conditions, he should have been equally concerned about breaching his no-drinking condition on the streets.

A very significant problem with Mr. Tsetta's evidence is his account of what happened with Ms. A. as to how the encounter ended.

I find that account completely implausible. Mr. Tsetta would have me believe that Ms. A., after four hours of drinking, suddenly noticed this bag on the floor, looked in it, rejected his perfectly reasonable explanation for it, and became enraged about this. Even taking into consideration that Ms. A. had been drinking, this simply makes no sense. Although Ms. A. and Mr. Tsetta had been in a relationship previously, that relationship had ended several years before. There was no talk or reconciliation, no flirting that night, nothing romantic going on between them.

Mr. Tsetta acknowledged, although again it took a few questions before he did, that he was aware of Ms. A. dating a man named Eric for a period of time. In this context, what Mr. Tsetta described, this sudden explosion of anger by Ms. A. over a bag with women's clothing in it, makes no sense.

Aside from the inherent implausibility of this account, it is also completely inconsistent with Mr. Mansley's evidence, which I accept.

The Vital Able Boarding House is very close to Mr. Tsetta's house. On Mr. Tsetta's evidence, he and Ms. A. drank continuously from when they arrived at the house up to the point where she had this sudden burst of anger and left.

They would have had consumed more than a bottle of Private Stock between the two of them and they were already drinking in town before that. If that was the case, I would have expected Ms. A. to have been far more intoxicated when she went to the boarding house than what Mr. Mansley observed.

 Even more importantly, Mr. Tsetta's account is completely at odds with Mr. Mansley's observations about Ms. A.'s emotional state.

Mr. Mansley saw someone who was distressed, crying, sobbing, not someone who was angry. In fact, she appeared so distressed to him that he broke the rules of the house and let her inside. He wouldn't have let an angry highly intoxicated person inside that building.

I have considered the inconsistencies in Mr. Mansley's evidence about his own assessment or whether Ms. A. had been drinking when he saw her. It seemed clear to me and, I think, to all of us in the courtroom that Mr. Mansley was affected by what happened that night and still is. He probably does feel a lot of sympathy for Ms. A. That is not surprising, but it is a far cry from thinking he would not do his best to be honest with the Court.

I accept his evidence about what he observed and what he did. That evidence is completely inconsistent with what Mr. Tsetta would have the Court believe happened between him and Ms. A. For this and the other reasons I have given, I do not find Mr. Tsetta's evidence credible at all, as far as what happened between him and Ms. A. and, more specifically, what happened before she left. I reject his account of this and it does not raise a reasonable doubt in my mind.

Having reached that conclusion about Mr. Tsetta's evidence, and I will address Shirley Tsetta's evidence in a moment, I must turn to the evidence presented by the Crown. Dealing first with the case involving C. G., the assessment of her evidence is crucial in deciding whether the Crown has met its onus. Without her evidence, the Crown cannot make out its case. Defence says that this evidence is simply too unreliable to base a conviction.

Her evidence, just like Mr. Tsetta's and the evidence of other witnesses, must be assessed looking at things like plausibility, internal consistencies, inconsistencies with other evidence. It must be assessed in the context of other evidence. So I will start with that other evidence.

First, the DNA evidence: Ms. Neufeld's qualifications were not challenged. She has considerable experience in this area. She was a careful witness. She never exceeded the scope of what I permitted her to give opinion evidence on. Her answers demonstrated to me that she was trying to assist the Court with this technical area, not advocate for one particular side. I found her credible and reliable and I accept her opinion evidence about these labs.

The result of the forensic evidence of the exhibits seized during the sexual assault examination do not assist the Crown. Ms. G.'s DNA was identified, not surprisingly, on some of the exhibits, but no male DNA profile was obtained from samples seized during the sexual assault examination or from her clothing. Simply put, there is no forensic evidence tying Mr. Tsetta to this offence and no semen was found providing evidence that there was ejaculation.

Ms. Neufeld was questioned about probabilities of finding semen or DNA in any given scenario and she was very cautious in answering those questions. Despite being pressed on it, she would not put numbers or percentages to it. She did agree with defence counsel's suggestion that, all other things being equal, the more sexual contact that takes place, the higher the chances of biological material being deposited. But she emphasized that there are many factors that can have an impact on whether DNA will be found.

She resisted suggestions that certain results would be expected in certain scenarios. She reiterated more than once that there are a variety of factors that have an impact on that. Ms. Neufeld acknowledged, and this is obvious, that one of the possible explanations for semen or DNA not being present is that no sexual activity took place. She also testified about other factors that can impact whether biological material will or will not be identified in these types of examinations.

Some of these do not arise in this case. For example, Mr. Tsetta testified he is not vasectomized and there was no suggestion that he is aspermic. But other factors are relevant.

Ms. Neufeld explained that urinating is one of the things that can cause the loss of biological material. We heard that Ms. G. has some bladder issues and needs to go to the bathroom frequently.

