Citation: *R. v. Kodwat*, 2017 YKTC 66

Date: 20171214
Docket: 15-00616A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before His Honour Judge Wyant

REGINA

v.

JACKIE JAMES KODWAT

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Noel Sinclair — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

REASONS FOR JUDGMENT

[1] WYANT J. (Oral): The accused, Jackie James Kodwat, is charged with sexual assault contrary to s. 271 of the *Criminal Code* of Canada.

[2] He is presumed innocent unless proven guilty beyond a reasonable doubt, the burden of which falls on the Crown throughout the trial. The presumption of innocence applies to a person accused of sexual assault in the same fashion as it applies to all other offences.

[3] In sexual assault cases, the Crown must prove the *actus reus* that constitutes the offence and the *mens rea*.

[4] To prove the *actus reus*, the Crown must prove beyond a reasonable doubt three things:

1. That there was an application of force by the accused on the complainant. The Supreme Court of Canada in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, concluded that any form of contact is force. So touching is force.

2. The Crown must prove beyond a reasonable doubt that the touching was sexual in nature.

3. The Crown must prove beyond a reasonable doubt that the complainant did not consent.

[5] If the three elements of the *actus reus* are proven beyond a reasonable doubt, then the *mens rea* to commit the offence can be inferred, unless the accused raises honest or mistaken belief in consent. In this case, that argument, sometimes described as a defence, has not been raised.

[6] By agreement in an agreed admission of facts filed as an exhibit in this matter, it is clear that the first two aspects of the *actus reus* have been proven. Defence counsel agrees that there was touching and that it was of a sexual nature. Forensic analysis of the vaginal swab taken from the complainant identifies Mr. Kodwat's semen on that swab, and forensic analysis of the penile swab from the accused identified the complainant's DNA on that swab. It is easy to conclude, then, that Jackie Kodwat had sexual intercourse with A.G. on December 20, 2015.

[7] The sole issue to be determined, then, is whether the Crown has proven beyond a reasonable doubt that the complainant did not consent to the sexual activity. The Crown argues that there is sufficient evidence for the Court to find that the complainant

did not consent or, in the alternative, that she did not have the capacity to consent to the sexual activity. The defence argues that the Crown has failed to prove that the complainant did not consent and that there is insufficient evidence to find that the complainant was incapable of consenting.

[8] "Without consent" is not actually defined in the *Criminal Code*. But "consent" is defined in s. 273.1(1) as "the voluntary agreement . . . to engage in the sexual activity in question." The Supreme Court in *Ewanchuk* stated that consent is "determined by reference to the complainant's . . . internal state of mind." The Supreme Court further stated that no consent is proven where the court is satisfied beyond a reasonable doubt that the complainant in her own mind did not want the activity to take place. This is purely a subjective inquiry. What did the complainant want or not want? The Supreme Court went on further to state that consent cannot be implied from any circumstances and, further, the complainant is not required to express her lack of consent or revocation of consent for the *actus reus* to be established.

[9] On the issue of capacity, Parliament has clearly stated in s. 273.1(2) that no consent can be obtained where "the complainant is incapable of consenting to the activity." In other words, where the complainant, for whatever reason, is incapacitated.

[10] The jurisprudence is clear and enunciated well in the headnote to the case of *R. v. J.A.*, 2011 SCC 28, that "Parliament has defined consent in a way that requires the complainant to be conscious throughout the sexual activity". As well, J.A. says that the complainant must consent to the activity at the time that it occurs. Clearly an unconscious complainant does not have the capacity to consent.

[11] However, it is clear that memory loss, commonly described as a "blackout," is not proof *per se* of unconsciousness or incapacity, and neither is intoxication on its own. Incapacity is something more. It is the inability to understand what is happening and to make decisions and to act on them. It is, further, an inability to understand risks. And the court has to be satisfied beyond a reasonable doubt that the Crown has proven incapacity in order to find that the consent could not have been given.

