

SUPREME COURT OF YUKON

Citation: *H.M.Q. v. McLaughlin and Belak*,
2010 YKSC 09

Date: 20100316
S.C. No. 09-01505
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

SHAWN MCLAUGHLIN

and

GRAHAM BELAK

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Before: Mr. Justice L.F. Gower

Appearances:

Robert Beck
Robert D. Warren, Q.C.
Andrew P. McKay

Counsel for the Crown
Counsel for Shawn McLaughlin
Counsel for Graham Belak

REASONS FOR JUDGMENT (Corrected for typographical errors March 18, 2010)

INTRODUCTION

[1] GOWER J. (Oral) Shawn McLaughlin and Graham Belak stand charged that they committed a sexual assault upon T.M., whom I will refer to as “the complainant”, on March 8, 2009, at Watson Lake, Yukon, contrary to s. 271 of the *Criminal Code*. Both were constables with the Royal Canadian Mounted Police (“R.C.M.P.”) detachment in

Watson Lake at the time. They continue to be members of the R.C.M.P., although I gather they have since been transferred from Watson Lake.

[2] As I see it, the issue in this case is whether the Crown has proven beyond a reasonable doubt that the sexual activity in this case occurred without the complainant's consent. If there is a reasonable doubt on that point, the accused are entitled to be acquitted, and the issue of mistaken belief in consent, argued in the alternative by defence counsel, does not arise.

THE UNCONTENTIOUS FACTS

[3] Many of the facts in this case are not significantly in dispute. The complainant, who was 28 years old on March 8, 2009, and her husband, P.M., who was then 27 years old, moved to Watson Lake from Ontario about a week prior to the events giving rise to this trial. The complainant is a registered nurse who graduated in 2006. She had obtained employment as a nurse at the Watson Lake Hospital. P.M. was intending to enrol in an online university degree granting program, and perhaps also look for some part-time work. During her initial week on duty, the complainant was introduced to various personnel at the hospital, including a male nurse, Sean Walsh, Katherine Relkoff, who was the head nurse at the hospital, as well as some emergency medical services ("EMS") employees.

[4] The complainant and P.M. were invited to a party at Sean Walsh's residence on Saturday, March 7, 2009. At around 2 o'clock that afternoon, the complainant smoked about half a joint's worth of marihuana. At that period in her life, the complainant smoked marihuana about three times a week and her husband was a daily user of the same substance. The complainant ate dinner between 5 and 6 p.m., and between 6 and 7:30

p.m. she had three beers while she was getting ready to attend the party. P.M. decided that he would rather stay home and watch sports on a new cable channel that he had just discovered. The complainant left for the party at Sean Walsh's between 7:45 and 8:15 p.m., smoking one additional joint of marihuana on the way.

[5] I find as a fact that the complainant arrived at Sean Walsh's between 7:30 and 8 p.m. and was the first guest to arrive. She brought four cans of beer with her and immediately opened one, which she consumed while she had general conversation with Mr. Walsh.

[6] I find as a fact, that between 9:30 and 10:30 p.m., additional party guests arrived, namely Erik Miller, Jordan Ebare, Mike Whitehead, Lindsay Agar. The three males were all EMS technicians, some of whom the complainant had met earlier in the week, and Ms. Agar, the then girlfriend of Mr. Miller.

[7] I find as a fact that, at about 11 p.m., Mr. McLaughlin and Mr. Belak arrived with a fellow off-duty officer, Louis Allain. McLaughlin and Belak had attended an earlier function at Mr. Allain's residence where they were watching an Ultimate Fighting event on television from approximately 7:30 to 10:45 p.m. Mr. McLaughlin had brought a six-pack of beer with him and drank four of them at Mr. Allain's, taking the remaining two with him to Sean Walsh's. Mr. Belak brought a 15-pack of "Coors Light" beer to Mr. Allain's residence, consumed four or five beers while there, and took the remaining 10 or 11 to Mr. Walsh's.

[8] Mr. McLaughlin was then 32 years old and had been married for about nine years, with a two year old son. He remains married and now also has a daughter about six

months old. He joined the RCMP in 2000, after completing an undergraduate degree in criminology and a brief stint of employment as a campus policeman.

[9] Mr. Belak was 29 years old at the time. After pursuing four years of junior hockey, he graduated from the RCMP depot in August 2007. His first posting was in Whitehorse, and he was transferred to Watson Lake in November 2008. He is six foot five and at the time he weighed about 240 pounds. He claimed to have a fairly substantial tolerance for alcohol.

[10] There were a total of nine people at the party, including the host, Mr. Walsh. Everyone was drinking various forms of alcohol to some extent or other and the mood was jovial. At one point, some shots of tequila were poured. The complainant acknowledges having one such shot, although there was evidence that she may have had as many as three. There was also evidence that she consumed two margaritas earlier in the evening.

[11] At another point in the evening, Mr. Walsh took a number of the guests, including the complainant, downstairs to inspect his exercise equipment. I find as a fact that Mr. McLaughlin was present in the basement at that time, although Mr. Belak was not. I will have more to say about that later.

[12] Around midnight, Mr. Walsh announced that he was about to hold a “screeching in” ceremony for anyone that wanted to do so. This involved each participant reciting a particular Newfoundland saying, drinking a shot of Newfoundland screech rum and, in this case, biting the head off a small saltwater fish known as a capelin. Both Mr. McLaughlin and the complainant participated in this event. Mr. Belak did not.

[13] After the screeching in ceremony, a majority of the guests migrated from the kitchen area into the living room where there was a normal three-seater couch and a separate love seat among the furniture. At one point, the complainant was sitting on the love seat in between the two accused, with Mr. McLaughlin to her right and Mr. Belak to her left. She became sick to her stomach from the screeching in ceremony and claims to have vomited five times in the washroom, following which she felt substantially better. After that, at the suggestion of Ms. Agar, the complainant was drinking water.

