

SUPREME COURT OF YUKON

Citation: *R. v. C.F.N.*, 2018 YKSC 15

Date: 20180327
S.C. No. 17-01502
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

C.F.N.

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

Before: Mr. Justice L.F. Gower

Appearances:

Leo Lane
André Roothman

Counsel for the Crown
Counsel for the accused

REASONS FOR JUDGMENT

INTRODUCTION

[1] GOWER J.: This is the trial of C.F.N. on a charge of sexual assault against J.B. in [redacted], Yukon, on November 25, 2016. The issue is whether the complainant had consensual sexual intercourse with the accused or whether the accused had intercourse with her while she was asleep.

[2] These reasons for judgment were read out in court, at which time I indicated that I would be also be releasing this redacted version of them for publication.

BACKGROUND

[3] The accused and the complainant were friends. They had worked together for about three years until the end of 2016. About four years ago the complainant also became good friends with the accused's wife, R.N. ("R."), although they have been estranged since the date of the alleged incident.

[4] The complainant's partner is R.G.. They have been together for about nine years.

[5] The accused and his wife have been together for about 14 years, and have been married for the last nine.

[6] Up until the date of the alleged offence, the complainant and R. would visit each other about once a week. Also, the two couples would visit each other in their homes regularly.

[7] The following facts are not contentious.

[8] On Thursday November 24, 2016, the accused finished work a little bit early and went home to start cooking supper. R. joined him soon after and the two started working together to sort some photographs for family members while supper was being prepared. The accused started drinking some beer around that time and R. started to consume beer-based drinks she referred to as "Twisted Teas".

[9] R. and the complainant texted each other about getting together for a "girls night out" that night. The complainant was driving and picked R. up at her house about 8:30 or 9 p.m. At one point, they attended at the a motel lounge, where they each had one beer and purchased more beer to take away.

[10] About 9:30 or 10 p.m. the two women went to the complainant's home, where R.G. and his friend Ro. were present. The four of them drank beer and chatted and the

mood was good. Eventually, R.G. shut the socializing down because he wanted to go to Whitehorse with his family the following morning. The complainant agreed to give Ro. and R. a ride home, which she did at some point after midnight. The complainant was unsure of the time, but R. recalled leaving the complainant's at about 2 a.m.

[11] The complainant dropped Ro. at his house and then continued on to R.'s house.

[12] The complainant and R. arrived at R.'s house at about 2:00 to 2:30 a.m.

[13] The complainant went inside R.'s house and began socializing with R. and the accused at the kitchen table. All three were drinking beer.

[14] At one point, R.G. phoned the complainant. He was upset because she had not yet returned home and he was unaware that she intended to continue socializing at R.'s home. About a half an hour later, R.G. came over. He was angry with the complainant for not coming home and took her vehicle keys so that she could not drive. R.G. stayed less than five minutes before leaving.

[15] The complainant, R. and the accused continued drinking at the kitchen table, chatting and listening to music, and the mood was good.

[16] At some point during the early morning hours, the complainant and R. began kissing and having sex in the master bedroom.

[17] At one point, the accused joined them in the master bedroom and there was a brief discussion about having a threesome. However, R. quickly declined, claiming that she would be too jealous.

[18] The accused left the master bedroom.

[19] The complainant subsequently left the master bedroom and went into the living room.

[20] R. was the last to leave the master bedroom. When she entered the living room, she saw the accused on top of the complainant engaged in sexual intercourse. Each had their pants and underwear pulled down, but each was clothed from the waist up. R. became enraged and started screaming and striking at the accused, causing four minor facial bruises or abrasions and some minor swelling. Various things were said by each of the parties as the accused and the complainant got dressed.

[21] The complainant found a spare vehicle key in her jacket pocket, left the home and drove to the location of a former restaurant, which was about 10 minutes' drive away. While there, she phoned her younger sister and her mother, L., to talk about what had happened. The complainant also exchanged text messages with R. during this time.

[22] Eventually, the complainant returned to her home where she told R.G. what had happened. L. picked the complainant up and the two of them went to the [redacted] Health Centre, where the complainant was examined and received Ativan as medication for her hysteria. While there, Cst. Kerry Jury took an audio statement from the complainant.

[23] Later, L. and R.G. took the complainant to the Whitehorse General Hospital, where she received a sexual assault kit examination.

[24] The accused was arrested at his home by Cpl. Peters sometime after 10 a.m., the morning of Friday, November 25, 2016.