[12] So what is proof beyond a reasonable doubt? Clearly, it is more than just thinking an accused is likely guilty. That is not enough. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39, the Supreme Court of Canada summarized the test as it has been summarized in countless other cases as follows:

> … A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[13] I will turn to the facts of this case. The complainant in this case is A.G., who was 16 years old at the time of the allegation, but who was 18 years old when she testified in court. Her identity is protected by court order.

[14] On December 19, 2015, A.G. came from her home in Carcross with her mother for a day of shopping. While in Whitehorse she ran into a group of friends and asked her mom if she could stay in town. Having received her mother's consent, A.G. made plans with a friend to stay at the friend's house in Whitehorse. After staying awhile at her friend's house, A.G. left and ended up running into another friend and then got a ride to Yukon College for a party, as some of her friends were drinking there. A.G. does not remember details but figures it was between 11:00 p.m. and midnight that she arrived at the dorm at Yukon College, and she probably stayed at the party for a few hours. At one point, she said, "Two, three, or four, (a.m.) probably."

[15] While at the party she consumed an unknown quantity of liquor. It appears that it was vodka. She drank shooters of vodka and also mixed it with soda. As well, she smoked two marijuana cigarettes, though it was unclear if she smoked them all herself or shared with friends. Her memory of specific events and times that night is problematic and sketchy. She testified that she left the party but did not remember when. She believes she left because all of the partygoers got kicked out for excessive noise.

[16] She initially testified that she was feeling drunk and blacked out, as she described it, at the College, and did not remember anything after leaving the College for a long time. She said, "I don't have memory." She admitted getting into a fight with

someone at Yukon College, but does not remember that herself. She testified she was told about the fight by others. She had visible injuries when examined at the hospital, but does not remember how those injuries happened.

[17] After leaving Yukon College, her memory is equally sketchy. In fact, at times it was hard to know if she was telling the Court things she actually remembered or things that she had been subsequently told by others. On one occasion she talked about getting into a cab with J.S. and T.J., but then admitted to the Court that she actually does not remember that, it is just what she had been told.

[18] She testified she went to Kwanlin Dün village with J.S. and T.J., as J.S. lived in the village with his mother and grandmother. She figured it was 1:00 a.m. or 2:00 a.m. when they got to J.S.'s house, which clearly contradicted her earlier evidence that she stayed at Yukon College until 3:00 a.m. or 4:00 a.m. T.J., for her part, when she testified was not sure of the time either, but at one point speculated it could have been 3:00 a.m. when they left Yukon College.

[19] In any event, A.G. says she does not really remember getting to J.S.'s place because she was not sure of many details. She said she left because she was uncomfortable and her two friends T.J. and J.S. were doing things that made her uncomfortable. Her friend T.J. denied any such thing and said A.G. had been fighting with J.S., something A.G. clearly does not remember.

[20] Regardless of the reason, A.G. did leave that house, though we cannot be sure of the time. She said she does not know then where she went, but she walked around the village. She does not know how long she walked. She thinks she was wearing two

pairs of leggings and a sweater. It appears it was fairly cold that night, perhaps minus 20 degrees. Her specific memory is hazy. She says she does not remember much and was really drunk. She does not remember how long she walked around, as I have said, or if she called anyone or saw anyone.

[21] Her next memory was being in a house and sitting in a chair. She does not remember who was in the house or how she got there. She said it was probably between 2:00 a.m. and 4:00 a.m. when she arrived. It seems she may have seen an older lady. She does not know if she was trying to call someone. She was not sure if she lost her cellphone. She went and sat in a chair in a small room, in someone's bedroom. She sat in a chair in that room and no one else was there. She fell asleep. That was the last thing she remembered until the morning when she woke up in bed beside Mr. Kodwat.