[14] There were a number of things done and said by the complainant at the Walsh party which she admits could be described as “flirtatious”, at a minimum, towards both accused, but primarily focussed on Mr. McLaughlin. About 10 minutes after Mr. McLaughlin’s arrival around 11 p.m., he and the complainant were engaged in intense conversation. The complainant admits that she thought Mr. McLaughlin was “a good looking guy” and that she was being very friendly, getting to know him. An unknown photographer was taking various candid photographs of the guests at the party which were tendered as evidence. Thus, there was objective corroborative evidence about some of the instances of flirtatious conduct by the complainant.

[15] Not too long after their initial conversation, the complainant approached Mr. McLaughlin, who was seated at the kitchen table, handed him a beer and sat in his lap uninvited, putting her arm around him. One of the photographs confirms this. At a later point, Mr. McLaughlin made a motion as if to be grabbing the complainant’s left breast from on top of her sweater, while she is seated on his right leg, with her arm around his shoulder. From the expression on her face in the photograph, the complainant appears to be enjoying the moment.

[16] At one point earlier on in the party, while many of the guests were still in the kitchen, I find as a fact that the complainant made a statement to both McLaughlin and Belak to the effect they had better watch out the next time they attended at the hospital because she might be tempted to drag them into one of the back rooms and have her way with them. The complainant did not recall making that statement.

[17] When a number of the guests went into the basement to inspect Mr. Walsh's exercise equipment, Mr. Walsh observed the complainant sit astride a large inflated exercise ball, which had a ribbed or bumpy surface. He described the complainant as bouncing up and down on the ball, about three feet away from Mr. McLaughlin, with the two of them maintaining eye contact with each other. Mr. Walsh described the complainant as having a "seductive expression" on her face at the time that she was on the ball. Mr. McLaughlin testified, and I find as a fact, that while bouncing on the ball, the complainant had her hands between her legs in front of her pelvic area.

[18] Later during the party, the complainant made a statement to the effect that "who ever touches me last gets to take me home." The complainant did not recall making that statement, but allowed that she could have done so.

[19] After a conversation between the complainant and Ms. Agar, the complainant said to Mr. McLaughlin "Who is this person? She is trying to mother me. She's telling me I'm being loud. It's just the way I am, I'm having fun". The complainant did not recall making that statement, but I find as a fact that it was said.

[20] While sitting between Belak and McLaughlin on the love seat in the living room, the complainant was rubbing the insides of the thighs of both men, from their knees

towards their crotch areas. The complainant did not recall doing so, but allowed that such conduct could be described as a “sexual touching”.

[21] Around 2 or 2:30 a.m., Mr. Belak announced that, as the party was out of beer, he was going back to his residence, where he had some beer, and that anybody that wanted to could come over. Mr. McLaughlin accepted that invitation and began to get ready to leave Mr. Walsh’s residence.

[22] The complainant testified that she didn’t know if she was invited or if she asked to go, but decided to go to Mr. Belak’s residence in any event. She described her level of sobriety at the time as probably a five on a scale of ten, but that her level of intoxication had subsided somewhat after getting sick to her stomach and drinking water. She notably had no difficulty getting on and lacing her hiking boots. According to Sean Walsh, whose evidence I accept as being the relatively sober host of the evening, “She seemed pretty good. Not overly intoxicated, she wasn’t staggering”, and she had no difficulty negotiating a set of five or six stairs at the Walsh residence.

[23] None of the other guests accepted Mr. Belak’s invitation.

[24] Mr. Belak left the Walsh residence a few minutes ahead of Mr. McLaughlin and the complainant. The complainant had no difficulty walking down the driveway with Mr. McLaughlin to where Mr. Belak was standing.

THE CONTENTIOUS EVIDENCE

[25] It is at this point that the evidence of the complainant begins to diverge from that of McLaughlin and Belak. The complainant says that she interlocked her arm with that of Mr. Belak, who was on her right side. She did not recall simultaneously interlocking her other arm with Mr. McLaughlin and, interestingly, made no mention at all of locking arms

with either man in her direct examination. I find as a fact that she was positioned between the accused, with Belak on her right and McLaughlin on her left, interlocking her arms with theirs.

[26] En route to Mr. Belak's residence, which was only a few minutes away, there were two significant conversations, however the complainant only admits to one of them. She testified that she thought that she was being flirtatious with Mr. Belak by discussing how nurses and police officers have a "special bond", while walking with him arm in arm. She acknowledged in cross-examination that, in saying that, she was trying to tell him that the two of them could "potentially have a bond together". According to Mr. McLaughlin, the complainant emphasized the word "special" in describing the special relationship that she thought nurses had with the police. I accept his evidence on this point. Mr. McLaughlin interpreted this as having a sexual connotation.

[27] The other conversation, which the complainant said did not happen, was one about a nurse at the hospital named Tanya. According to each of the accused, the threesome was walking past a nurses' residence in the area, which caused Mr. Belak to ask the complainant whether she knew a nurse by the name of Tanya. According to both the accused, the complainant acknowledged that she did know this person, having met her the week prior and thought she was attractive. However, the complainant then said something to the effect that "She's not your type, Graham, because she's not the type that is going to sleep with you on the first date." I find as a fact that this conversation occurred. It seemed to flow logically as part of the narrative. It also strikes me as being improbable that each of the accused would fabricate this evidence, particularly when it

would be objectively capable of corroboration, by confirming the location of the nurses' residence and the name of the nurse involved.

[28] Upon entering the Belak residence, there is general agreement that Mr. Belak poured glasses of wine for the complainant, Mr. McLaughlin and himself. There were some disagreements about who sat where, but not about the fact that there was generally a sociable conversation between the three individuals over the next 45 to 60 minutes. Mr. Belak had turned on the television and for a while the group was watching some programming, although that was later changed to a music channel.