[25] The complainant estimates that she consumed about 14 beers in total throughout the evening of November 24th and the early morning hours of November 25th. R. estimates that she consumed between 15 and 18 beers (including the "Twisted Teas")

during the same time period. The accused estimates that he consumed about 20 beers in total, and that he drank the last 12 beers after the complainant and R. arrived at his house between 2:00 and 2:30 a.m.

LAW

[26] The accused testified in this trial. Accordingly, counsel are agreed that I am obliged to consider the principles originally set out in *R v. W.(D.)*, [1991] 1 S.C.R. 742, in assessing the credibility of the accused in relation to the onus of proof, which in this case remains on the Crown at all times. The *W.(D.)* principles have been expressed by courts in various ways since originally pronounced. There is no magic wording or formula in stating the principles. The way they are expressed in *Canadian Criminal Jury Instructions*, 4th Ed., 2017, at p. 4.04 - 3 is as follows:

- 1) If I believe the evidence of the accused, I must find him not guilty.
- 2) If I do not believe the evidence of the accused, but his evidence leaves me with a reasonable doubt [on the issue of consent to the sexual intercourse], I must find him not guilty.
- 3) If I do not know whom to believe, then I have a reasonable doubt and must find the accused not guilty.
- 4) Even if I am not left with a reasonable doubt by the evidence of the accused and the defence witnesses, I must still ask myself whether, on the whole of the evidence, I am satisfied beyond a reasonable doubt that the accused is guilty.

ANALYSIS

1) *The evidence of the accused*

[27] In summary, the evidence of the accused is as follows.

[28] He was awake and sitting at the kitchen table when the complainant and R. arrived at about 2:00 or 2:30 a.m. He said the two women were both very intoxicated. He drank with them at the kitchen table and the mood was good.

[29] The accused testified that he went outside for a smoke and when he came back inside both women were gone from the kitchen table. He walked to the master bedroom door, which was open, and could see a light on in the ensuite bathroom from under the door, which was closed. He then returned to the kitchen and continued drinking beer.

[30] A while later, the accused heard a noise from the bathroom, which he described as sounding like something falling or banging on the wall. He went back to the master bedroom, walked inside and knocked on the closed ensuite door. He asked if everything was okay and heard one of the women reply that they were okay and would be out in a bit. He was not sure which one of the women was speaking.

[31] The accused returned to the kitchen and continued to drink beer. He went outside and had another cigarette and when he returned to the kitchen the women still were not present.

[32] The accused then heard the door to the master bedroom close. He returned to the bedroom and opened the door without knocking. He said that he saw the complainant sitting on the bed by the dresser and R. standing in between the dresser and the bedroom door. The accused testified that each woman was only wearing a bra and underwear. He asked them what they were doing. He said that the complainant replied saying that she would like to have a threesome. He said R. looked at him and he said "Yes", that he would be "down for a threesome". He looked at R. again and she looked at him saying "No", she would be too "jealous", and that she did not want it to

happen. The accused said that R. then told him to leave the bedroom. He did so, returning to the kitchen, where he continued to drink beer.

[33] The accused testified that he went outside for another smoke and after coming into the house through the front door, he went to the fridge for another beer. In the course of doing this, he saw the complainant walking by the front entrance towards the L-shaped sectional couch in the living room. He heard the complainant say “It is your turn”. He said he put the beer on the table, went to the living room entrance and asked what she had said, to confirm what he had heard. The accused testified that she said a second time “It is your turn” and “Come here”. He said that this was about half an hour after he had been in the master bedroom with the two women and R. had asked him to leave the room.

[34] The accused said that he went over to the complainant and she came towards him and started to kiss him. The two were both standing. He then said that the complainant backed off and pulled her pants and underwear down, laying back on the couch and said “Come here” a second time. He then pulled his own pyjama pants and underwear down and the two of them started to have sexual intercourse.

[35] The accused testified that R. then came into the living room. He lifted his head to look towards her and she started punching him in the face with a closed fist. He immediately jumped off of the complainant, and sat on the other part of the couch, pulling up his underwear and pyjama pants. R. continued to hit him.

[36] At one point, the accused said that the complainant held R.’s right arm to prevent her from hitting him and he used the break in the action to go into the kitchen. He said that R. came into the kitchen also and the complainant followed behind her.

[37] In direct examination, the accused testified that the complainant said two times, “Don’t tell R.G.”. R. then asked him “How could you be having sex with her?” He said he replied, “I thought it was okay because you two were doing it.” He then said that the complainant changed her story to say that she was sleeping before the intercourse. He said that he challenged her on this and told her that she was not sleeping, saying “You asked me to have sex with you.”