Defence argues that, given Ms. G.'s description of how many times she was sexually assaulted, the absence of forensic evidence should raise a doubt in my mind. Ms. G. thought Mr. Tsetta must have ejaculated because she felt wet in her genital area but she was not sure, nor did she know if he used a condom at any point. On the whole, I find the result of the forensic DNA testing to be a neutral factor in this case.

Next, I turn to the injuries. Ms. G. had bruising on various parts of her body, a small tear on her vulva between the labia minora and the labia majora, as well as bruising to her vagina cervix. Defence argued that the Crown cannot rely on this evidence as corroboration for legal and factual reasons.

First, the legal argument: defence argues that it would not be legally permissible to him to suggest to Ms. G. that a person other than Mr. Tsetta caused her injuries without making a s. 276 application. He further argues that he would not have had a basis to make such an application. So he says, because of this, it was incumbent on the Crown to make a *Seaboyer* application and obtain leave to ask Ms. G. if she had sexual contact with anyone else that night. Not having done so, he argues the Crown cannot rely on the injuries and, in particular, the genital injuries as corroboration.

With respect, I disagree. If, on a sexual assault case, the issue or one of the issues is the identity of the perpetrator, a question to the complainant that someone else is responsible for the assault and resulting injuries is a question about the sexual activity forming the subject matter of the charge. This can be asked without a s. 276 application being made, in my view. Surely it is permissible to suggest to a complainant that she is mistaken about the identity of the person who caused the injuries and sexually assaulted her and the circumstances that gave rise to those injuries.

Next, the factual argument: Defence argues that the injuries are unhelpful to the Crown because of the gap in Ms. G.'s memory about how she got home. Her recollection, at first, was that she walked all the way. She later had a fleeting flash of a car and possibly being picked up on her way home. She also says she has had dreams about these events and she is unsure whether she actually got picked up or whether that flash from memory is from a dream.

Defence argues that this memory gap leaves open the possibility that Ms. G. suffered her injuries after leaving Mr. Tsetta's house and, because of this, they cannot be relied on by the Crown as corroboration. Again, I disagree. These injuries are circumstantial evidence.

The Crown is entitled to ask the Court to draw the inference that this evidence supports Ms. G.'s version. I don't have to draw that inference, but I can. If, to prove an essential element of the offence, the Crown relies entirely or primarily on circumstantial evidence, then the trier of fact must exclude other reasonable explanations and be careful not to jump to conclusions too quickly before drawing the inference the Crown is asking be drawn.

The Supreme Court of Canada addressed this in *R. v. Villaroman,* 2016 SCC 33, at paragraph 30 speaking of how a jury should be instructed on this issue. The Court said:

[…] in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of ‘filling in the blanks’ by too quickly overlooking reasonable alternative inferences.

A judge sitting alone must apply the same caution. This is simply the specific operation of the requirement for proof beyond a reasonable doubt to a case that is reliant, wholly or mostly, on circumstantial evidence. But this is not a case here where the Crown relies primarily or wholly on circumstantial evidence. The Crown relies heavily on direct evidence: the evidence of Ms. G. about what happened to her.

The requirement for proof beyond a reasonable doubt applies to the elements of the offence, not to every fact and not to every individual item of evidence. There is no requirement that the trier of fact reject every possible explanation for an item of circumstantial evidence before being able to use it. The gap in Ms. G.'s memory about how she got home, of course, has to be considered as part of the overall assessment of the reliability of her evidence and of her recollection but, in my view, it is not a bar to taking into account her injuries in the assessment of this case.

The next evidence I want to turn to is the evidence of Mr. Ouellette. I found him to be an honest credible witness. He acknowledged that he and Ms. G. were chronic alcoholics and that their lifestyle at the time was not healthy. There were some inconsistencies that arose in his evidence between his trial evidence and his statement to police, but they do not cause me any concern about his credibility or his reliability as a witness.

For example, there is a discrepancy between what he told the police and what he said at trial about what time Ms. G. left their home on the morning of the events. When he was presented with this inconsistency, he explained that when he gave his statement to the police, he was upset, in a bit of a daze, which, under the circumstances, is not surprising. So I accept his evidence as credible and reliable. He explained how Ms. G. left their house in the early afternoon. They had started drinking earlier in the day. She wanted to go out and continue and he did not. So she left and, after that, he laid down and dozed off.

When he woke up at around 5:00, she had not returned and he was concerned about this but she had also, at times, gone out and not returned until the next day and he thought that maybe that would be the case this time. But she did return, he said, at around 10:30. He said she was not intoxicated like she normally would have been after a day of drinking.

She looked like she was in shock and looked lost. He asked her where she was and, at first, she said she didn't know. He pressed her and eventually she said she was in Ndilǫ. He said, "Don't tell me you were with Peter Tsetta," and she said she was.

He then said, "He'd better not have done anything to you." Mr. Ouellette was aware of rumours and allegations about Mr. Tsetta, so when Ms. G. told him she had been there, he said it raised red flags for him but, eventually, he just put Ms. G. to bed. The next morning, when she got up, he noticed a red mark on her neck and asked her about it. This was when she told him she was sore "down there" and that she thought Mr. Tsetta must have done something to her. She did not give him many details. She still seemed in shock. That is when they called the police.