The Complainant's Evidence

[29] Here the complainant's version of events significantly differs from that of each of the accused. She testified that she shared two small "Colt" cigars with Mr. Belak during the sociable conversation. At some point, her wine glass was refilled by Mr. Belak before it had been totally consumed by the complainant. In total the complainant recalls consuming less than two glasses of wine before being sexually assaulted. At one point she recalled having difficulty putting her lips around the plastic tip of one of the Colt cigars she had been smoking. She didn't remember the specific conversations until there was a complimentary remark by one of the accused that her sweater "looked good" on her. She admitted standing up in front of Mr. Belak "in a flirtatious manner" showing him her sweater. She then said that Mr. McLaughlin came behind her and pulled her hips into his waist, such that she could feel that he had an erection. She said that she closed her eyes for a second and didn't pull away from Mr. McLaughlin. When she opened her eyes, Mr. Belak said something, from his seated position on the sectional sofa, about the crucifix around her neck. He stood up in front of the complainant and she went to hold her

ornamental crucifix up to explain it to Mr. Belak. She remembered Mr. Belak was looking behind her and that he had a smile on his face. She then heard a clink sound, and looked down to see that her belt and her pants were on the floor. She leaned over to pull her pants up saying "no, no, no", but fell over. She thought Mr. McLaughlin was going to break her fall, but apparently that did not happen, because she described hitting the floor. At that point, she testified that she thought they were just joking around and that it had gone too far. After hitting the floor, when she next opened her eyes, Mr. Belak was having sexual intercourse with her, with her on her back and him on top. At that point she said that Mr. McLaughlin was kneeling above her head with his hands on her wrists holding her arms in a stretched out and crossed fashion. She said that she was unable to speak and couldn't move. She testified that she was trying to arch her back, but just felt paralyzed. When Mr. Belak looked into her eyes and smiled, she turned her head to the left and then passed out. The next thing she remembered is waking up on the couch with Mr. Belak having sexual intercourse from on top. She was on her back and could see Mr. McLaughlin but didn't know for sure if he was still holding her arms. She still didn't feel like she had the ability to move and blacked out again.

[30] When she next awoke, she found herself lying on the sofa. She got up, put on her pants and started looking for her coat. She saw a light on down the hallway. She testified that she didn't remember walking down the hallway but did remember standing near a bedroom with the light on and saw Mr. Belak lying naked on the bed, awake, with his hands crossed behind his head. She then remembered turning around and Mr. Belak was following her down the hallway, naked. She said he helped her putting on her coat. She put her own footwear on, with no mention of any difficulty doing up the laces. She said

that Mr. Belak came with her to the door and she ran out of his house. She had been unable to recover her underwear.

[31] She said her residence was about five or ten minutes away, and she initially tried to run, but couldn't run very well. She passed by the Watson Lake Hospital on her way home, but for reasons which I will get into later, decided not to go in to seek assistance. I find as a fact that she arrived home between 6:20 and 6:30 a.m. She was met at the door by her husband, who was upset with her for not letting him know where she had been.

The Accuseds' Evidence

[32] The evidence of each of the accused is that, at some point during the sociable conversation at the Belak residence, the topic arose of people cheating on their spouses. The complainant did not recall this conversation, but allowed that it could have taken place. According to each of the accused, this conversation began to involve some discussion about the complainant's husband and Mr. Belak said, "Well, you know, the best way to get at a guy would be to cheat on him, because it attacks his manhood and is probably the worst thing you could do to a guy." He then said that the complainant responded that she should cheat on her husband because he deserves it and treats her like crap. According to Mr. McLaughlin, the complainant responded saying, "I should, because he's an asshole". The complainant denied that this latter aspect of the conversation took place.

[33] Each accused then testified that there was a discussion about the complainant's sweater and that she stood up with her hands on her hips and put her shoulders back to stick her chest out. The complainant agreed that the reason she did this was to display her breasts. Mr. McLaughlin said that he then complimented her breasts. The

complainant did not recall that happening, but allowed that it was possible it could have. Mr. Belak then testified that he said he was a butt man and that he liked a woman with a nice butt as opposed to nice breasts. Mr. McLaughlin corroborated that part of the conversation and both accused testified that the complainant's response was, "Well, I think I can offer you both", turning around, sticking her butt out and, according to Mr. McLaughlin, shaking it.

[34] At that point, Mr. McLaughlin said to the complainant "You know, I'm not sure what's going on here, but are you wanting a threesome?" He said that she responded by saying "I'm not going to lie to you. It's not like I haven't been thinking about it" and smiled. She then went to the washroom saying, "I'll be right back". That evidence was substantially corroborated by Mr. Belak.

[35] While the complainant was in the washroom Mr. Belak said something like "Well, at least you can't say you weren't upfront about it" to Mr. McLaughlin. When the complainant returned to the living room, Mr. McLaughlin went down the hall to the bathroom. When he returned, the complainant and Mr. Belak were sharing one of the Colts cigars. As Mr. McLaughlin went to walk past the complainant, she reached back with her right arm and grabbed his right arm. He took that to be an invitation and approached her from the rear, placing his hands on her hips while standing behind her slightly to the left. That evidence is substantially corroborated by Mr. Belak. Mr. McLaughlin then started kissing the complainant on the left side of her neck. He said that she then returned his kisses and eventually was kissing him on the neck and the mouth. Mr. McLaughlin then said that the complainant took her left hand and reached around and grabbed his groin area. They embraced and he began to fondle her breasts both

over and under her sweater. At that point, Mr. Belak made a comment about her sweater and both accused testified that she told him to be quiet because he was ruining the mood. Mr. McLaughlin then raised the complainant's arms and took off her sweater.

[36] Eventually, Mr. McLaughlin ended up seated on the sectional sofa with the complainant on her knees between his legs. He assisted her in undoing his belt and pants and she began performing oral sex on him in that position. He then shifted his position to the floor, such that he was on his back, propped up on his elbows, with the complainant continuing oral sex. Mr. Belak then moved around to the rear of the complainant and began fondling her. He assisted in removing her brassiere and then removed her pants and panties, with the complainant's cooperation, by lifting her knees off the floor one leg at the time. After some more fondling, Mr. Belak began having intercourse with the complainant from behind, while she was continuing to perform oral sex on Mr. McLaughlin.