[38] The accused then said that R. told both the complainant and himself to leave the house. The complainant did so, but the accused did not. Rather, he went down into the basement.

[39] In cross-examination, the accused testified that R. said “What the fuck were you doing? How could you?”, when the complainant grabbed R.’s arm, allowing him to go into the kitchen. He said R. was “furious” at him.

[40] The accused was specifically asked whether R. said to the complainant “How could you not feel that?” He initially replied that R. asked such a question to the complainant, but that it did not happen until the three of them were in the kitchen. In particular, he said that R.’s question was, “How could you not feel the accused fucking you?”

[41] The accused said that R. then announced that she was going to call R.G. She attempted to do so, unsuccessfully, while the three of them were in the kitchen. At that point he said that the complainant started to claim that she had been asleep and R. told her to leave.

[42] Later in his cross-examination, the accused agreed that R. asked her question to the complainant, “How could you not feel the accused fucking you?”, while the

complainant and the accused were still on the couch. He then testified that all of the other exchanges of statements took place while the three of them were in the kitchen.

[43] The accused testified that after the complainant left the house, he went downstairs and slept for a while on a couch.

[44] At some point, while he was downstairs, the accused posted a Facebook message to his friend, D.M., calling his wife a “bithch” [as written] and asking whether he could stay at his place for a while.

[45] When he woke up, R. was sitting across from him and the two of them had a conversation. In particular, he said that R. asked him if the complainant was sleeping during the sex, to which he replied “No” and that the sex had not been going on for “very long” before R. came into the room and started to hit him.

[46] At another point that morning, the accused said that he received a telephone call from R.G., telling him that he better leave town because R.G. was going to kill him. About 15 minutes later, the accused said that R.G. came over to his house, came downstairs and said “You have been charged with this before”, referring to the accused’s prior criminal record for sexual assault. The accused said he replied “Yes”, but that he had done nothing wrong.

[47] I pause to note that, although the accused’s prior conviction for sexual assault was referred to by two of the witnesses in this trial, it is obviously irrelevant to the question of whether he committed this offence, and, as well, I consider it to be of little weight in my assessment of his credibility.

[48] I agree with defence counsel that the testimony of the accused as to the events of that night is probably the most detailed and consistent of all three of the principal

witnesses. Initially, I was quite impressed with his evidence, but as the cross-examination proceeded, I became less so.

[49] For a number of reasons, I do not believe the evidence of the accused.

[50] First, although the accused is a large man (6 feet and 280 pounds at the time), twenty beers is an exceptional amount of alcohol to have consumed in approximately 12 hours. In particular, he consumed the last 12 beers between 2:00 or 2:30 a.m. and 6:30 or 7:00 a.m. The accused admitted that this was “lots more” than he usually drinks. Although he claimed that his memory of the events of that night was not affected by the alcohol, in my view, it is only common sense that I should have significant concerns about the reliability of his recollections due to the amount he had consumed and his state of intoxication.

[51] Secondly, while I am alive to the concern about placing too much weight on demeanour, as the direct and cross-examination of the accused proceeded, the accused’s speech became more and more monotone and the manner in which he delivered his abbreviated answers suggested to me that they had been rehearsed.

[52] Thirdly, there was an important internal inconsistency in the accused’s evidence about when R. asked the complainant the question, “How could you not feel the accused fucking you?” Initially, the accused said that R. asked this question when the three of them were in the kitchen. However, he subsequently admitted that the question was asked while he and the complainant were still on the couch, which had to be immediately upon R. entering the living room. In my view, this is highly significant. Why would R. have asked the question if the complainant was awake and willingly engaged in sexual intercourse? Conversely, the admission tends to support the complainant’s

version of events, i.e. that she was sleeping during the intercourse, and only woken up when R. started screaming.

