

Citation: *R. v. Omale*, 2024 YKTC 44

Date: 20241118  
Docket: 23-00454A  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Gill

REX

v.

VICTOR FERDINAND OMALE

**Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.**

Appearances:

Leo Lane and Peterson Ndlovu  
Jennifer Budgell

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] The accused, Victor Omale, is charged with two counts of sexual misconduct in relation to the complainant.

[2] Count 1 alleges that the accused, on or about September 8, 2023, at Whitehorse, Yukon Territory, did commit a sexual assault on the complainant, contrary to s. 271 of the *Criminal Code* (the “Code”).

[3] Count 2 alleges that the accused, on or about September 8, 2023, at Whitehorse, Yukon Territory, being in a position of trust or authority towards the complainant, a

person with a mental disability, did without her consent for a sexual purpose counsel to touch directly with a part of her body to wit: her vagina the body of the accused, contrary to s. 153.1(1) of the *Code*.

[4] The Crown did not present any testimony that the complainant did not consent to the sexual activity as alleged. Indeed, the complainant herself testified that she eventually agreed to it. However, the parties are *ad idem* that this would not be a bar to a conviction on the counts in the event that all of the other elements for each of them are made out. As will be seen later in these reasons, this is because of the unique circumstances of the complainant at the relevant time, which put her in a position where any consent, if induced, counselled or incited by the accused while he, in relation to her, was in a position of trust or authority, would be thereby vitiated.

[5] The meaning of consent on a charge under s. 271 of the *Code* is set out in s. 273.1:

#### 273.1 Meaning of "Consent"

(1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(1.1) Consent must be present at the time the sexual activity in question takes place.

(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

(2) For the purpose of subsection (1), no consent is obtained if

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(a.1) the complainant is unconscious;

- (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

[6] The question of consent as it relates specifically to sexual exploitation of a person with a disability is set out in s.153.1(1) of the *Code*:

#### 153.1 Sexual exploitation of Person with Disability

(1) Every person who is in a position of trust or authority towards a person with a mental or physical disability or who is a person with whom a person with a mental or physical disability is in a relationship of dependency and who, for a sexual purpose, counsels or incites that person to touch, without that person's consent, his or her own body, the body of the person who so counsels or incites, or the body of any other person, directly or indirectly, with a part of the body or with an object, is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding 10 years; or
- (b) an offence punishable on summary conviction.

...

[When no consent obtained]

(3) For the purposes of this section, no consent is obtained if

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (a.1) the complainant is unconscious;

- (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
- (c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

[7] Therefore, on a charge under s. 271, induced consent is vitiated pursuant to s. 273.1(2)(c), and on a charge under s. 153.1(1), counseled or incited consent is vitiated by s. 153.1(3)(c).

[8] In light of the foregoing, this case rests not on any question of consent but rather solely on a single issue, namely whether or not any sexual activity occurred between the parties on the date in question. The complainant alleges that it did, and the accused maintains that it did not. Here it must be remembered that because this is a criminal trial, the accused is not under any obligation to prove his innocence. He is at law presumed innocent unless his guilt is proven beyond a reasonable doubt. This is the criminal standard of proof.

[9] By way of uncontested background, the complainant is under the supervisory jurisdiction of the Yukon Review Board and was, at the time of these events, on a disposition order allowing her to reside in the community but on an assisted-living arrangement that required what could be described as line-of-sight supervision which

meant that a staff worker had to be in her immediate vicinity at all times. The accused was such a staff worker and as such, he exercised a position of trust or authority over her.

[10] The meaning of line-of-sight supervision meant that while the complainant did have her private space, notably bedroom and washroom facilities in the living unit, she was otherwise at all times under visual supervision and was not allowed to leave the living unit unescorted.

[11] The care home where the complainant resided was operated by an organization known as Connective. This particular residence had two dwelling units, an upper unit accessed from the front of the house, and a lower unit accessed by going around the outside to the back of the house. The complainant resided in the lower unit, and there was a different client in the upper unit.

[12] Photographs of the complainant's living unit tendered during the trial show that much of the interior of her living unit, certainly the entry door, kitchen, and living room is capable of surveillance by staff sitting in the office located within that very unit and there are also surveillance cameras surrounding the house that record, as well as feed live footage to a monitor visible from within the office.

[13] In addition to the supervision requirements, the complainant also required various medications to treat her mental health conditions that included Fetal Alcohol Syndrome ("FAS") and other cognitive disorders requiring antipsychotic medication.

[14] As a whole, then, it can be said that the complainant's living conditions imposed on her a large number of restrictions on her freedom. I will, later in these reasons, review what the complainant herself thought about these restrictions.