In my view, the evidence of the injuries and the evidence of Mr. Ouellette are strong corroboration that something traumatic happened to Ms. G. that evening. She was not injured earlier that day and she was injured next morning. I accepted that an intoxicated person may trip, fall, bang themselves on things, and that this could explain some of the bruising, but not all the bruises and certainly not the injuries to her genital area.

Mr. Ouellette knew her well. She was not herself when she got home. Something happened to her.

Of course, the only direct evidence as to who the perpetrator was is Ms. G.'s. So it really comes down to whether I can really be sure, based on her evidence, that the person who caused these injuries was Mr. Tsetta as opposed to someone else. Ms. G. is certain it was him. My assessment of her evidence is that she is sincerely convinced of this. She is certain it was him and she was not shaken at all on that assertion in cross-examination.

She was, and is, angry about it, and is especially angry and hurt because she considered him a good friend. I will get back to some of the submissions that were made about her attitude as a witness, but for now I will say that, in my view, the central issue here is the reliability of her account, not her sincerity. And, as I understood defence's submissions, that was really the defence's primary focus. Ms. G. is sure but can I be sure?

Defence says I cannot for a number of reasons, including her conduct as a witness, problems with her memories evidenced by the gap in her memory about getting home and some of the things she told Mr. Ouellette and the police operator when she phoned the next day, her intoxication at the time of the events, inconsistencies in her evidence, and importantly, the fact that she is demonstrably wrong about certain things she was sure of.

I want to deal first with her conduct as a witness during the trial. Defence argues that aspects of how she presented suggest that she was not a careful witness, that she was cavalier about her oath and about her testimony in general.

Ms. G. said she has lived on pure hate since this happened to her and there were times during her testimony that this showed. She came across as very angry at times. She was argumentative with defence counsel, even combative at certain points, and I did have to intervene a number of times.

But even though she struggled during her evidence and lost her calm at various points, it seemed obvious to me that she was also trying very hard to control herself. At one point, she asked for a minute, because she said she needed to breathe. At another point, she asked for a break so she could take medication that calms her down. She was not always able to keep her emotions in check but, in my observations, she tried. On a few occasions, she apologized after I had to remind her not to argue with counsel and not to interrupt. And she also apologized a few times after having used swear words in answering the questions.

And she did not display only anger. She displayed a lot of hurt as well. She cried at certain points. When she was asked to look at the photographs of her injuries, her reaction was compelling. When she was asked to describe what was happening when she first regained consciousness, she became very upset.

One must be very careful when basing credibility or reliability findings on demeanour. Certainly such findings should never be based exclusively on demeanour, especially here, because if Ms. G. is sincere but mistaken about who assaulted her, all those emotions would be there and they would appear to be and be, in fact, very genuine.

So I have not used her demeanour in that way. I'm making reference to those aspects of her testimony and how she behaved as a witness because they indicate to me that she was not cavalier or careless or flippant about her evidence. It is true that, at times, she volunteered somewhat random information that was not entirely connected to questions, such as saying she might have been smoking pot and later saying she did not that day -- but she was not sure because she smoked a lot of pot back then -- or in volunteering that she was on painkillers during that period of time, but later saying that she did not take any painkillers that morning.

It is perhaps noteworthy that she also volunteered that she stabbed her common-law a week after these events and went to jail for it and various other things that happened in her life. This was in the context of her trying to recall certain timelines, such as when she talked with Ms. A. about what happened. But the point is those are not things that put her in a particularly good light. She did not strike me as someone who was trying to mislead the Court, minimize her shortcomings, or trying to make herself look good.

She admitted her drinking, blacking out, sometimes having to be escorted home. She admitted smoking crack cocaine at one point.

Counsel noted how she reacted when she was confronted with the photographs that clearly contradicted her testimony about the furniture. Counsel argued that a reasonable response would have been someone saying, “sorry, I must have been mistaken about that”. I think it is problematic to say that in the face of cross-examination, even appropriate and fair cross-examination which this was, there is a “reasonable way” to respond that we can or should expect from all witnesses.

Witnesses come to court with different backgrounds, skills, abilities, and experiences. Evidence has to be assessed taking that into account. Obviously, the standard of proof in a criminal case cannot be diluted or lowered based on a witness' life struggles, levels of education, or sophistication. But, in assessing evidence and especially the conduct of the witness, their background and experience cannot be overlooked. For someone with Ms. G.'s background, it is not realistic to expect the same conduct as a witness as what we saw, for example, from Ms. Neufeld or from the police officers who testified or even from Ms.Ouellette, who seems to be a much more even-keeled, calm person.

Ms. G., we know from the evidence, has cut back on her drinking in recent times but, at the time of these events, she drank daily; she hung out on the streets; she sometimes drank to the point of blacking out.

On the whole of the evidence, I think it is clear she has had a hard life. That does not mean her evidence should be assessed based on sympathy. It cannot be assessed on the basis of sympathy. But who she is and her background and life experience have to be taken into account when assessing the impact of her manner of testifying and her reactions to certain questions.