[53] Fourthly, the accused was internally inconsistent about when and whether he began to suspect that the two women were fooling around in the ensuite or the master bedroom. Initially, he said nothing about being suspicious in this regard when he first saw the light was on in the ensuite, coming from under the door. Further, even after hearing the sounds in the ensuite and going back a second time to ask whether everything was okay, he said he did not think much about it and had no thoughts about the possibility that they were fooling around. Then, when he went back the third time and opened the master bedroom door without knocking, he was asked why he did not respect the privacy of the two women. He responded that he did not know what they were doing in the room. However, in the course of the cross-examination, the accused admitted that he began to suspect they were fooling around when he initially saw the ensuite light was on. Further, his suspicions increased when he heard the noise and asked them whether everything was okay. Finally, he admitted that when he heard the bedroom door close, his suspicions that they were fooling around increased yet again. Nevertheless, he barged in without knocking. I conclude from all of this that the accused was being dishonest when he initially testified that he had no thoughts about what was going on between the two women. I further conclude that he was being untruthful when he said that he walked into the room without knocking because he did not know what they were actually doing. Rather, this action supports the inference that the accused was quite keen to get involved in whatever sexual activity was going on, as he was admittedly sexually attracted to the complainant.

[54] Fifthly, the accused was internally inconsistent when he testified that he “honestly believed” that R. would be okay with him having sex with the complainant, explaining that his reason for saying so is because the two women “were doing it”. This is because the accused also testified that, when the complainant proposed the threesome, he was very careful to look at his wife to see what she thought about the proposal, because he respected her opinion and did not want to cross any boundaries with her. He also testified that R. almost immediately responded that she did not want the threesome because she was too jealous and when she told the accused to leave the room, he immediately did so. In other words, he was very respectful of R.’s views on the prospect of him having intimate sexual contact, direct or indirect, with the complainant, even though he was sexually attracted to her. Therefore, I find it highly implausible that he would have honestly believed, only about half an hour later, that R. would have been okay with him having sex with the complainant, simply because she had earlier been fooling around with the complainant.

[55] Even though I do not believe the evidence of the accused on some key points, I must nevertheless ask myself whether it raises a reasonable doubt. Strictly speaking, even when considered in the context of the other evidence, I would not be comfortable saying that it raises a reasonable doubt as to whether the complainant consented to the sexual intercourse.

[56] I must now decide whether, on the whole of the evidence, I am satisfied beyond a reasonable doubt that the accused is guilty. Thus, I will now turn to an analysis of the balance of the salient evidence.

2. The evidence of the complainant

[57] I have a reasonable doubt about the reliability and truthfulness of the complainant's evidence for the following reasons.

[58] First, I have concerns about the reliability of the complainant's evidence due her consumption of approximately 14 beers, the degree of her intoxication, and the fact that she claims to have been blacked out for a period of time between sitting at the kitchen table with the accused and R. and coming to in the bedroom when the threesome was discussed.

[59] Second, it is significant to me that when the complainant was interviewed by Cst. Jury the morning of November 25, 2016, at the [redacted] Health Centre, the complainant made no mention whatsoever of her sexual intimacy with R. or the brief consideration of a threesome with the accused. Simply put, she was not entirely truthful with the Constable. I also do not accept the complainant's explanation for this omission, which was that she was hysterical and under the influence of the Ativan medication. It appears that she had no difficulty providing other significant details to Cst. Jury about the events of that night and early morning. Although Cst. Jury initially had some difficulty communicating with the complainant, she testified that the complainant eventually calmed down enough to speak with her and that the Constable was satisfied she had obtained a complete statement by the time she was done asking the complainant her questions.

[60] Thirdly, when defence counsel cross-examined the complainant about the possibility that she might have made the suggestion that she, R. and the accused have a threesome, she denied the possibility, saying "No, I did not want it to happen". When

defence counsel pressed her and asked whether it was possible that she might have made the suggestion, but that she simply cannot remember, the complainant replied “No”, again denying that possibility. However, the complainant was then confronted with her earlier testimony at the preliminary inquiry, where the following exchange occurred:

- Q And did you make any suggestions to R. about - for the sexual activities involving the three of you?
A I - not that I can remember, no. I - I don't know.

The complainant subsequently acknowledged that this answer was true, and therefore adopted this earlier testimony. While not the clearest inconsistency, her answer at the preliminary inquiry was equivocal on this point, and, to the extent that she agreed she was being truthful then, I find it reflects poorly on her reliability. This, along with her state of intoxication and her claim of being blacked out for a period of time, leads to me to prefer the evidence of both the accused and R. that it was the complainant who suggested that they all have a threesome. While that suggestion does not make it more likely that the complainant ultimately consented to the subsequent sexual intercourse with the accused, it does affect the reliability of her evidence about the contemporaneous events.