[15] Natalie Gallant was then a residential support worker who assisted in training the accused at the care home. While she was unable to recall exactly when that was, I find, on the totality of the evidence, it would have been likely in or about July or August 2023. Ms. Gallant described a number of the features associated with working with the two clients residing at that residence. She agreed the complainant suffered from FAS and had cognitive delay issues requiring assisted living. She agreed there was little if any access by staff to the complainant's bedroom space. She would never enter the bedroom unless invited for a specific need. While unaware of the complainant's views for or against staff using her washroom, the witness herself would only use it while the complainant was asleep. She did not explain why. She confirmed it was against workplace policy to give money to any resident or to buy things for a resident with one's own personal funds. Everything had to go through the Connective credit card. Finally, in describing how the two units worked together, she said that while workers on a given shift would be assigned to work in one unit or the other, there was no impediment to such staff visiting between the units. A common example was if there happened to be a particular supply item needed from the other unit.

[16] Ms. Gallant trained the accused for four hours on each of the two units. She could not recall whether the complainant was present at the time or whether she might have been on one of her then increasingly frequent abscondments, sometimes for days at a time with refusals to return home that would prompt calls to the police for

assistance in locating and returning her. She was aware the complainant would sometimes return intoxicated and that her abscondments included physical altercations. She seemed to be aware of a time, in or about August or September 2023, that the complainant absconded with all the meat in the fridge or freezer.

[17] Ms. Gallant was the recipient of the complainant's initial disclosure regarding this charge, made to her during her shift that started just before midnight on September 13, 2023, so and into the early morning hours of September 14. She described the complainant's usual demeanour as being "variable", which included her being sometimes talkative and other times not. On this particular day, she said the complainant was towards the quieter side, in other words not chatty and just watching TV, when she told her of what happened. On receiving the disclosure, Ms. Gallant immediately informed her supervisor and the police were subsequently called.

[18] The next witness, Kudrajot Singh, is now a program manager at Connective and was at the time in question a casual support worker there and working mostly in the living unit occupied by the complainant. He did a mix of morning and evening shifts, but not the late night shifts commencing at midnight. As with Ms. Gallant, Mr. Singh confirmed that staff would visit between the units, usually to get some kind of supplies, but also that the residents would sometimes visit one another. All told, he did not describe this as necessarily a daily or frequent thing, but it was not unusual.

[19] Mr. Singh arriving to work at 8:00 a.m. on September 14, 2023, this would have been immediately following the shift just completed by Ms. Gallant, and at whose request he telephoned the RCMP. He had a conversation with the complainant and

recorded her unprompted words, which he showed to the RCMP officer upon her arrival. He described the complainant as not crying but having an expression like something bad had happened. Not really having worked with her much, he did not really explain how or why he had come to this conclusion. Overall, Mr. Singh was able to better describe his own reaction than hers.

[20] Mr. Singh testified that the next day he was asked by program manager, Joshua Matthew, to inspect the garbage on premises to look for any discarded condoms. He searched the round stainless steel garbage bin located in the unit kitchen but found nothing. He confirmed that police thereafter seized all of the garbage in and about the premises including the garbage from the exterior bins. Here it should be noted as common ground that garbage from the interior of both units is eventually transferred to the exterior bins and then removed by the city on a biweekly basis. Anything deposited into any garbage receptacle in the house would, at the time all of the garbage was seized by the police, still have been present and would not yet have been removed by the city.

[21] As with Ms. Gallant's testimony, Mr. Singh agreed staff would mostly observe from their office within the unit and regarded the complainant's bedroom as her private space, entering only on invitation by her. Mr. Singh agreed that the complainant actually did not want people to come into her bedroom. He agreed there was an occasion during an outing when he purchased the complainant an energy drink, having received prior approval from his manager to use the Connective credit card. This is because the complainant did not have her own funds to buy things.



[22] Mr. Singh confirmed that the complainant absconded frequently from the living unit and that it was not unusual if she was entirely absent during his shifts at the residence. He testified about his own experiences in chasing her down, on one occasion catching her as she was about to leave the residence and trying unsuccessfully to persuade her to not leave, and she explaining to him that she needed to give a friend a doughnut. He did not elaborate on this explanation given by her which, on its face, makes little sense, in particular because he did not say she had any doughnuts with her.

[23] Mr. Singh added that sometimes he would phone her to persuade her to return, on one occasion speaking to a male who answered the phone replying the complainant had sold her phone to him. On another date, in late August 2023, he learned on arrival to work that the complainant was in the hospital, and he then spent his shift with her there.

[24] Of particular note, Mr. Singh testified about an occasion when he was required to refuse the complainant's request for the purchase of a drink for her because he had not received his manager's approval. He described the complainant as becoming very upset with him, leaving the store and returning to the car while swearing at him. He said when he later apologized to her she replied that although she understood, she said to him words to the effect "I said I told you don't make me angry".

[25] Like Ms. Gallant, Mr. Singh had no personal knowledge of actually seeing the complainant in an intoxicated state.