So I disagree, with respect, with counsel's interpretation of her behaviour as a witness as indicating that she was careless or cavalier in her evidence. As I have already said, the question to me is not whether she was sincere; the question is whether her evidence is reliable.

And I will now turn to those issues. Intoxication has an impact on memory and on reliability. It is clear that Ms. G. drank a fair bit that day. When she left her house, she was already feeling the effects of alcohol. She left her house because she wanted to continue drinking and she did so while she was out. She went home with Mr. Tsetta because she wanted to continue drinking and she admitted that. I disagree with defence that she was trying to exaggerate her state of sobriety. She acknowledged that she drank to the point of blacking out, and Mr. Tsetta actually confirmed that she actually did go to sleep in his house.

The evidence of Mr. Ouellette on this point is important though. He said that when she arrived home she was “coming down” from alcohol, not as intoxicated as he would have expected her to be coming in from a night of drinking. This supports the idea that Ms. G. was not consuming alcohol continuously and up until the time she went home. So, to the extent she was confused when she was home, I find it was not because she was highly intoxicated. It was because of something else.

Defence has also raised various inconsistencies in her account, such as what time she started drinking that morning, how long she and Mr. Tsetta drank at his house, whether she was or was not taking opiates that evening. Having carefully reviewed her testimony, I do not find those inconsistencies particularly significant. They are not surprising. They are not on topics central to what happened to her or even on the matters I would expect her to remember. In many ways, considering that she was drinking and the lifestyle she led at the time, if her account had been devoid of any inconsistencies or problem, I would find that far more troubling.

Defence, of course, has also argued that the gap in Ms. G.'s memory and her stated lack of recall as to where she was and what happened are important factors that undermine the reliability of her evidence. As I mentioned, she testified that she remembered leaving Mr. Tsetta's house, walking fast, running, trying to put as much distance between that house and her as she could. She is no longer certain she walked all the way home. She says she was in shock.

Also, there is the evidence of Mr. Ouellette that, after she returned home, he asked her where she was and at first she said she didn't know. Similarly, defence points to some of the things the next morning, to Mr. Ouellette and then to the police telephone operator, suggesting that there are serious issues with her memory of what happened.

Ms. G. testified that when she got home she did not want to tell Mr. Ouellette what had happened. She just wanted to sleep. And although that night she initially told him she did not know where she had been, she did eventually tell him she was at Peter Tsetta's. Mr. Ouellette questioned her for a while about where she had been and he himself said in cross-examination: "It probably didn't help her any, me badgering her like that."

Ms. G. maintains she knew where she had been and she eventually did tell him. On the whole, I do not find the interaction with her spouse when she got home supports the idea that she was unaware of where she had been before she got home and that there are large parts of the evening that she doesn't remember, especially considering she was not highly intoxicated when she got home.

I find that she simply did not want to tell Mr. Ouellette what happened. As she said, she did not want to deal with it. Similarly, the fact that she told Mr. Ouellette the next day "he must have done something to me" has to be taken in the overall context. It does not mean she did not know what happened to her. It could well mean that she was not yet able to tell her spouse the full story.

I have considered carefully Ms. G.'s statement to the police operator outlined in the agreed statement of facts marked as Exhibit 8. She does use words like "barely remember" in that call, but those words have to be taken in the context of everything that she said. She identified the person who did this. She identifies where it happened and she provided some detail.

Ms. G.'s allegation to the operator cannot be used to bolster the reliability of her trial testimony because repetition does not enhance reliability and prior consistent statements cannot be used for that purpose. But given the use that defence counsel invites me to make of some of the things that were said during that call, I have to take it as a whole. I have to consider the overall context of the call.

On the whole, the matter in which her disclosure came out is not determinative and, to my mind, not fatal to her reliability. We all know sexual assault disclosures happen in a variety of ways and the law is clear that we should not expect one standard reaction or one standard matter of disclosure in these matters.

I turn now to the matters that Ms. G. was certain about and are demonstrably wrong. Ms. G. testified that she remembers drinking with Mr. Tsetta sitting at a little brown kitchen table in his house. She was sure about this. The photos of the house show that there is no kitchen table here. Confronted with the photos, she said there was something wrong with the pictures; that is not how she remembers the inside of the house. Eventually, she said she was getting confused about the furniture but not about what happened to her. She is also very convinced that there was a device at the top of the door frame that prevented it from being opened from the inside.

Again, the photographs that were taken by Ms. Tsetta show that there was no such device. I have no reason to disbelieve Shirley Tsetta about taking those pictures and about not having seen anything unusual on the top of the door frame. She is Mr. Tsetta's sister and cares about him, so she is not an independent witness, but her relationship to him is no more a reason to discount her evidence than it would be to discount Mr. Ouellette's evidence because he is Ms. G.'s spouse.

As for Mr. Tsetta himself having done something to his door or to his furniture, I do have some difficulty with the notion that he would have done this in the two days between the events and his arrest.