[22] She cannot say if she woke up at any other time before the morning, but as I say her next memory was when she woke up in bed beside Mr. Kodwat. He was behind her. Her pants and underwear were off. She figures it was about 10:00 a.m. when she woke up. She said Mr. Kodwat tried to pull her close and said something about her nice teeth and smile. She quickly scrambled to get her clothes and left and went next door to her friend D.C.'s house, where the police were called.

[23] She said she did not know Mr. Kodwat. She had never met him before and she had never consented to sexual activity with him and would not have consented. She said she recalls nothing about any sexual activity between them and had no discussions about such with Mr. Kodwat. She said she was still drunk when she woke up in the

morning and does not remember if she vomited that night. She said she is not the type of person who blacks out and gets attracted to people and denied being sexually attracted to Mr. Kodwat.

[24] A helpful overview of the current law with respect to the lack of consent and capacity to consent can be found in the decisions of Greene J. in *R. v. Tariq,* 2016 ONCJ 614, and by Ducharme J. in *R. v. J.R*. (2006), 40 C.R. (6th) 97 (Ont. S.C.). Simply put, the court must be satisfied, as the Supreme Court of Canada said in *Ewanchuk*, at para. 26, that the complainant did not consent to the sexual activity *at the time such sexual activity occurred*.

[25] In this case, there is no evidence of such, because the complainant has no memory of what occurred. So there is no direct evidence on the issue as to whether or not the complainant consented or not during the time of the activity in question. As Judge Greene said in *Tariq* at para. 65:

> …Given that the burden lies with the Crown to prove an absence of consent, the absence of such evidence often makes it difficult for the Crown to meet their burden.

Given that, in cases of sexual assault, the testimony of the complainant is key and often the only direct evidence, this can become very unfortunate, because the complainant cannot give direct evidence as to whether or not she consented to the sexual contact or whether she had the capacity to do so.

[26] However, as Judge Greene observed further in *Tariq,* quoting Justice Ducharme in *J.R.*, such absence of evidence of consent or lack thereof is not necessarily fatal to

the prosecution. Ducharme J. in *J.R.* said the following at para. 20 of that judgment:

> This does not mean that evidence of memory loss or a blackout is unimportant, irrelevant or necessarily lacking in probative value. It may well be circumstantial evidence which, when considered with other evidence in a case, may permit inferences to be drawn about whether or not a complainant did or did not consent or whether she was or was not capable of consenting at the relevant time. But even here, while not required as a matter of law, for such evidence to be probative, some expert evidence will almost always be essential.

[27] There may be other factors or evidence upon which the trial judge can draw inferences of lack of consent as Judge Greene noted in *Tariq,* for example, at para. 70, where the judge said a witness' assumption as to how he or she would have acted or behaved in a certain situation can still be viewed as circumstantial evidence of an absence of consent. As well, other cases have concluded that how a complainant acted after the sexual activity could also be viewed as circumstantial evidence that could lead the court to conclude a lack of consent to the activity was given.

[28] The courts have been clear that, in determining whether or not lack of consent has been proven by the Crown beyond a reasonable doubt, in addition to the complainant's evidence, the court may consider the totality of the circumstances including what occurred both before and after the sexual touching. In doing so, the court must be mindful not to rely on outdated notions or stereotypes of sexual behaviour. In other words, for example, the fact that a complainant did not resist or flee is not something the court can rely on in concluding lack of consent was not proven or that consent must have been given. However, evidence, for example, that the complainant did flee is something that, amongst other things, could be considered in

determining whether consent was given or not because it could be seen as being inconsistent with wanting sexual activity to have taken place.

[29] Further, on the issue of capacity, the Supreme Court of Canada was clear in the *R. v. J.A.* case that the complainant must be conscious throughout the sexual activity in order to provide the requisite consent; hence if someone is unconscious for any reason or incapable of providing consent for any reason, be it a disability or for some other impairment that renders them incapacitated, then they are incapable of providing consent. And if shown, the Crown has met the burden of proving no consent was given, because the complainant would lack the operating mind capable of granting or revoking consent.