[37] The group then switched position, and Mr. Belak commenced having sexual intercourse with the complainant with him on top in the missionary position. While he was doing so, the complainant grabbed Mr. McLaughlin and indicated that she wanted to continue performing oral sex on him, which she did.

[38] At one point, McLaughlin and Belak bumped heads because they were in such close proximity to one another. This caused Mr. Belak to start chuckling. He assured the complainant that he was not laughing at her, but had to go to the kitchen to regain his composure.

[39] There was then a lull in the sexual activity. According to Mr. McLaughlin, the complainant went to the bathroom and when she returned the three individuals sat

around having a conversation about nothing in particular. It was at this point that Mr. Belak recalled that Mr. McLaughlin and the complainant had both gotten dressed and he had put his boxer shorts back on, while they sat on the couch talking. Mr. Belak described the conversation as “uncomfortable” and Mr. McLaughlin described it as “nervous banter” and “awkward chuckling”.

[40] Mr. McLaughlin next went to the kitchen and to the bathroom, and when he returned to the living room, he noted Mr. Belak again on the floor on his back with the complainant on top of him having intercourse. He became involved by caressing the complainant’s breasts and touching her during that action. The complainant and Mr. Belak took a break, which Mr. McLaughlin used as an opportunity to have missionary intercourse with the complainant to the point of his orgasm. After he was finished, he gathered up his belongings and went back to the bathroom.

[41] According to Mr. Belak, at one point when Mr. McLaughlin was out of the room, he again started kissing the complainant, they went down to the floor, disrobed each other, and he got on top to resume missionary intercourse with her. Eventually, his knees became sore, so he asked the complainant if she could get on top, to which she agreed. While she was on top, Mr. Belak noticed that Mr. McLaughlin had returned to the room and the complainant indicated that her knees were getting sore and she wished to go back on the bottom. At that point, Mr. Belak stopped having sex with the complainant, Mr. McLaughlin disrobed, and began having missionary intercourse with the complainant from on top.

[42] After Mr. McLaughlin had apparently climaxed and left the living room, Mr. Belak said he moved in and began having missionary intercourse with the complainant from on

top. Because his knees were hurting, he asked if she would like to move to the couch, to which she agreed. Mr. Belak and the complainant continued having missionary intercourse with him on top. At that point, Mr. Belak observed Mr. McLaughlin coming down the hallway towards him, giving a nod as if he was leaving the residence, which he did.

[43] Mr. Belak was unable to get comfortable on the couch and asked the complainant if she would like to continue in his bedroom. The two of them got up; he put on his boxers and she put on her pants and they walked down the hallway. The complainant went into the bathroom at the end of the hall and Mr. Belak went into his bedroom, took off his boxers and lay down on the bed waiting for her to come out of the bathroom. When she did so, Mr. Belak said that she stood at the end of the bed where he was laying and he slid to the edge of the bed so that she was between his knees. He said that he began to kiss her neck and breasts and took her pants off and lay back on the bed while she crawled up on the bed and got on top of him so that they could continue intercourse. Mr. Belak said that they switched one final time so that he was on top, but that after a couple of minutes, they were both tired. He said that he ultimately rolled over and fell asleep. He said that he did not ejaculate.

[44] The next thing Mr. Belak remembered was the complainant asking him what time it was. He looked at his watch, which said 5:37 a.m. but he rounded it down to 5:30 a.m. He said that the complainant seemed like she was in a hurry to get home. As she didn't have her underwear, she put on his boxer shorts, which were lying by the side of the bed, and went down the hall to grab the rest of her clothes. She returned to the bedroom stating that she couldn't find her underwear. Mr. Belak attempted, without success, to

help the complainant to find her underwear, following which the complainant said, “Oh, I’ll get them later” and got dressed. When Mr. Belak asked her what she was going to say to her husband, she said, “Oh, I’ll think of something” and “Oh, but he’s going to be mad, he’s going to lose it”. When Mr. Belak asked why, she said “Because he’s Irish and he has a short temper”.

[45] Mr. Belak then offered to arrange some transportation for the complainant, which she declined. While the complainant was putting her boots on, Mr. Belak gave her her jacket, which was on the floor where she had left it by the closet, and said, “See you around”. She replied “See you around” and then left. At that point, Mr. Belak was wearing his boxers again, because the complainant had taken them off in the bedroom, after the unsuccessful search for her underwear.

[46] Each accused testified that all of the sexual activity with the complainant was consensual.

ANALYSIS

[47] Counsel are agreed that, since the accused have each testified, the case of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, sets out the governing principles. First, if I believe the evidence of the accused, then I must acquit. Second, even if I don’t believe their evidence, if I am left with a reasonable doubt by it, then I must acquit. Third, even if I am not left with a reasonable doubt by the evidence of the accused, then I must still ask myself if I am convinced beyond a reasonable doubt of their guilt on the basis of the balance of the evidence which I do accept. Finally, if I do not know who to believe, I must acquit.

[48] As the Supreme Court of Canada noted in *R. v. Gagnon*, 2006 SCC 17, para. 20, assessing credibility is not a science. Rather, it is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.

[49] The Supreme Court of Canada further noted in *R. v. Lifchus*, [1997] 3 S.C.R. 20, at para. 29, that a witness' demeanour in the witness box is something that *can* be taken into consideration in the assessment of credibility. However, demeanour alone should not suffice: See *R. v. S.(W)* (1994), 90 C.C.C. 3(d) 242 at p. 250. The British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, stated at pp. 256-7, that the appearance of telling the truth is but one of the elements that enter into an assessment of the credibility of a witness. The Court of Appeal further held that, in the end, the real test of the truth of the story of a witness is that it must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[50] Cases subsequent to *W.(D.)* have held that it is not necessary that I begin with an assessment of the evidence of the accused. In this matter, I prefer to begin with an assessment of the credibility of the complainant, because it will provide a greater context for my later assessment of the accuseds' evidence.