[26] The next Crown witness was the complainant herself. She confirmed having been in an assisted living arrangement since 2012, diagnosed with Fetal Alcohol Spectrum Disorder (“FASD”) and schizophrenia and some other health issues that she was not able to recall. She agreed her living arrangements were on the ground floor unit of the residence, where she would be assisted by three different staff workers per day, each taking one of three shifts on a 24-hour rotation. The complainant testified that on the date of the allegation, September 8, 2023, Mr. Omale introduced himself to her by shaking hands in a way that she found strange, rubbing her hand and not letting it go, causing her to pull her hand away. She said this was after she had woken up from a nap at about 4:30 in the afternoon to find her manager, Joshua, another worker named Anna, and the accused occupying the office in her unit. She said the introduction occurred after the other two individuals had left the office.

[27] There is some discrepancy in the complainant’s evidence as to whether it was the accused who introduced himself to her or the other way around. While this is not a big point to be concerned about, of greater significance is that the complainant could not recall whether or not there were any interactions with the accused prior to the date of the allegation. When specifically asked whether she recalled earlier accompanying him to a grocery store to buy things, she said she recalled something like that but could not remember everything but then ultimately said she had no recollection of the event, because these were events that would have happened more than a year ago. It would appear, however, that her recollection of any earlier interactions with Mr. Omale was vague or missing even as early as less than a week after the date of the allegation when this topic was specifically broached in her police statement. In that statement,

she said first that she had met him earlier, then, that she could not recall if she had, and finally, that she had not met him before.

[28] The complainant then recounted the rest of the afternoon and evening spent with the accused. She said they went together to the Canada Games Centre (“CGC”). She was unable to recall whether the CGC was closed for cleaning or anything but testified that she asked Mr. Omale if she could have what she described as a booster juice sold at a concession at the CGC. She knew that such purchases had to be preapproved by the manager and said that Mr. Omale responded that he would therefore have to call the manager to obtain the credit card. She said that after 45 minutes of waiting, the manager never appeared and so they did not buy the juice.

[29] On cross-examination, the complainant was unsure as to whether her request for the booster juice was made by her at the CGC or while driving there from the care home. Regardless, she denied any possibility that permission to buy the booster juice was actually first sought from the care home manager, and not approved by him, before even she and Mr. Omale departed the care home. She was also inconsistent as to whether the booster juice was a common reward for her working out, as opposed to her later maintaining that on this occasion, she only went to the CGC to get the booster juice, and not for any work out, maintaining that she definitely did not engage in any workout on that date, at other times saying she did not know if she worked out. Regardless of all of these unresolved scenarios about the booster juice and her activities on that day at the CGC, she did agree that she never received the booster juice.

[30] Here, it is noteworthy that on an earlier occasion with a different staff worker, Mr. Singh, his failure to receive permission to buy her a drink had caused her to become upset with him, to swear at him, and to warn him about not making her angry.

[31] The complainant was also inconsistent with respect to whether or not the accused would be swimming with her at the CGC. While maintaining on cross-examination that this would never occur, she told the police officer in her September 14, 2023 statement that they were waiting at the pool for Mr. Omale's swimsuit to be dropped off, along with the credit card for the booster juice. She said this even though she also had said they discovered the pool was closed on their arrival. None of this makes any sense, and indeed, the complainant herself agreed she must have been confused about this. On cross-examination she also agreed that she could not recall if the accused had, in fact, told her while at the CGC, that he did not have permission to buy her the juice. In any event, she insisted that after this period of waiting for the approval at the pool, the credit card never arrived because the manager, Joshua, was out of town. The complainant herself having testified about seeing this manager at the living unit only about a half hour earlier that afternoon, it is difficult to make logical sense of this entire sequence of events as related by her. Regardless, she said that she eventually asked the accused for a car ride to Marsh Lake which is where they went next.

[32] The complainant testified it was upon their arrival at Marsh Lake that the accused first made a sexual advance to her. She said they had parked in a pull-out area by the lake and that they had not spoken during the drive there. She said that while seated next to her in the car, the accused motioned his hand, palm down, in circles near her

vaginal area and asking, "can I play with you?". She said that when he said this to her, she could not recall what she said in reply. When pointed out to her in cross-examination that she had advised the police in her statement that she had not made any reply back and that she was now giving a different answer, her response was that she did not know.

[33] Following this advance, she said they went back home, saying nothing on the way. She said the accused had, in fact, been very quiet around her the entire day. On arrival back home, she changed into her night clothes and sat on the couch in the living room where, after a few minutes, the accused emerged from his office, sat on the floor next to her outstretched body and again motioned in circles close to her vagina asking, "can I play with you?". She was clear that this happened about five or 10 minutes after returning home. She said she replied "no" but that after a couple of minutes, she followed the accused back to the office where he had returned and told him "yes we can play". She said he asked her if she had a condom to which she replied that yes she did in her purse, from which she then removed a condom and handed it to him.