As far as the furniture, he could not have known that it would become an issue in this case. As for the door, I find it improbable that he would, in that timeframe, have had major changes done to his door. Because of my conclusions in this regard, the admissibility of his utterance to Constable Costache becomes of no consequence, so I will not spend a lot of time on it, but I need to address it because it was raised.

Defence argued it was admissible because Mr. Tsetta's utterance showing some confusion about what he was being arrested for serves to rebut the notion that he would have done anything in the days before his arrest to, more or less, camouflage what he had done. For this proposition, defence relies on *R. v. Edgar*, 2010 ONCA 529. Crown filed *R. v. Moir*, 2017 BCSC 1006, and *R. v. Stewart*, 2016 BCSC 2490, that call into question the correctness of *Edgar.*

I note that in *Moir* and *Stewart,* one of the concerns identified was enabling an accused to put exculpatory utterances in evidence and then avoiding having to testify. That concern did not arise here, in the end, because Mr. Tsetta did testify. But I agree that the reaction of an accused at the time of arrest, generally speaking, is not necessarily probative of anything. An innocent person may express surprise or confusion at being arrested but a guilty person may pretend to be surprised or confused while fully knowing what they are being arrested for. There may be cases where an accused's reaction is probative. In short, I do not think there is a one-size-fits-all answer to this issue.

In this case, I find the evidence is admissible because defence would not have known, at the time of the trial, what conclusions I would or would not reach about the door frame and the missing table. But I also think, in the context of this trial, Mr. Tsetta's reaction at the time of his arrest does not have much probative value. His question and confusion at the time of his arrest could mean he had done nothing and did not understand why he was being arrested. It could also mean, if he did assault these two women, that he was confused about who had reported the matter.

Going back to the assessment of Ms. G.'s evidence, I conclude she was mistaken, at least in part, with respect to the furniture and the presence of a table in the kitchen that night. I also find she was mistaken about the presence of a latch on the top of the door. Defence says that this is fatal to her reliability. I disagree. The evidence is fairly clear that Ms. G. was not a regular visitor at this house. She would have no particular reason to make note of the furniture. As for the latch, an admittedly more important point, she is sure there was one that day, but she never said she saw it. What she said was that she tried to escape, the door was locked, and she could not open it. And when Mr. Tsetta let her leave, she saw his arm reach up, she heard a click, and the door opened.

This door, as clear from the picture, is no ordinary door. It is a metal door, almost industrial-looking. If it was locked from the inside, it is quite possible that Ms. G., especially in a panicked state, did not see or realize the locking mechanism was on the doorknob. The click she heard when Mr. Tsetta later unlocked the door could have come from the door being unlocked, from the door handle, and not from a latch. Mr. Tsetta could simply have had his arm up on the door as he opened it. She may have made certain assumptions, at the time, that were mistaken. I do not find this fatal to her reliability.

As I already said, in my view, the evidence establishes that something happened to her before she returned home that night. Something caused the injuries. Something caused her not to be herself, to be in shock, to appear lost, when she got home. Pointing to the gap in her memory about her return home and her level of intoxication, defence notes that her physical and emotional condition when she got home might be explained by something having happened to her after she left Mr. Tsetta's house.

But this would mean that the next day, realizing she was hurt, knowing she had been at this house, and perhaps because of what she knew about his reputation, she became mistakenly convinced that he was the one who hurt her and developed an elaborate false memory of him sexually assaulting her for hours.

The frailties and aspects of Ms. G.'s recollection of certain things and mistaken memories about furniture or mistaken assumptions she made about the locking device do not, in my view, detract from the reliability of her account of the core of what happened to her.

Her account was a compelling vivid description of being sexually assaulted for a period of time, trying to escape, not being able to open the door, being sexually assaulted again, and finally being allowed to leave. The person who she says did this is a long-time friend, someone who was very well known to her. I find that there are things that Ms. G. was mistaken or confused about, but there is a world of difference between being mistaken about those things and being mistaken about where and by whom she was sexually assaulted.

Mr. Tsetta does not have to prove anything or explain away the evidence presented by the Crown, as I have said. The onus is on the Crown.

Here, I have evidence I found compelling and convincing from her about being sexually assaulted by a man she has known for the decades. There are some frailties and problems in her evidence, but there is also evidence that corroborates her account, including Mr. Tsetta's own account about how they met that day, how they got to this house, that they drank there alone, and that she eventually passed out. As I already noted, Mr. Ouellette's evidence and her injuries offer powerful corroboration that she was assaulted as she described, that she tried to fight Mr. Tsetta off, and that it was very rough sex.

Her account was compelling, as was her reaction, when it was suggested to her at the end of the cross-examination that Mr. Tsetta did not, in fact, sexually assault her. I do not think there is any possibility that she is mistaken about who did this to her. I do not think it is possible that she has somehow mistakenly and, after the fact, attributed responsibility to Mr. Tsetta for doing this because of his reputation or because of anything anyone told her.