[51] For the reasons which follow, I did not find the complainant to be an impressive witness. At times, I found her testimony to be choppy and incomplete, her tone challenging, and her attitude defensive and argumentative. I will provide a few examples

of why I struggled with her credibility:

1. The most significant evidence detracting from the complainant's credibility is that relating to her knowledge of the date rape drug, Rohypnol. The initial evidence of the complainant was that, by the time she gave a statement to Detective McVey on March 24, 2009, she became aware that Rohypnol could be physiologically eliminated from the human body within six to 20 hours, but that she didn't have that knowledge at the time she alleges she was raped. The complainant stated to Detective McVey, on March 24, 2009, that Rohypnol goes through one's system in six to 20 hours, but the "sad thing" was that she had reported the rape 36 hours after the event. In this trial, the complainant testified that she was "aware of *that*" because of an incident that happened to another girl while the complainant was attending nursing school in Oshawa, Ontario, from 2002 to 2006. As a result, defence counsel suggested to her that she had that knowledge in 2009. The complainant then answered:

"I would have had to refresh my memory. I didn't specifically know that at the time. I looked it up on the Internet."

However, defence counsel continued with the following question and received the following answer:

"Q: And – but your conversation to Detective McVey was about your friend or the incident that happened in Oshawa between 2002 and 2006?

A: Correct."

As I interpret all of the complainant's answers on this point, including the statement that she gave to Detective McVey, I find that she was "aware of *that*", that being that Rohypnol goes through your system between 6 to 20 hours, because of the incident that

happened in school between 2002 and 2006. Therefore, I find as a fact that the complainant had that knowledge on the date of the alleged rape.

Thus, the delay by the complainant in failing to report the matter until more than 24 hours had elapsed from the time she was administered the drug meant that the toxicology analysis would not detect the presence of the drug. In other words, if the complainant was telling the truth about the drug, then one would logically expect her to want to get tested for it before it was flushed out of her system. That would particularly be the case, given the complainant's experience as a registered nurse. However, if the complainant is not telling the truth about the drug, then waiting more than 24 hours later would make it impossible to say one way or the other whether the drug was in her system, which would work to her advantage.

2. The complainant testified that she came to believe she had been drugged with a form of date rape drug while drinking wine at Mr. Belak's. In her mind, this explains why she felt unable to speak or move during sexual intercourse. I have found that, on the date of the alleged offence, the complainant had some experience and knowledge about a form of date rape drug. After the complainant left Mr. Belak's residence, she had to pass directly by the Watson Lake Hospital en route to her home. When asked why she didn't go into the hospital to seek medical attention and to report the sexual assault, she said that she didn't feel that she was able to speak at that point, and felt like if she walked into the hospital she would fall flat on her face and that either Shawn McLaughlin or Graham Belak, or both, might be dispatched by the RCMP to deal with her. When asked if she went to the hospital and reported that Mr. Belak and Mr.

McLaughlin had sexually assaulted her, why did she think the police would send either one of them or both to investigate such a report. She gave the following answers:

“A: No, I felt at the time that was – I still wasn’t able to speak, so I felt that I would not have been able to tell them what happened and there was a possibility that the two of them could have come and I was afraid.

Q: You could have spoken enough to tell the hospital that McLaughlin and Belak, two police officers, had done the things that you’re saying. You could have talked to that extent, could you not?

A: No.”

This explanation rings false to me.

First, there was no evidence from the complainant that the drug she thought she had been administered prevented her from speaking throughout. Rather, she clarified that the time when she felt she couldn't speak was when she was being raped by Graham Belak on the floor. She made no mention of an inability to speak while she was being raped by Graham Belak on the couch, or he was helping her with her coat. She was also asked whether she had “*tried to speak*” as she was walking away from Graham Belak's residence, and said she didn't recall.

Second, it is inconceivable that, had the complainant specifically reported a sexual assault by McLaughlin and Belak, that either officer would be dispatched to investigate the charge.

Therefore, in addition to my concern about her knowledge of how much time it would take for a date rape drug to become undetectable, for these two reasons I am further puzzled as to why the complainant did not seek assistance at the hospital immediately after leaving Mr. Belak's residence, if she thought she had been both

drugged and raped only a short time before. Having said that, I am quick to remind myself not to expect that victims of sexual assault will react in stereotypical or predictable ways.

3. Related to the previous point, the complainant said in direct examination that she didn't say anything when she first became aware that Mr. Belak was raping her on the floor in the living room because she was unable to speak. Presumably, she attributed that inability to the date rape drug that she said she was administered. Later in direct examination, she was asked whether there were any other occasions where she attempted to speak after that and could not. She replied "Not that I recall". In answer to a question from me, the complainant confirmed that the time that she felt that she could not speak was when she was on floor while Mr. Belak was having intercourse with her. Therefore, there is no explanation from the complainant why she said nothing to Mr. Belak to indicate her lack of consent when she awoke to find him on top of her having sexual intercourse on the couch.

4. According to Dr. Sergeeva, whose evidence I accept, despite the submissions of the Crown to the contrary, the complainant gave her two different stories about how the sexual assault occurred. Dr. Sergeeva testified that she wrote the complainant's history "exactly" as it was told to her.

When the complainant was interviewed at Mr. Walsh's house, she said she "thought" that she had been raped by "two" RCMP officers. She stated that she had been invited to one of the officer's homes. She remembered one of the officers making a comment about her sweater, but was unsure as to which one or what the comment was. She could not remember details, but stated that she woke up on "the floor", in the dark

and no one was around. She found her jeans but could not find her underwear. She got dressed and went home.

When the complainant was interviewed at the hospital, about an hour or so later, she was “sure” that she had been sexually assaulted. She was drinking wine at Graham Belak's residence. She remembered that the comment about her sweater was that “it was a nice sweater”. She said that Shawn McLaughlin pulled her up from the sofa, was holding her by the waist and undid her jeans. She bent down to pull up her jeans and found herself on the floor. She then stated that Shawn McLaughlin was holding her arms above her head and Graham Belak was on top of her penetrating her. She then said that she woke up on the sofa.