[34] She said she was the first to enter her bedroom, hearing the accused closing the living room and kitchen blinds, and locking the front door. She said he left the bedroom door open after entering. She said she removed her nightgown and lay on the bed, on her back with her legs open. She said he was standing in front of her, with his pants pulled partially down and his shirt still on. He touched her bare vagina with his fingers, smelled his fingers, invited her to touch his penis which she did, and then and then placed the condom on his penis. On this point it should be noted that the allegation about the accused smelling his fingers was not in her statement to the police because,

as she explained, she remembered it just yesterday. She believes she mentioned it at that time to Crown but could not be sure.

[35] The complainant testified they then had sexual intercourse lasting about five to 10 minutes after which she told him it was hurting. She said in response, he withdrew his penis, touched her breasts and then told her to turn over onto her stomach, which she did, with her feet still on the floor and crouched over the side of the bed. She said he then slapped her bum and told her to turn back over, saying “that he hadn't come”. She complied and they had further sexual intercourse lasting two or three minutes. During the sexual intercourse she described the accused as making moaning sounds.

[36] Afterwards, she said he pulled his pants up, took the condom off and left the room. She said just as she was coming out of her bedroom and on her way to the bathroom, she saw the accused standing over the stainless-steel garbage can in the corner of the kitchen. She went to the washroom and that was the last time she saw the condom. She said she never saw him use the washroom in her unit, nor go upstairs to use the upstairs washroom. She did not see him ever wash his hands, he just went straight to the garbage can and then to the office where he remained for the rest of the evening. They did not talk. She went to the living room couch for a while before going back into the bedroom for the night. She estimates the total time they spent together in the bedroom was about 15 or 20 minutes.

[37] The disposition order from the Yukon Review Board prohibited the complainant from consuming any intoxicants. Regardless, the complainant agreed that at the time of these allegations, she was consuming intoxicants, and specifically that she was

experiencing a shortage of funds to purchase marijuana and cigarettes for that entire week. While agreeing she told the police she was desperate for these substances, she said she mis-worded it when she said that marijuana made her do stupid things. She said marijuana only made her mellow out and abscond. She further agreed she was selling or pawning her personal items, including electronic devices, in exchange for cash to buy these substances.

[38] The complainant also agreed that although she felt immediate guilt about what had occurred with the accused, and felt she should have talked to someone sooner after it happened, she at the same time thought about demanding money from the accused, \$100, to not tell anyone. She agreed this was connected to her desperation for money to buy alcohol and drugs. She thought she would ask him for this money the next time she saw him, but the opportunity never arose during the next week, right up to the date of her disclosure. She agreed that up to the date of her disclosure, and despite her strong opposition to being assigned male staff workers to her unit, she was still being assigned male staff workers.

[39] The complainant agreed that she did not tell the police about her idea of demanding money from the accused, and only mentioned it very recently to Crown because she knew that disclosing it earlier would make her look bad. She agreed the idea of demanding money from the accused in exchange for her silence was wrong but she also said that she did not feel bad about it. She at times in her testimony referred to her consumption of marijuana as an addiction but other times denied any such addiction. The complainant denied the defence suggestion that her idea of demanding

money from the accused was purely to prevent her from making an allegation about a sexual encounter that never actually happened.

[40] As regards her living arrangements and their impact on her privacy, the complainant testified as having no particular issue with anyone using her washroom. She said support workers did not enter her bedroom unless invited and otherwise they would mostly stay in their office.

[41] Of particular note, she readily conceded that she was opposed to having to be supervised by male staff members and that she had reported this several times to four different managers, to no avail. She agreed that her discontent with having male staff in her living unit was why she so frequently absconded. The complainant also conceded she was not happy with all of the restrictions she was living under and wanted her freedom from those restrictions as well. She was aware that her frequent absconding and associated use of alcohol and drugs contravened her disposition order and she was also aware that an upcoming emergency hearing before the Yukon Review Board scheduled for the end of August 2023, would likely result in an even further tightening of those restrictions, which she did not want. It is common ground that she did not attend that emergency hearing and was, at the time, hospitalized after a lengthy period of absconding, during which absconding she consumed alcohol. Despite her admitted concerns about even more unwanted restrictions being imposed on her if she attended the emergency hearing, she agreed that she had told her social worker at the time that she missed that hearing because she had low blood sugar and a stomach ache.



[42] The complainant further elaborated that the reason she was against having male staff is because she felt uncomfortable and unsafe with them and that despite her objections, she was not offered female only staffing until *after* her complaint about the accused and that until that time she had kept eloping. Indeed, she conceded on cross-examination that on one occasion she asked one of the female managers words to the effect of "what if I walk around the house naked to not have to work with males?" She qualified that by explaining it was not something she was necessarily thinking of actually doing but was thinking that if she told them that, it might work for her to get the all female staff that she wanted.