A reasonable doubt can arise from the gap in the evidence and there are certainly gaps in this case, but there are none that raise a reasonable doubt in my mind. And it is for those reasons that I am satisfied that the Crown has proven its case beyond a reasonable doubt on the two charges that relate to Ms. G.

Turning now to the Crown's case on the allegation involving M. A. The statement M. A. gave to Constable Alward is obviously the central and crucial piece of evidence for the charges that pertain to her. Mr. Tsetta can only be found guilty of charges against her if I conclude that that statement is sufficiently reliable to leave me sure of his guilt. At this stage, it is the ultimate reliability of the statement that must be considered. Defence argued that the statement is not sufficiently reliable to base a conviction for a number of reasons.

First, defence points out that although the statement was videotaped, Ms. A.'s face, her expression, her demeanour, are difficult to see on the video and certainly do not compare to the ability to observe a witness in a courtroom. Defence also notes this was not a sworn statement. Ms. A. was not warned about the importance of telling the truth.

These are all fair points. However, having reviewed the video, it is possible to get a sense of Ms. A.'s demeanour. Not as much as if she had been in court, obviously, but viewing the statement, one does get a sense of how she speaks and of her emotions.

At the beginning of the statement, she gives a long uninterrupted narrative of what happened without the officer leading her or needing to prompt her in any way. She acknowledges her excessive drinking right from the beginning. She gets quieter at points, emotional at others, and this is confirmed by the officer who took the statement.

There is one point where the officer is asking her about the other woman who she says was at the house with them, and Ms. A. says she took off but does not remember her leaving. The officer encourages her, at that point, to continue telling her when she does not remember something and not to make things up if she does not remember them.

Overall, the interaction suggests that Ms. A. was honest, not guessing, and not hiding things that might put her in a bad light, like the fact that she drank too much that day.

Second, defence argues that the cross-examination that took place at the preliminary hearing was not sufficient to test the statement in key areas, and that, as a result, I cannot be satisfied of its ultimate reliability.

Counsel elaborated on the areas of cross-examination that could have been pursued at the preliminary hearing, as well as those that he would have liked to have pursued at trial, for example, questions about the other woman she says went to the Tsetta house, inconsistencies about what clothes were off when she woke up to the assault, what she knew about rumours about Mr. Tsetta, how many times she had been in his home after the end of the relationship, why she did not tell Ms. Martin what happened when she went to her house that night.

I recognize that these areas could have been explored. It is more often than not a feature of cases where an out-of-court statement is admitted for its truth, that trial counsel does not have the opportunity to cross-examine the declarant.

I cannot speculate as to what the answers to certain areas of questions would have been and whether those answers would have assisted Crown or defence. I have to assess what is before me. It seems to me that what the defence invites me to do, delving into areas of cross-examination that could have been explored and, in general, assess the sufficiency of the cross-examination that took place at an earlier stage of this proceeding is not without difficulties. There are issues of style and strategy that go into decisions as to how to cross-examine.

The assessment of ultimate reliability should not be turned into an exercise in weighing or judging the quality of the cross-examination or the wisdom of the approach employed. Again, I cannot speculate, and I have to decide on the ultimate reliability of this statement based on what is before me.

The issue is whether there is enough evidence to assess the reliability of the statement. A key element in that is assessing whether there is any corroboration of the statement. Defence argues there is not and, with that, I completely disagree.

In my view, there is a substantial body of evidence that corroborates the things that Ms. A. said to Constable Alward. First of all, her account of what happened before she was at Mr. Tsetta's house is largely corroborated by Mr. Tsetta himself, that they met downtown, that they were drinking, that they took a cab to his house, that he paid for it, that they continued drinking there. There are some differences. Did he invite her or did she say she was coming? Was there another person with them at any point?

But on the basic way they met and the fact that they were at his house drinking late in the night, his evidence demonstrates that Ms. A.'s account is reliable. What she says happened after she left the house is also corroborated: That she went to the Vital Abel Boarding House and she saw a man there, that she disclosed what happened, that police were called but she got impatient and left before they arrived, that she went to Nora Martin's house. All these aspects of Ms. A.'s statements are demonstrably reliable because they are confirmed by other witnesses.

The evidence of her demeanour immediately after she left the house corroborates her statement to the police officer that something traumatic had happened to her. Mr. Mansley said Ms. A. was distressed, sobbing, upset. She either asked or agreed that police should be called. The evidence shows that Ms. A. was not someone who was particularly comfortable with police or who readily went to police. That much is clear, considering how long it took for her to actually give a statement about this.

Mr. Mansley's observations of her and her wanting the police called are consistent with something bad having happened to her.

The physical location of these various places in Ndilǫ is totally consistent with things having happened in the way Ms. A. described. Mr. Tsetta's house is a few minutes' walk from the boarding home and the boarding home is also very close to Ms. Martin's house. The direction Mr. Mansley said Ms. A. was going when she left, in between the two schools, is in the direction of Ms. Martin's house.

I have carefully considered whether and how the *res gestae* utterance to Mr. Mansley and Ms. A. pointing the direction of Mr. Tsetta's house can be considered as evidence enhancing the reliability of her statement to Constable Alward. I will include my full analysis of this in my written ruling on the admissibility of the hearsay evidence. I will not say it all here, but I will simply state what I have used the evidence for.