At trial, the complainant's version of the sexual assault further differed from those given to Dr. Sergeeva. For example, she testified that Graham Belak penetrated her on two occasions, once on the floor and once on the sofa. Further, Shawn McLaughlin did not pull her up from the sofa, rather, she was already standing when he came around behind her, held on to her waist and pulled her buttocks into his crotch, such that she could feel his erection.

5. When the complainant first reported the sexual assault to Sean Walsh on March 9, 2009, at the hospital before 8 a.m., Mr. Walsh said she told him “I think Graham raped me. I don't think Shawn did anything”. The complainant denied this, saying she told Mr. Walsh in no uncertain terms that “Graham raped me”. However, based on what the complainant initially told Dr. Sergeeva, while being interviewed at Mr. Walsh's house, I find as a fact that she said to Mr. Walsh “I think Graham raped me”. That, of course, could be interpreted as an indication of uncertainty on the complainant's part.

6. The complainant was asked about injuries she received from the sexual assault. She testified about cramping in her legs and lower back, which lasted about a week, and said that her vaginal area was "sore", particularly on the outer sides of her labia, and that this soreness persisted for about 48 hours. However, Dr. Sergeeva testified that she did a general physical inspection of the complainant's body, including her vagina and labia, for evidence of some force being applied during the sexual contact. She didn't find any indications of such force and concluded that everything was normal. If the complainant was injured as she testified, it is reasonable to expect both that she would have related this to Dr. Sergeeva and that Dr. Sergeeva would have noticed such complaints as part of her physical examination. Neither of these things occurred.

7. Head nurse Katherine Relkoff, testified that the complainant reported soreness to the front parts of her knees during the sexual assault examination at the hospital on March 9, 2009. I accept that evidence. However, on cross-examination, the complainant only recalled that she complained to Nurse Relkoff about a bruise on the side of her right knee. This inconsistency detracts from her credibility. Further, the fact that she complained about soreness to the fronts of both knees is consistent with the evidence of both accused that, at times, the complainant was engaged in sexual intercourse with them while she was on top, with her knees on the wooden floor of the living room.

8. According to the complainant, just before she was initially raped by Mr. Belak, she recalled Mr. McLaughlin behind her, with his hands on her waist pulling her into his hip area. At that point, she said she could feel Mr. McLaughlin's erection. In direct examination, she said that she then closed her eyes and thought that she should

probably be going home. In cross-examination she said that the reason that she didn't say anything to indicate her lack of consent to what was going on at that point was that she was drugged. However, further along in cross-examination, she said that it was at that point that Mr. Belak acknowledged the crucifix around her neck and she wanted to explain to him the details of the ornamental crucifix. When pressed by defence counsel as to why she didn't simply leave at that point, she said "I didn't feel threatened by Shawn".

She then said she held her crucifix up to explain it to Mr. Belak, heard a clink and saw that her belt and her pants were on the floor. She said that she immediately went to pull her pants up by leaning over to her right saying "no, no, no". At that particular point in time, the complainant said that she thought the two accused were "joking around" and that it had gone too far. On cross-examination, she estimated that the time frame between feeling Mr. McLaughlin behind her with his erection to noticing her pants coming down was about 30 to 45 seconds. And yet, she said that she did not have enough time to think about leaving, because it all happened in such a short time frame and her critical thinking skills were impaired by some form of date rape drug.

I find all of this evidence from the complainant to be internally inconsistent, illogical and unreliable.

9. The complainant said that her belt and pants were removed by Mr. McLaughlin without her being aware that he was doing so. However, she said earlier in direct examination that, although she had lost some weight recently, her pants were still tight around her thighs and she had done her belt up quite tautly, such that the waistband of her pants bunched up in the front. Given that, I find it difficult to accept that the

complainant would have had absolutely no awareness of Mr. McLaughlin undoing her belt and removing her pants in the manner she described.

10. In direct examination, the complainant said that she did not recall either accused being in the basement of Sean Walsh's residence when she was down there bouncing on the exercise ball. In cross-examination she clarified that evidence, saying that she was "certain" that Mr. McLaughlin was never in the basement when she was there on that ball. However, this directly conflicts with the evidence of Sean Walsh, which I accept, that at one point in the evening, he, the complainant, Mr. McLaughlin and some other guests went into the basement to look at his exercise equipment.

11. The complainant testified that when she woke up on the couch after having been sexually assaulted, she put her pants on and started looking for her coat. She said she saw a light down the hallway and although she did not remember walking down the hallway, she did remember standing near a bedroom in which there was a light on and saw Mr. Belak lying naked on the bed. She described him as lying flat on his back with his arms behind his head, with his elbows out. She was referred to a planned drawing of the Belak residence, which included Mr. Belak's bedroom on the top right, or northeast corner of the house. She said that Mr. Belak's head would have been on the end of the bed against the east wall of the residence. She also said that she remembered the bed being "just a little bit lower here" than it appeared in the diagram. In other words, the bed would have been closer towards the closet than is shown in the diagram. Finally, she remembered seeing a dresser on the left hand side of the room, opposite the end of the bed.

I find this evidence puzzling. The complainant had just said that she was drugged and raped. She gave no evidence about previously being inside Mr. Belak's bedroom. Yet, she had a remarkable recall about the placement of the bed and the dresser within that room. Finally, the complainant said that she was only standing in the doorway looking into the bedroom. On my assessment of the planned diagram, her sightline from the hallway would have been such that it would have been very difficult, if not impossible, for her to see the head of the bed on the east wall and the dresser in the northwest corner of the room.

12. The complainant testified in direct examination that when she entered her residence, her husband, P.M., was "very upset" and was "yelling" at her when she walked in the door. Later, in cross-examination, she seemed to minimize her husband's reaction by simply stating:

"He was upset, I didn't feel he was angry, no... I wouldn't say anger, no."