[43] Many of the complainant's answers to questions, particularly on cross-examination, came across with a degree of ambivalence that made it difficult to assess whether it was because she did not recall or was being evasive. Adding to that problem, on more than one occasion, when asked questions, her reply was "I'll pass". After a number of such responses, she was eventually instructed by the Court that unless otherwise instructed, she must answer questions to the best of her ability and could not herself decide which questions she would answer and which she would not.

[44] The complainant was also cross-examined on matters not directly connected to the allegations against the accused but asserted by the defence to be relevant to them, in terms of her credibility and her motive to fabricate. I will deal firstly with the matter of her criminal record, which is lengthy. Here I will just say that although the complainant seemed non-responsive regarding questioning about the fact of the convictions and some of the underlying circumstances, some relate to matters up to 30 years ago, much of which was when she was in the throes of even more pronounced addictions, along

with likely untreated mental health issues. I do not believe she was denying her criminal history, per se. I am also not convinced that such history, looked at in isolation, should be heavily relied on to find her not credible as regards these allegations.

[45] The next matter raised by defence, relating more directly to the complainant's credibility and motive to fabricate, touches on allegations that she assaulted a female staff worker of Nigerian descent while directing racial slurs against her. The defence argues this conduct bears on the adjudication of the present matter in two ways, firstly demonstrating the complainant's bias against black people generally which would thereby include the accused, and secondly, on the defence theory that in addition to any other motivations to be free of restrictions at the care home generally, the complainant, knowing that she was facing charges in relation to assaulting this female staff worker, would have been further motivated to fabricate the allegations against Mr. Omale in a way that she thought she might be able to use, in essence, to play off one set of charges against the other.

[46] The complainant admitted to using racial slurs in anger but denied being racially biased and denied fabricating her allegations against the accused in the hope that they could be negotiated or played off against charges she faced regarding the other staff worker. Those other charges were ultimately stayed by the Crown.

[47] While racially motivated slurs should always be a matter of concern, and the existence of the other charges is undoubtedly a complicating factor, I do not find, on the basis of the evidence presented and thoroughly explored at this trial, that they have any

persuasive value in connection with assessing the present charges. I will leave it at that.

[48] The next Crown witness was the investigating police officer, Cst. Carol Locke. The officer attended the care home on the making of the September 14, 2023 disclosure by the complainant, met with the complainant and took her audiotaped statement in the presence of Mr. Singh, and seized the complainant's nightgown and the earlier mentioned notes taken by Mr. Singh.

[49] The officer also accompanied the complainant to the hospital for a medical examination, and later that same day attended at government offices to arrest Mr. Omale, where he was in the course of an unrelated meeting with his employer.

[50] The officer was also questioned about an attendance some months later at the residence of the accused on an unrelated matter that was subsequently determined to be without foundation, but she omitted to remember another encounter occurring about a month after that, where the accused might have been stopped on a traffic matter. On the application by Crown to permit the officer to be recalled following the conclusion of her testimony initially, she testified that she did now indeed remember being in a police car operated by her partner officer. She could not recall why Mr. Omale had been stopped specifically and could not recall any traffic ticket actually having been issued. Nothing turns on this.

[51] Finally, Cst. Locke testified that she eventually turned the file over to Cst. Karina Moore.

[52] Cst. Moore was the final Crown witness, taking conduct of the matter only a few days after it was reported. She spoke with some of the same staff workers previously mentioned in these reasons. She also attended at the hospital noting that the complainant had actually attended the hospital on two occasions, first on the evening of the day of disclosure and then later on that same day.

[53] This officer also seized the complainant's bedsheets for a forensic analysis and seized all of the garbage from the care home, again searching it thoroughly. This officer was also instrumental in obtaining the closed-circuit television ("CCTV") surveillance video from the residential cameras. Unfortunately, some of the surveillance video was no longer available because by the time of its seizure, approximately 10 months post allegation date, some of it had been recorded over. The officer explained this lapse by saying she thought the surveillance video would be covered by a production order already sought and obtained, only to later on learn it was not. It is regrettable that in the interim, no police officer attended at the care home to have the video footage secured until it could be taken. The result is that while there is reliable footage of the front of the care home during the relevant times, other footage notably relating to cameras located at the side and back of the house covering entry to the complainant's living unit is missing.

[54] The foregoing summarizes the case presented by the Crown.

[55] Victor Omale testified in his own defence. He is now 38 years old and as at the time of these allegations, was a recent immigrant to Canada, having arrived in or about April 2023, preceded by his spouse. Mr. Omale received his education from his native

Nigeria, graduating with a Bachelor of Arts and then obtaining a Master's degree in information management in which field he worked for about five years before his arrival here.

[56] Mr. Omale obtained work at the Connective housing shortly after his arrival to Canada. He testified that he had performed similar work at a group home in Nigeria, so he had prior experience in working with people suffering from FAS and schizophrenia. He testified about his training at the Connective assisted-living homes including training on how to take proper case notes about the day's activities and he came to learn something of the complainant specifically by reading past case notes made by other workers that covered things such as her likes, dislikes, and other behaviours.