This is not the easiest or clearest area of law. Usually when an utterance meets the *res gestae* criteria, it is admissible for its truth. So here, it would be admissible as evidence that Ms. A. was sexually assaulted and her gesture to Mr. Mansley would be admissible as evidence that this happened in the general direction of Mr. Tsetta's house.

This does not pose a problem when the declarant does not testify and there is no other evidence from the declarant before the Court. But if the declarant does testify or, as here, another out-of-court statement from the declarant is ruled admissible, it seems on the whole of the case law that I've reviewed, the *res gestae* utterance cannot actually be used for its truth because that would offend two other evidentiary rules: The rule against self-corroboration and the rule against using prior consistent statements to bolster reliability. So I have not used Ms. A.'s utterance in either of those way.

Of course, much of Mr. Mansley's evidence would have been admissible irrespective of *res gestae*. The timing of events, his observations about Ms. A.'s demeanour, her level of intoxication, all of that is clearly admissible evidence. As for the content of the utterance, I have used it only to give context to what Ms. A. told Ms. Martin shortly after. What I mean by this is that since Ms. A. told Ms. Martin that Mr. Tsetta did not do anything, the fact that she communicated that something did happen to a different person a short time before and the circumstances when that utterance was made is important context to assess the significance of what she told Ms. Martin.

In considering the issue of ultimate reliability of Ms. A.'s statement, I have carefully considered the evidence that calls into question the reliability of her statement.

First, the effect of alcohol on her memory: she herself states she was drinking a lot and Mr. Tsetta also talked about how much they had to drink. The timeline is not totally clear, but it seems the evidence about her sobriety level when she went to the Vital Abel Boarding House is the closest in time to the events she talks about in the statement.

Mr. Mansley agreed that he told the police she had been drinking for sure, but he never described her as highly intoxicated. In his testimony at trial, he was cross-examined closely on this and he was firm that she was not highly intoxicated. She was not staggering. She was not slurring her speech. As Mr. Mansley has rethought about this, he has wondered if he mistook signs of low blood sugar level with signs of intoxication. He was honest about his thought process.

I accept his evidence that Ms. A. was not highly intoxicated by the time he saw her, which would have been shortly after she was at Mr. Tsetta's house.

I have not overlooked Ms. Martin's evidence about Ms. A. being half-cut. She also said Ms. A. smelled of alcohol. On cross-examination, she said she could tell Ms. A. had been drinking. Ms. Martin said that she and Ms. A. were “drinking buddies”, so she had seen her sober and intoxicated before.

Ms. Martin's memory of these events did not appear very clear. She said there were two times in the spring of 2017 when Ms. A. came to her house in the middle of the night. One of those times, Ms. A. said, she had been at Mr. Tsetta's. Ms. Martin appeared to have some trouble distinguishing between the two times.

That is not surprising, as these are events that, at the time, would not have been significant for her. During cross-examination, much reliance had to be placed on refreshing her memory with her police statement. So when it comes to assessing Ms. A.'s level of intoxication, I find Mr. Mansley's evidence much more reliable than Ms. Martin's.

The details Ms. A. gave in her statement about what was going on before and after the assault are corroborated and suggest that whatever her level of intoxication was, it was not to the point that she would be mistaken or be confused about being sexually assaulted.

She was coherent when she spoke to Mr. Mansley. She knew to ask him for some juice because she is a diabetic. She was not falling down drunk, confused, or disoriented. So I do not find the factor of intoxication is a cause for me to have concerns about the reliability of Ms. A.'s statement.

The second thing I have considered as potentially detracting from the reliability of the statement is Ms. Martin's evidence that Ms. A. told her Mr. Tsetta did not do anything to her. As I said already, Ms. Martin was not the most compelling of witnesses but, under the circumstances, I tend to think this is an exchange she would remember, being concerned about her friend hanging out with a man that had hurt her in the past.

Assuming she and Ms. A. did have this exchange, the exchange itself was a bit ambiguous. Ms. A. said something along the lines that Mr. Tsetta was trying to bother her. In my experience, that expression usually has sexual connotations when people use it in this jurisdiction, but Ms. Martin was clear that this was not what she understood Ms. A. to be saying.

She understood her to be saying that Mr. Tsetta did not want Ms. A. to leave or something like that, but that he did not do anything to her. Accepting that this exchange took place, does it really detract from the reliability of her later statement to Constable Alward? Is it really surprising that Ms. A. would say nothing to Ms. Martin about what had happened? Ms. Martin said she was upset at her friend for having gone to Mr. Tsetta's house because he had hurt her in the past. She was giving her a hard time about it.

I do not find it surprising at all that Ms. A. would not want, at that point, to tell her friend that Mr. Tsetta, in fact, did hurt her again. I note that, at one point in her statement to Constable Alward, Ms. A. says:

When you drink alcohol you don't care about anything, right?