She didn't recall him using vulgar language towards her, stating that he was upset that she hadn't called, that he wondered where she had been and was concerned about her. However, in a previous inconsistent statement to Detective McVey, on March 24, 2009, when asked what her husband said to her when she got home, she answered "Oh, he was pissed when I got home... ." Further, the complainant's evidence on the point directly contradicted that of her husband who admitted that he was "furious" and that he "unloaded" for about 30 seconds on the complainant when she came in, using various profanities.

13. The complainant admitted that she smokes marijuana about three times a week on average. She testified that she smoked about half a joint in the afternoon of

March 7, before going over to Mr. Walsh's residence and another joint while walking over to the residence. She also admitted smoking between 10 to 14 bowls of marihuana while she was at home during the afternoon of Sunday, March 8. She said that she could get about four drags of marihuana from each bowl. Her husband, P.M., estimated that three or four bowls would be the equivalent to a small joint of marihuana. The complainant believed that she had been administered a date rape drug while at the Belak residence. However, when interviewed by Dr. Sergeeva, the morning of March 9, 2009, and after having blood samples taken during the sexual assault examination at the hospital, the complainant made no mention at all of her marihuana usage. As a registered nurse, I infer that the complainant must have known that the analysis of her blood would reveal THC from her marihuana consumption. Indeed, the forensic analysis of the complainant's blood revealed THC levels suggesting that she was a "frequent user of cannabis". Despite all this, the complainant made no mention whatsoever of her marihuana usage to any professionals investigating her allegations, until confronted by Detective McVey in July 2009, after the release of the toxicology report. The matter was apparently of enough concern to the police that Detective McVey was dispatched from Edmonton to the complainant's home in Ontario to discuss the situation. The complainant testified at the trial that she didn't tell the police or anyone else about her marihuana usage because she didn't think it was relevant. I find that this was a serious lapse by the complainant and one which adversely affects her credibility. It indicates to me an intention to deceive, or at the very least, to withhold potentially relevant evidence.

14. Crown and defence tendered as an agreed statement of facts that on August 5, 2009, at about 18 minutes after midnight, following the preliminary inquiry in

this matter in Whitehorse, RCMP Constable Brean Desaulniers, received a report from the complainant that her husband “was getting aggressive towards her” and that she was “scared of what he may do tonight”. There was other evidence indicating that as a result of this report by the complainant, the police got involved and suggested that the complainant spend the rest of that night at a women’s shelter in Whitehorse, which she did. However, when specifically asked in cross-examination whether the complainant had made such a report she definitively answered “No”. This evidence is significant because, not only did the complainant deny a known fact, but also because it is an indication that she was fearful of her husband on that occasion. That in turn, conflicts with other evidence given by the complainant that she has never had any concerns about her husband’s volatility and that he has never in any way ever been violent towards her. Rather, she painted a picture of them having nothing but a positive and caring relationship. That, in turn, is very relevant, because it conflicts with the evidence of the two accused that the complainant was speaking ill of her husband during the conversation about spouses cheating on one and other.

[52] In contrast, I found the evidence of each of the accused to be believable. I confess that, in part, I believed the accused because of the manner in which they testified and because they were not shaken in any significant way by the cross-examination of the Crown. However, I wish to make it clear that is not my only reason for believing them. Their evidence was detailed and thorough. There was uncontradicted evidence that they made a pact with each other upon their initial arrest not to discuss the details of the incident in order to avoid the appearance that they had colluded. While both had consumed alcohol, neither man was intoxicated to any significant degree. There were

minor discrepancies between their stories, but none which caused me to disbelieve either. The evidence that Mr. McLaughlin ejaculated and Mr. Belak did not is corroborated by the forensic reports. Perhaps, more than anything, what impressed me the most was their ability to recall with great precision and candour an obviously embarrassing and regrettable scenario.

[53] I also I agree with defence counsel that it would have made little sense for them to have risked administering a date rape drug to the complainant, as she alleges, knowing that she was a registered nurse. With her knowledge as a nurse, it seems to me that there would be a very strong probability that she would attend at the hospital soon after leaving Mr. Belak's residence, if not immediately, to be tested for the presence of the drug. Plus, there would be the further likelihood that she would make the complaint of rape and that the accused would be charged accordingly. It seems improbable that either of the accused would have put themselves in a situation of such incredible risk.

[54] Furthermore, there was apparently no need for them to administer such a drug to the complainant, since there is an abundance of evidence that she already appeared to be sexually interested in both of them. I pause here to emphasize that I am not saying the complainant must have consented to the sexual intercourse because of her previous flirtatious behaviour. That would be an impermissible inference. However, what I am saying is that the complainant's previous flirtatious behaviour created a situation which made it unlikely that either of the accused would have found it necessary to risk their careers in the Royal Canadian Mounted Police, and in Mr. McLaughlin's case, his marriage and family, by surreptitiously administering a date rape drug to the complainant.

[55] In seeking to challenge the evidence of the accused, a number of points were made by the Crown. First, it didn't make sense that the accused would have had sex with the complainant, knowing that she was a complete stranger to them, in the hope that she would remain silent. In other words, they really had no concerns about any consequences and did not know what her reaction might be. I expect that, in retrospect, each of the accused would agree with that assessment. Each regrets his involvement to varying degrees and I would think that they probably wish nothing more but that the incident had never happened. However, their failure to consider the consequences of their actions is not a sufficient reason to disbelieve their evidence.

[56] Second, Crown counsel suggests that it came "out of the blue" when the complainant began to speak with the accused negatively about her husband in the context of spouses cheating on each other. He pointed to the tenor of the complainant's evidence that her husband treated her very well and that there was no evidence to the contrary. However, I agree with defence counsel that there is evidence to the contrary, and that was the complainant's report to the RCMP that her husband was being aggressive towards her and that she was scared of what he may do that night of August 5, 2009, following the preliminary inquiry. The police were sufficiently concerned about this report that they suggested the complainant spend the night apart from her husband at a local women's shelter.