[57] Mr. Omale testified that on the date in question, he received a last-minute call from Connective inquiring if he could fill a shift, which he accepted. Because he was then coming off another job with slightly overlapping shift times, he arrived at the Connective home on Tigereye Street a little bit late, around 4:15 p.m. He logged in at the upper unit as required, and then proceeded to the complainant's dwelling, in the lower unit which is accessed by going around the side of the house. There, he saw the complainant and spoke briefly with his manager regarding the activities planned for the rest of the day.

[58] Mr. Omale testified that before he and the complainant departed for their planned outing to the CGC, the complainant mentioned that she expected to get a booster juice, which is some kind of juice, at the CGC. He said he asked his manager if that could be approved but it was not, and he explained to the complainant that because there was no

approval, she should get a drink from the fridge if she wanted anything to bring along. He said she was not happy about this, and that she grumbled about it on the way, and that once they arrived at the CGC, the complainant became argumentative about not being able to get a booster juice despite his repeated explanations to her that he simply did not have the approval for it. He said that the complainant remained angry with him, raising her voice and creating something of a scene causing other patrons to look at them to see what was going on. He testified that under no circumstances were they waiting for the program manager to bring the credit card, and this was because it had already been rejected by the manager before they departed the care home.

[59] The accused said the complainant eventually relented about the juice, and when they were informed by staff at the CGC that the pool was closed, she decided to use the track for a short while. She then changed into the other shoes she had brought in her bag with her to use on the treadmill. It was shortly after that he said that they departed for Marsh Lake.

[60] The accused said they did not speak in the car on their way to Marsh Lake and that on their arrival she got out of the car to have a cigarette, then got back into the car for the return drive home. During their brief stop at the lake, he denied motioning to her genital area, asking if she wanted to play, or making any sexual advance at all.

[61] He said they returned home between 7:00 p.m. and 7:30 p.m., not talking in the car, and that upon their arrival the complainant went straight to her room, and he went into the unit office for a few minutes before eventually attending the upstairs unit to use the washroom. He said at that point the complainant was in her bedroom so he thought

he could quickly go and return, which he did. Because he had not purchased anything at the CGC and was still hungry, he also retrieved some noodles from the upstairs unit, bringing them back to the complainant's dwelling where he cooked them in the kitchen, all while the complainant was still in her bedroom. He said while in the kitchen and noticing an offensive smell from the garbage, he took it outside to the exterior bin.

[62] Afterwards, he completed his case notes for the day, watched the complainant go outside for a cigarette, later on provided her medication, watched her make some noodles for herself and eventually return to her bedroom for the remainder of his shift. This would have been the last time he saw her that evening. He denied any advances, any invitations to play, and any sexual encounter of any sort. He did not enter her bedroom. He learned of the allegations only at the government offices on Alexander Street, about a week later, when he was arrested. This came as a complete shock to him. Following his arrest and release, and crying as he testified, he said that he subsequently lost all the jobs he held, and he and his family were devastated by the accusations.

[63] The accused was cross-examined at length, including about the case notes that he made regarding the complainant during his shifts on August 8, 2023, and again on September 8, 2023. The prominent focal point here was why were the notes not consistently made about his observations regarding the complainant and, for example, if the complainant was making such a fuss about not getting a booster juice at the CGC, why did the accused not make a note of it. His response was that because this kind of behaviour, essentially what he described as her grumbling aloud, was for her not out of

the ordinary and because it did not escalate into any kind of physical violence, he did not think it necessary to record it.

[64] In another example, in his August 11, 2023 entry, the accused noted the complainant as being in a good mood and smoking multiple times, whereas when he accompanied her to Marsh Lake on September 8, 2023, which is the date of the allegation, he failed to note that she smoked at the lake. The suggestion is that he did not record it because it did not happen.

[65] Other examples were also addressed in his cross-examination about recording things or failing to record them in a way that were argued by Crown as consistent with the desire by the accused to make his denials appear more believable. He was cross-examined at some length about his rationale for recording some things but not others. In this regard, I will simply note that there appears to be an element of discretion as to exactly what is recorded, or at least how behaviour is described, in relation to a given client, and that also depends upon the particular worker's perceptions of what might be normal behaviour unnecessary to record as opposed to atypical behaviour for any given client.

[66] The other problem is that it is very difficult to make extrapolations about consistency from such a small sample size of only two case note entries he made about her, over a period of the two months of his involvement. As such I simply do not see the particular inferences sought by the Crown as available to draw, or at least they are not the only, or most plausible inferences that could be drawn.



[67] The Crown also pursued Mr. Omale as regards his denial about ever shaking hands with the complainant, as she asserted he did during their September 8, 2023 meeting. The accused maintained that he did not shake hands with clients ever, and he even could not recall shaking hands with colleagues or other staff that frequently, if ever. In this regard, he did not rely on any cultural practices, but rather as simply something that he avoided.