That's how I was feeling. So I just took my chances going down, but I didn't think he was going to do that to me.

Ms. A. went to Mr. Tsetta's because she wanted to drink despite what he had done to her in the past. If she did so, taking her chances as she put it, and something bad did happen to her, it makes complete sense to me that she would not want to tell her friend at the very moment her friend is giving her a hard time about seeing this person. It makes perfect sense that at that point she would just want to go to sleep and leave the next day. Without having breakfast, as Ms. Martin noted.

I do not find that Ms. A.'s denial to her friend that anything had happened, taking into account the full context, detracts from the reliability of the statement she gave to police later, especially when taken into the context of her interaction with Mr. Mansley a short time before. After spending some time at the boarding home, she decided she did not want to wait for police. She was not crying and sobbing when she got to Ms. Martin's house. She had calmed down and she was just looking for a place to sleep.

I have considered other things that could raise reliability concerns with Ms. A.'s statement. One is the history between her and Mr. Tsetta and the potential that she may have had some reason to want to get him into trouble. Defence did not pursue that theory and rightfully so, I think. The evidence does not support it at all. It does not support the idea that Ms. A. was out for revenge against Mr. Tsetta. Her conduct is not consistent with that of someone who is fabricating a story to get someone in trouble for revenge because of a past wrong.

On the contrary, she was very reluctant to give a statement. She left before the police arrived the first night. She left the detachment before being interviewed on another occasion. She missed an appointment another time. And even during the statement, when she mentioned that there were other times where Mr. Tsetta had harmed her and she was given an opportunity to talk about it, she declined to do so. This all belies any notion that she had an axe to grind with him or was being vindictive.

I've also considered the evidence about Mr. Tsetta's reputation and rumours, things Ms. A.'s cousin told her about him, and the press release that the RCMP issued announcing that Mr. Tsetta was charged with sexual assault and unlawful confinement. This press release was issued on June 20th. I do not find that those have any impact on the reliability of Ms. A.'s statement.

The evidence is clear that none of the officers told her about the allegations and, also, she identified Mr. Tsetta as the person who did this and gave some details to Constable Hemeon before she had the conversation with her cousin and before the press release was issued.

Ms. A. used to be in a relationship with Mr. Tsetta. She has known him a very long time. The notion that rumours or his reputation could have somehow resulted in her becoming confused about what happened to her and who did it is, in my respectful view, completely implausible and far-fetched. On the whole, in my view, there is much that corroborates Ms. A.'s statement to police and very little that calls its reliability into question.

I find the statement is reliable and it, in combination with the circumstantial evidence of Ms. A.'s actions and demeanour immediately after she left the house, leaves me sure that what she told the police was true and accurate and that she was sexually assaulted by Mr. Tsetta.

During submissions, I raised the issue of the unlawful confinement charge. The Crown's position is that it occurred after the sexual assault when Mr. Tsetta placed his hand over Ms. A.'s mouth to stop her from screaming when there was a knock at the door. The Crown argued this was distinct from the sexual assault and makes out the unlawful confinement charge. On my review of Ms. A.'s statement, I do not find it entirely clear that there is such a clear distinction between the sexual assault and Mr. Tsetta's efforts to stop Ms. A. from screaming.

In her initial narrative at the start of the statement, she said:

I blacked out and the next thing I remember, he was on top of me. I tried to get him off me -- get off me -- and I started yelling, screaming, for help. The window was open. I know that part. I was calling my friend Irene because she lives down below. They -- anyway, I was yelling and then he covered my mouth.

She then describes trying to fight him back but not being strong enough, and then there was a knock at the door but she could not do anything because his hand was on her mouth, and that she finally got him calmed down, and then he almost fell asleep and that was when she got up.

Later in the statement, when the officer goes on to ask her some questions, Ms. A. says:

I woke up and I tried to get him off me and that --when I started freaking -- that -- when I start trying to scream and everything -- and then he got off me and started holding my mouth.

A bit later in the statement, she says, when the officer is asking about her trying to get him off:

I tried to, yes. And then he held me down and that's when I started screaming, because I told him to get off me -- get off me and he wouldn't get off me, so that's when I tried to start and scream.

And then there's an indiscernible part, "get off me -- and that's when he started covering my mouth."

 On the whole, it is not entirely clear to me that Mr. Tsetta putting his hand over Ms. A.'s mouth was distinct from the sexual assault. That is one possible interpretation of what she says, but I think it is also possible to interpret what she says that all of this was part of the same continuous ongoing chain of events.

It is not entirely clear to me that the sexual assault had ended by the time he covered her mouth. In my view, everything Mr. Tsetta did, being on top of her, stopping her from screaming, was part and parcel of the sexual assault. Putting his hand over her mouth during the assault is an aggravating feature of the sexual assault, but I am not convinced it makes out a separate charge for unlawful confinement.

These are my reasons for concluding that Mr. Tsetta should be found guilty of counts 1, 3, and 4 on the indictment and not guilty on count number 2.

**(PROCEEDINGS CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 4th day of September, 2019.



\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Kim Neeson

Principal