[61] Fourthly, I have a difficulty with the complainant's evidence about her attitude towards her partner, R.G. Initially in cross-examination, she denied that, after the sexual contact, she was “scared” because she was concerned he would find out that she had consensual sex with the accused. The complainant described R.G. as a sympathetic person, who was very protective towards her and very calm. She said that he was not the type of person who often shows anger. When asked whether he gets angry towards her, she said “No, he has been by my side through all of this”. When asked whether she

was scared of him after this, she again said “No”, but that she was just scared in general.

[62] However, this evidence is inconsistent with a text message that the complainant sent to R., while she was parked at the restaurant, sometime after 7:53 a.m., where she said:

I'm so scared of [R.G.] you have no idea what the fuck is going on.. I'm freaking out and I do not know why

[63] The complainant's evidence praising R.G.'s peaceful and supportive character is also internally inconsistent with her admission in cross-examination that he has been physically violent with her on at least one previous occasion. It is further contradicted by R.'s evidence that R.G. has a very short temper, is very violent and very jealous. R. further denied absolutely that he could be described as calm and docile. Rather, she testified that he has been verbally abusive towards the complainant in the past, calling her “a slut, a whore and a cunt”. R. also said that before coming over to her house in the early morning hours of November 25th, R.G. had sent her a text asking where his “skanky assed wife” was. R. also testified that, when R.G. came over to the house to get the vehicle keys from the complainant, he grabbed her and shook her violently. I accept R.'s evidence in this regard, as I am satisfied that she had no motive to fabricate it. She admits that she and R.G. grew up together and “have been friends forever”, so it seems unlikely that she would want to paint him in such a negative light if she was not being truthful.

[64] My assessment of the credibility of the complainant's denial of being scared of R.G. was also affected by the evidence of her mother, L. L. testified that when she spoke with the complainant on the telephone somewhere between approximately 8:50

and 9:20 a.m. on the morning of November 25th, the complainant told her that she was scared to call her boyfriend and tell him what had happened. According to L., the complainant also told her that she did not think R.G. would believe her about what happened. While none of these statements are admissible for the truth of their contents, I do find that they impact on the complainant's credibility to the extent that, in the trial, she absolutely denied telling her mother these things.

[65] Fifthly, the complainant testified that she was "a light sleeper". She also testified that she was "sleeping" on the couch in the living room just prior to the sexual intercourse, and rejected the suggestion that she had instead again blacked out from the alcohol. However, the complainant also admitted that she was wearing "snug fitting jeans" that night. In order for the accused to have had sexual intercourse with her, he would have had to have unbuttoned the top button of her jeans, pulled down the zip, pulled her jeans down from underneath her hips and buttocks, pulled down her thong, spread her legs apart and positioned his six foot, 280 pound frame on top of her. Nevertheless, the complainant maintains that she did not wake up through any of this. Rather, she said that she only awoken to the sound of R.'s screaming. While this might have been possible if the complainant had been in a deep sleep for some time, the circumstances here do not bear that out. R. testified that, after the complainant left the bedroom, she was in the ensuite vomiting for about 10 minutes before going into the living room. The accused also testified to a relatively short time having elapsed. Therefore, even if the complainant had fallen asleep on the couch, as she claims, she would only have just fallen asleep for a few minutes before becoming aware of the sexual intercourse. Further, the complainant claims she was less intoxicated when she

went to the couch to go to sleep than she was earlier that night and morning. For all of these reasons, I have difficulty accepting the complainant's evidence that she remained asleep throughout all of the above mentioned activity.

[66] Sixthly, the complainant testified in this trial that when she spoke to her mother on the morning of November 25th, she told her that the accused had unwanted intercourse with her. However, this is externally inconsistent with L.'s evidence. She was cross-examined on her statement to the police given the same day, where she was asked the following questions and gave the following answers:

- Q Kay. Okay, and so she doesn't know, she, she was highly intoxicated obviously cause she doesn't remember what happened. Um her pants were off?
- A Yeah they were yeah, I guess so.
- Q Or..
- A Half way down or something yeah.
- Q Okay. Um, does she, does she remember if, if they had actual intercourse or anything like that?
- A She didn't know.
- Q She did not tell you? Okay
- A All she said she remembers was waking up and she, he was on top of her and [R.] was pulling him off.

[67] Again, while I recognize that the content of the text messages and L.'s evidence about what the complainant said is not admissible for its truth, the fact that the complainant testified to telling her mother something significantly different does impact on her credibility.