[68] The suggestion by Crown is that he is attempting, through this denial, to distance himself from any form of physical contact with the complainant in an effort to bolster his denial of any sexual encounter with her. Again, while this is an inference theoretically capable of being drawn, it is not the most likely one. There is no reason that the inference sought by Crown should be preferred over Mr. Omale's own explanation about it, which is that it was simply not his practice, generally. Here it should not be overlooked that the accused and the complainant had already met prior to September 8, 2023, so their encounter on September 8 might not be one that would prompt a handshake in the first place.

[69] Crown also pointed out that Mr. Omale seemed to make a particular effort to deny having ever even looked inside the complainant's bedroom, much less entered it. Maintaining that the first time he actually put his mind to any specific furnishings inside her bedroom was when he saw the photographs tendered in these proceedings does come across as odd. Even if it is the case that the complainant's bedroom was off the line of travel from the entrance to the unit and the staff office contained within it, one cannot help but wonder how there could not be something as simple as a casual occasional glance into her bedroom when in and about the unit during a shift, if the

bedroom door happened to be open. This is a troubling aspect of his testimony and may well be the most plausible instance of him denying even non-incriminatory conduct to create as much distance as possible from any actual misconduct. While difficult to know what exactly to make of it, it draws suspicion at the very least.

[70] It is clear from the evidence of many of the witnesses who worked at the care home, including the accused, that all were aware of the possibility of occasional and unannounced entry by staff or clients between the two units at the residence.

Mr. Omale himself saw it happen a couple of times and had to do it once himself, to obtain a garbage bag from the other unit. He agreed it was not something that happened with any great frequency, but it seems to have had to it an element of unpredictability. The relevance of this is to question whether a person would engage in inappropriate sexual activity during the early evening in one of the living units and risk being discovered by staff from the other unit making an unannounced entry. There would be a clear risk of being caught, even if it were a risk difficult to precisely gauge. Perhaps it could be a risk best described, if it were to be taken, as reckless.

[71] Crown made a great deal of the fact that Mr. Omale, while maintaining that the complainant was grumbling and argumentative about not getting a booster juice, appeared perfectly ready to buy something for himself in her presence which, it was argued, would simply inflame her already bad mood. The Crown's suggestion here is that the complainant was actually nowhere near as angry about this as the accused was asserting. To this, Mr. Omale's response was that the complainant was indeed vocally upset about not being able to get the juice at the CGC and that it was for that very reason he decided to not purchase anything for himself while there.

[72] I have already mentioned the existence of limited video surveillance footage that was available from the residence. Although the Crown did not present it, the defence tendered it and had the accused describe the events as they unfolded on the date in question. Overall, the footage runs from just before 4:00 p.m. and ends just before 10:30 p.m. While the video clips show various comings and goings of different people, it includes the accused and the complainant departing for the CGC just after 5:00 p.m. with the complainant carrying a green bag said to contain her swimming trunks along with canvas sneakers for the purpose of working out. Mr. Omale is seen not carrying any bag of items and consistent with this, was adamant in his testimony that he would never take his trunks to swim with the complainant, describing his job as one of keeping watch on her, allowing her to do whatever it was that she wanted.

[73] The video footage further shows that shortly after they departed for the CGC, they returned so that Mr. Omale could retrieve his wallet. Having started this shift immediately on the heels of completing a different job, he had not had anything to eat and thought he might get something at the pool. He also retrieved his driver's license.

[74] A later clip shows them returning home around 7:20 p.m., the complainant exiting the car still carrying her green bag and walking around the side of the house out of the view of the camera. The accused is seen getting out shortly afterwards, throwing some items from the car into the exterior garbage bin, returning his wallet to his own car and then also disappearing around the side of the house as he returned to the complainant's dwelling unit. The accused is next seen only a few minutes later, coming back from around the side of the house and entering the upper dwelling. This he testified about as using the washroom there, and then returning, carrying the noodles he said he cooked.

He is next seen about 20 minutes after that carrying a black garbage bag to the exterior garbage bin. By now it is almost 7:50 p.m.

[75] The video surveillance clips also depict the accused, much later in the evening, returning to his car for a water bottle and, later on, for something that looked like a charging cord and some other larger item that could not be identified from the video nor from Mr. Omale's own recollection. He denied that the video clip depicted him taking the condom allegedly used during sexual activity with the complainant to his car so that it could not be located in or about the residence.

[76] The defence made a point about the Crown deciding to not present the video footage as part of its own case, on the theory that this was because the evidence, while relevant, was unhelpful to the prosecution because the timeline of events depicted was at odds with the timeline of the events as related by the complainant following her return home. While I prefer to not draw any conclusions regarding Crown's decision in this respect, it is clear that the depictions, and the timelines associated to them, are more consistent with the turn of events as related by the accused than by the complainant.