[57] Third, the Crown said that it would have made no sense for the complainant to be involved in the conversation about Tanya the nurse, since the complainant had only been in Watson Lake for a short time and only knew a very few people. Therefore, as I understood the argument, it would be unlikely that the complainant would be in a position

to make a judgment about whether this woman would be a good fit for Mr. Belak or not. On the other hand, while it may have been unlikely that the complainant knew nurse Tanya, it certainly would not have been impossible. Further, each of the accused corroborated the other in stating that the conversation took place. Finally, the comment about Tanya not likely sleeping with Mr. Belak on the first date seems to be generally consistent with the flirtatious conduct and similar innuendoes uttered by the complainant throughout the evening of March 7 and into the early morning hours of March 8, 2009. Therefore, I have no difficulty concluding that the conversation occurred as the accused testified.

[58] Fourth, the Crown seemed to suggest that the complainant was still in the throes of her menstrual period by the time she was at the Belak residence, and therefore would not have had consensual sex with either accused, because she thought “it was gross” to have intercourse while menstruating. However, the evidence does not establish that the complainant was still bleeding by the time that each of the accused had intercourse with her. If anything, there were indications to the contrary. In particular, the complainant said that her period had been very heavy “up until that Saturday”, and on that evening she did not need to use tampons as frequently. She said that she used two tampons at Sean Walsh’s and then believed she just used a panty liner after that. She said that the bleeding would start a little bit, stop a bit, and start a little bit. She could not recall for sure if she even had a panty liner on when she left the Walsh residence and does not remember using any feminine hygiene products at the Belak residence. Further, although the complainant herself said that she was sexually assaulted on the couch, the forensic investigation failed to detect any signs of blood whatsoever in that area.

[59] Fifth, Crown counsel also pointed to the complainant's evidence about how her condition changed from being simply intoxicated at the Walsh residence to something else which she had never experienced before. He referred to the complainant's references to her eyelids closing more slowly, the fact that her thought processes seemed to be slowing down, her difficulty in keeping the cigar from slipping out of her lips, her paralysis, her inability to speak and her periodic blacking out. However, the complainant herself testified that she researched the effects of Rohypnol on the Internet and was familiar with a previous incident involving a girl in Oshawa who had been subjected to such a drug. Therefore, the complainant had knowledge of the adverse symptoms of this type of a drug before providing her evidence to the police and to this Court.

[60] Crown counsel made two final points about aspects of the evidence of the accused which he said "did not make sense". The first was the evidence of Mr. Belak, that during the lull in the sexual relations, the two accused and the complainant sat on the couch carrying on an uncomfortable conversation, by which time the complainant had put her sweater and pants back on and Mr. McLaughlin had gotten similarly dressed, to an unstated extent. Mr. Belak himself admits that he had put his boxer shorts back on. Frankly, I feel unable to comment whether such behaviour could be said to be out of the ordinary or otherwise unreasonable in that context. Just as the Crown cautioned me against making subjective judgments about the complainant's intentions when she was acting in a flirtatious manner, I don't feel equipped to make a subjective judgment about whether getting dressed to a degree in the midst of a three-way sexual encounter is unusual to the point of not making sense. Indeed, it may well be expected, given that

both Mr. Belak and Mr. McLaughlin spoke of the mood as being awkward and nervous around that point. In that context, it is perhaps not surprising that the parties would have been motivated to cover themselves to a degree out of sheer modesty.

[61] The Crown also questioned why it was necessary for Mr. Belak to put on his boxers, and for the complainant to put on her pants, when they moved from the living room to the bedroom, to continue their intercourse. Once again, counsel submitted that such conduct “didn’t make sense”. My response to that submission is the same as I just stated above.

[62] Crown counsel submitted that the Crown’s own witness, Dr. Sergeeva, was extremely biased, not impartial and not objective, and implied that I should give little weight to her evidence. I understood this submission to be based primarily on a point raised in cross-examination by defence counsel, which the Crown took issue with. The report prepared by Dr. Sergeeva following the sexual assault examination of the complainant at the Watson Lake Hospital on March 9, 2009, detailed what Dr. Sergeeva testified to as the two different versions of the sexual assault reported by the complainant, as well as the only noted findings of a few bruises on the mid right and left thighs and the mid posterior right side of the body. There were no bruises noted to the abdomen, back, wrists, arms or breasts. There was no tenderness upon palpation of the neck, arms or shoulders. While there were some swelling found in the sacral area, that was without redness or bruising. Dr. Sergeeva concluded that “the above findings alone cannot be interpreted as proof of forceful intercourse.” Defence counsel, Mr. McKay, in cross-examination, asked whether, if there was sexual intercourse, her findings would support a conclusion that it was consensual intercourse. Dr. Sergeeva agreed with that

suggestion. However, on re-examination she was challenged on this last point by the Crown. She conceded that her opinion that the intercourse would have been consensual, assuming there was evidence of intercourse, was based partly on her personal opinion and not on her professional medical opinion. In fact, she had not reached any conclusion in her own mind about whether sexual intercourse had taken place or not. While I concede that Dr. Sergeeva should have not been relying on personal opinions, having observed her testify and looking at all of her evidence in total, I am not persuaded that the remainder of her evidence is of no value. Indeed, the rest of her evidence was essentially unchallenged and corroborated in many respects by Head Nurse Relkoff. Accordingly, I have accepted Dr. Sergeeva's evidence about the complainant's inconsistent versions of the sexual assault, as well as all the other evidence about her physical examination of the complainant.

CONCLUSION

[63] In the result, each of the accused are presumed innocent of the charge of sexual assault against the complainant. Because of the difficulties I have with the complainant's evidence and her credibility, I am not satisfied that the Crown has proven beyond a reasonable doubt that the sexual contact between each of the accused and the complainant was without her consent. Looking at the matter from the perspective of the two accused, I have concluded that I believe the evidence of each of them, in the context of the evidence as a whole, and therefore I must acquit them of the charge.