[68] Seventhly, there is a discrepancy in the timing of when the complainant was parked in her car and when she made her telephone calls to her sister and her mother. The complainant testified that she woke up at about 6:30 or shortly afterwards and that she left the accused's residence before 7 a.m. She also said that she spoke to her sister first about what happened and that her sister suggested she call her mother. The

complainant testified that she spoke with her mother on the telephone at about 7:30 or 8 a.m. However, we know that the complainant did not send her first text to R. until 7:53 a.m., and it was only the fourth such text, at an unspecified time, when she indicated that she had phoned her sister. Obviously, if the complainant did not speak with her sister until sometime after 7:53 a.m., then she could not have been speaking with her mother on the telephone at about 7:30 or 8 a.m. The complainant's evidence here is also inconsistent with that of her mother. L. testified that she did not receive the call from her younger daughter until about 8:30 or 9 a.m., and it was only about 20 minutes after that that she called the complainant on the phone. That would have placed the conversation between them and about 8:50 or 9:20 a.m. These times are corroborated by Cpl. Geoffrey Peters who testified that he received a call from the RCMP dispatch at about 9:50 a.m., indicating that L. had called to advise that the complainant had been sexually assaulted.

[69] The significance of this discrepancy is twofold. First, it goes to the general unreliability of the complainant's memory of the events of that morning. Second, it indicates that a significant amount of time passed between the complainant leaving the accused's residence and calling her sister and mother. If she left the accused's residence at about 7 a.m., and allowing for a 10 minute drive to the former restaurant, this still leaves about an hour and a half or more which is unaccounted for by the complainant, other than by her first four texts to R., which commenced at 7:53 a.m. The content of those texts is as follows:

[R.] I'm fucking scared and I don't know what is happening.

I'm freaked out

[I'm] so scared of [R.G.] you have no idea what the fuck is going on.. I'm freaking out and I do not know why

I phoned my sister freaking out

[70] The complainant testified that her partner was a person who is sympathetic, very protective towards her, very calm, and not often angry, especially towards her. She also said that he has been by her side through this entire ordeal. If that evidence is to be believed, then it raises a significant question in my mind why the complainant told R. she was scared of him and why she chose to go to the restaurant, and sit in her car for about an hour and a half trying to sort out what she was going to do.

[71] Further, her conduct in this regard is consistent with the theory of the defence that the complainant and the accused were interrupted by R. while having consensual sex, and that once the complainant realized R.G. might find out about this, she had to take some time to figure out a strategy, i.e. to claim she was sleeping when the intercourse began.

3. The evidence of R.

[72] R. testified that she is 34 years old and has been in a relationship with the accused for 14 years. The couple have been married for the last nine years.

[73] She became friendly with the complainant about four years ago. In 2016, prior to this incident, R. testified that she and the complainant would see each other about once a week. Their activities together would include drinking alcohol, playing with their kids at a park, attending each other's houses, and having cigarettes. R. acknowledged that the complainant was a friend of the accused's also, but said that she was probably "closer with me".

[74] R. suspected that the complainant and the accused had been flirtatious with each other in the past, but decided to maintain a close friendship with the complainant, because in her words, it was important “to keep your enemies close”.

[75] Much of what R. had to say about the events of the evening of November 24th and the early morning hours of November 25, 2016 dovetails with the complainant’s evidence, with a few relatively minor exceptions. She confirmed that the two of them made plans to go out together the evening of November 24th, and that the complainant was driving and came to her house to pick her up. R. also confirmed that at one point the two women went to the motel where they each had a beer and then picked up more beer to take home. She said she went to the complainant’s house about 9:30 or 10 p.m. She said that R.G. was “fine” and that she and the complainant drank beers with R.G. and his friend Ro., who was an artist. R. then testified that she, the complainant and Ro. left together, because the complainant was giving R. and Ro. a ride home. This was about 2:00 a.m., on November 25th.

[76] R. said that when they dropped Ro. off, she went inside his garage to look at some of his paintings. The two women were at Ro.’s residence for about 15 minutes. When they got back in the car the complainant said that R.G. was texting her, saying some pretty nasty things and was threatening her. According to R., the complainant said she was scared to go home, so R. invited the complainant over to her house.

[77] She said they arrived about 2:30 or 2:45 a.m. and that the accused was up sitting at the kitchen table drinking beer. R. testified that the two women joined the accused at the kitchen table and they all sat around listening to music, talking and drinking beer.