[77] The final defence witness was Ms. Tracy Burns, a disability social worker having conduct of the complainant's service file and acting as the resource liaison person for the complainant in respect of her annual Yukon Review Board disposition hearings. The information gathered by Ms. Burns and relayed to the Yukon Review Board would therefore be based on her own first-hand observations along with those based on information and belief as obtained from others in the course of their employment.

[78] Ms. Burns was very familiar with the complainant's habitual absconding and with the locations within town where she could be sometimes found, often with others at those locations who themselves appeared intoxicated. She would unsuccessfully attempt to convince the complainant to return but the complainant would simply run away. She was aware, by the complainant's own admission to her, that the complainant used marijuana. She obtained a great deal of information about the complainant's substance abuse from co-workers but she never herself actually saw the complainant intoxicated.

[79] Ms. Burns was aware that the complainant's absconding was directly linked to her being tired of obeying the strict rules of one-to-one line of sight supervision and wanting her freedom. The complainant did not like support workers in the care home because she felt she was being watched at all times.

[80] Finally, she testified that the complainant's problematic behaviours had definitely escalated during the summer of 2023, so much so that an emergency Yukon Review Board hearing was arranged for August 30. When she informed the complainant about it, the complainant refused to attend, and the hearing had to be postponed to a date in September. She said she made the complainant aware that one possible outcome of any hearing, whenever held, might involve even more restrictions being placed upon her and possibly being taken to Ontario, which the complainant did not want to happen.

[81] The foregoing represents the evidence presented at the trial. Notable by its absence is any incriminating forensic evidence sought from the examination of the seized bedsheets, from the single hair that was isolated, and from the complainant's

night gown. Further as already noted, no condom was ever located. The absence of this kind of corroborating evidence, while not a bar to a conviction, becomes a more problematic issue in a case where the only other evidence is that of the complainant's word against that of the accused. There is simply no relevant forensic trace of the accused ever being in the complainant's bedroom, much less of anything associated to sexual activity.

[82] I will not repeat in detail the various problems earlier covered in these reasons pertaining to the complainant's testimony. Suffice to say that it contained numerous examples of inconsistencies as between what she told, or did not tell, to the police as compared at trial, her admissions about being confused in some of those instances on matters that could not be dismissed as minor details, her alternating between different answers to the same questions, and her reluctance to sometimes answer questions until specifically directed.

[83] Added to this is her admitted dislike of male caregivers, her increasingly frequent absconding in relation to that dislike, and her thought about how she might be able to engineer their exclusion by wearing no clothes in their presence. Added to this is her desperation for money for her admitted alcohol and drug addiction, which she said overcame her guilt about agreeing to a sexual encounter with the accused by such magnitude that she actually thought about demanding money from him to keep quiet about the encounter, an encounter that the accused denies occurred at all. She was aware of an upcoming Yukon Review Board hearing that she knew could result in even more restrictions rather than fewer ones, and she actually refused to attend an emergency hearing called because of her rapid deterioration at the time.

[84] I have already related my observations regarding the depictions and associated timelines from the video footage, and how the complainant's description of the timing and duration of the sexual encounter at home is essentially implausible with the timing of that footage.

[85] There was much in this trial about what situations or behaviour could be characterized as plausible or implausible, or what inferences should be drawn from them. I found most of those very difficult to assess, in terms of the different conclusions that could be drawn.

[86] In particular, the Crown argued that a complainant who might be fabricating the allegation, would not likely admit to things such as agreeing that she consented to the sexual activity and to having thoughts essentially of blackmailing the accused over it afterwards. I agree with the defence that it would be erroneous to treat these behaviours as credibility enhancing. See in this regard *R. v. Alisaleh*, 2020 ONCA 597, at para. 16.

[87] When assessing the Crown's case, it could reasonably be said that the complainant was not moved off of the core of her allegation, namely what happened in the car and later in the bedroom, but the same could be said of the denial by the accused.

[88] Therefore, in assessing these opposing versions, and in the absence of any other corroborating evidence, one must look to the broader context that includes motive and testimonial consistency of both the internal and external variety. It is in all of those that the accused carries a distinct advantage. His testimony, while far from perfect, and

in some instances raising suspicions about tailoring to fit a particular narrative, does not have the challenges associated with that of the complainant. His denial, at the very least, is reasonably capable of being true.

[89] Given all of the foregoing, in my view, the problem from the perspective of the Crown's case is that of the strength of complainant's testimony itself. To be clear, this Court has made no finding that the complainant is fabricating the allegation. The more fundamental barrier to a conviction is that even taking into consideration the complainant's cognitive challenges, the sufficiency of the Crown's case, in terms of both credibility as well as reliability, does not meet the criminal standard. While that finding would alone be dispositive, I would simply reiterate that regardless, by application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, the denial by the accused, at the very least raises a reasonable doubt. On those footings, the charges are therefore dismissed.

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GILL T.C.J.