[78] Within half an hour of their arrival, R. said that R.G. came into the house without knocking, grabbed the complainant, shook her up, called her a few names, and then asked her for her car keys. Once he had the keys, he left the residence. R.G. was present in the house for less than five minutes before leaving. R. said that she did not think the accused was present for that incident and that he might have been in the bathroom or outside smoking. She also said that the complainant was very upset and crying after this incident.

[79] In any event, she, the complainant and the accused continued to sit at the kitchen table drinking beer and listening to music until about 5 a.m.

[80] Up to this point, there was little significant divergence in the testimony of R., the complainant and the accused. However, from this time on, the inconsistencies begin to increase. This is also about the time when the complainant claimed that she was blacking out.

[81] R. testified that she and the complainant went into the master bedroom and started “making out”, which led to sex between them. She said that the accused came to the bedroom door and tried to open it, but she pushed it closed. R. said that the accused asked, “What’s going on?” and she replied that they would “be out in a minute”. She then said that she locked the door and that she and the complainant continued to have sex.

[82] R. testified that the accused came back to the master bedroom and that she opened the door and spoke with him. At that point, R. said that the complainant mentioned the idea of having a threesome, while R. was standing at the door talking to the accused. She said that the accused was for the idea and that “to start off” so was

she. R. testified that the complainant had suggestions of how the three would interact sexually, and that the accused began by kissing R.. However, when the accused touched the complainant, R. said that her jealousy flared up. She said that the complainant suggested, "Well, you can do me and he can go behind you". R. replied that she said to the complainant she could not do it because the accused was her husband, although she was willing to continue the sex between her and the complainant. Therefore, R. said that threesome did not happen and she looked the accused in the eye and said, "You need to leave". She said that the accused respected that command and walked out of the bedroom.

[83] R. said she closed the bedroom door again and that the complainant was repeatedly trying to talk her into the threesome idea, but that R. was continuing to resist the idea. She said that she and the complainant started to kiss and make out some more, but that she, R., started to feel nauseous from the alcohol. R. testified that this was about 15 minutes to half an hour after the accused left the bedroom. About that time, R. also said she was starting to get impatient with the complainant's repeated attempts to persuade her to join in a threesome and, in her frustration, she said to the complainant, "Go ahead, go fuck him". She later explained that she said this to shut the complainant up about the threesome.

[84] R. then testified that she then went into the ensuite bathroom and vomited a couple of times.

[85] After about 10 minutes, R. said she went to the kitchen to get a glass of water, when she noticed the complainant and the accused having sex on the couch. She described the complainant as being on her back with her arms wrapped around the

accused's shoulders and with her legs up and spread. R. testified that the complainant was not passed out and that the two of them looked like they were enjoying the sex.

[86] R. then said that she went into an extreme rage and went up to the accused and started punching him and kneeing him in the head. She gave him a bloody nose. She explained that she reacted this way because she is a very jealous person

[87] R. said she wanted to hurt the accused because she had been hurt by witnessing the sex between him and the complainant. She said she asked the accused, "Was she even awake?", because she knew that those words would hurt him, and not because she had any doubt that the complainant was awake.

[88] R. also said that the complainant was trying to pull her off of the accused, saying repeatedly that she was sorry. Ultimately, R. said she told the complainant to "Please leave the house", which she did.

[89] At some point after the complainant left the house, she exchanged text messages with R.. Those began with the complainant texting R. at 7:53 a.m., but we do not know when the subsequent messages were exchanged.

[90] Later that morning, R. saw that the accused had referred to her as a "bithch" in his Facebook posting to D.M. She explained that she and the accused share the same Facebook account. In response, R. posted the following messages to D.M.:¹

Actually I'm not being a bitch, I'm being nice, I just caught him fucking my friend when she was passed out, and I'm not calling the cops ! And this is not my first time catching him he is actually in the middle of a pardon because of jail time sexual assault! He did 8 mths, you want me to be a bitch the accused ? I'm being nice authorities or the husband has not been contacted right now, but don't be an ass to me and at

¹ These were admitted into evidence following a successful application by the Crown under s. 9(2) of the *Canada Evidence Act*, as well as a successful *Khan* application to have the evidence adduced for the truth of its contents.

the very least talk to my kids so o [as written] guess your [as written] right the wife is being a bitch when a couple hours ago I just caught you fucking my friend on my couch while she was passed out!

...

I'm sorry [D.], has nothing to do with you but just truth being told he has sexual assault jail time under his belt and I just caught him again, but if your [as written] cool with that , my heart is fucking broken , I'm sorry u are even brought into this but being called a bitch and a cunt ! Fuck [D.]!

I'm sorry

[91] There is no clear evidence of when these messages were actually posted, although given the reference to “the husband”, i.e. R.G., it is reasonable to conclude that they were posted before he attended the accused’s residence on the morning of November 25th, to confront the accused about what happened.

[92] Much of R.’s explanation for having posted these messages was given in a *voir dire* on the *Khan* application to have the messages admitted in the trial for the truth of their contents. I admitted the messages for that purpose, however, R.’s explanation in the *voir dire* for having posted the messages was never admitted in the trial, so I can have no regard to it. That said, R. did testify in the trial that she wrote the messages because she was angry and still intoxicated at the time. Specifically, she said, “That is the ugly part of addiction, is not thinking before you speak”. R. also testified that she was aware of the contents of the Facebook messages when she spoke with Cpl. Peters at about 4 p.m. on November 25th and disclosed their existence, along with the text messages she exchanged with the complainant earlier in the morning.

[93] Finally, R. testified that this entire incident was “a wake-up call” for both her and the accused. She said that she stopped drinking immediately after the incident and has

now been sober for the last 15 months. She said that she and the accused attend alcohol counselling once per month in Teslin. This evidence is uncontested and it was corroborated by the accused, who has also stopped drinking.

[94] Crown counsel argued that R.'s Facebook messages to D.M. about finding the accused having sex with the complainant when she was passed out should be relied on in my decision. He submitted that if R. walked in and saw consensual sex between the complainant and the accused, one would expect her to have been equally angry at both of them, but rather she took her anger out almost exclusively on the accused. Then, after R.G. effectively accused the accused of rape, the Crown says that R. had to change her story to protect the accused. Accordingly, she began to send texts to the complainant referring to catching them having consensual sex. The Crown says that there is a high degree of reliability in R.'s Facebook messages, because there is nothing in them which is self-serving, similar to an admission against interest.

[95] The Crown also submitted that although screenshots of R.'s text messages exchanged with the complainant have been admitted as a full exhibit in this trial, they are not admissible as proof what happened. I agree. However, Crown counsel went further and said that the accused cannot rely on these text messages as corroboration of R.'s testimony. I disagree with the latter. The text messages are evidence of what R. said to the complainant, regardless of whether what was said was true. Therefore, to the extent that they are consistent with R.'s testimony in this trial, they are potentially relevant to my assessment of her credibility, and I find this to be the case.

[96] Further, while I accept the Crown's argument as to the truthfulness of R.'s Facebook postings, even finding that she wrote them while believing the contents to be

true does not take me all the way to proof beyond a reasonable doubt. It is clear, on all the evidence, that R. was indeed furious with the accused when she discovered him having sex with the complainant. She was also still intoxicated from having consumed 15 to 18 beers over the course that night and morning. She was more even more infuriated when she saw that the accused had called her a “bithch” on the Facebook posting to D.M.. Still further, immediately after R. interrupted the intercourse, there was talk between the three main actors of whether the complainant had been sleeping when the intercourse commenced. This may well have stuck in R.'s mind and become a source of suspicion for her as, despite what she saw when she walked into the living room, she could not have known what condition the complainant was in when the intercourse commenced. All of these circumstances combine to potentially explain why R. might have made the Facebook postings, i.e. to hurt the accused, just as she testified she had when she asked him, “Was she even awake?”, when R. first confronted the accused in the living room.

[97] I found R. to be a generally impressive witness. While, like the other witnesses, her reliability is to some extent affected by the consumption of a significant amount of alcohol, her description of the events was detailed and remained consistent, for the most part, despite cross-examination. In particular, I cannot reject the evidence R. gave at trial about what she witnessed between the complainant and the accused when she entered the living room, given that she articulated a credible reason for characterizing the complainant as ‘passed out’ in her Facebook post to D.M. and was resistant to all suggestions that this is what she in fact saw.

CONCLUSION

[98] After considering all of the evidence, on the critical issue of the complainant's consent to sexual activity with the accused, I am left in the position of not knowing whom to believe. While I generally prefer R.'s evidence where it contradicts the complainant's or the accused's, her evidence is of no assistance with respect to the complainant's state when the sex was initiated between her and the accused. As between the complainant and the accused on this point, for the reasons set out above, I have concerns about the credibility and reliability of each. Even though the accused's evidence does not raise a reasonable doubt for me, the complainant's evidence does not satisfy me beyond a reasonable doubt that there was a lack of consent. Accordingly, I am required by law to acquit the accused.

GOWER J.