[30] So the two essential questions in this case are identical, though the facts are different, to what the Court considered in *Tariq*:

1. Has the Crown proven beyond a reasonable doubt that the complainant did not consent to the sexual activity with the accused?

2. If the Crown has not proven absence of actual consent, has the Crown proven that the complainant lacked the capacity to consent and therefore proven an absence of consent?

[31] The analysis of the first question: Has the Crown proven beyond a reasonable doubt that the complainant did not consent to the sexual activity with the accused?

[32] There is, as I have said, no direct evidence of consent at the time the sexual activity took place, because the complainant has no memory and there are no other

witnesses that testified as to that fact. However, that does not end the analysis. The Court is entitled, and in fact required, to look at other circumstantial evidence to see if the Crown has proven the lack of consent beyond a reasonable doubt.

[33] What are the facts in this case? There are at least four factors that the Court can look at in determining this issue of lack of consent.

[34] The Crown argues that the complainant's uncontradicted and unchallenged evidence that she did not consent, as she testified, ends the issue right there. The Crown is wrong about that, because although the complainant did so testify, it was not related to lack of consent at the time the activity took place, which is clearly the law. So this evidence is unhelpful to this analysis and it cannot be used to bolster the Crown's argument that there was no consent.

[35] The second issue is that the complainant testified she would not have consented to such activity with Mr. Kodwat because he was old. This factor, how she said she would have behaved, on its own would not be determinative in this Court's view, but certainly could be a factor that could assist the Court along with other factors in determining the lack of consent. And we have seen that in other cases.

[36] However, in this case the complainant's own evidence on this point was unsatisfactory. In cross-examination she admitted, with some reluctance, to being currently in a relationship with a man twice her age. While the issue of what she might feel was an "older man" or an "old man" was not defined for the Court, the fact that the

complainant was reluctant to divulge this information, along with the fact that the Court notes that her current partner is twice her age, does not help, in this Court's view, with circumstantial evidence required to find lack of consent.

[37] Similarly, the complainant testified that she is not the type of person who blacks out and gets attracted to people and that normally she just wants to sleep. While I have no doubt that is what the complainant believes, the statement on its own is unhelpful and at best neutral to this inquiry.

[38] Two factors do assist the Court on this issue, however. The first is that Mr. Kodwat was a stranger to the complainant and that she showed up at a stranger's door in the middle of the night. This could clearly be viewed, as the Crown suggests, as evidence of decreased risk awareness. The second factor is her behaviour in the morning, which could be viewed as corroborative of the lack of consent: getting up and leaving and going to a friend and neighbour's house and clearly being distressed and distraught to the neighbour, D.C., who testified she was crying hysterically. The police officer, Cst. Hoogland, described her as being teary-eyed and in a bit of distress. Dr. MacDonald's evidence when she examined her was that A.G. broke down emotionally with her mother after the physical examination at the hospital. So leaving, being upset, immediately reporting it, and having these observations made by three independent people certainly could be viewed by the Court as being consistent with the lack of consent.

[39] Are these two factors enough, that is, showing up in the middle of the night at a stranger's door and the other behaviour as I described? In this Court's view, while they

could certainly be viewed as being consistent with the lack of consent, the Court does not and cannot find in this case that those factors combined lead this Court to conclude on the high standard of proof beyond a reasonable doubt that no consent was given. There simply is not the web of circumstantial evidence upon which that inference could be drawn in this case that could lead this Court to conclude that that was the only reasonable explanation. This, coupled with concerns the Court has with respect to some of the complainant's evidence, in this Court's view it would be dangerous and indeed an error to make that absolute link. In other words, while the evidence might be consistent, it could be inconsistent, and therefore falls short of what the Court would require in this case.

[40] The inquiry does not end there, but continues with an analysis of the second question: Has the Crown proven that the complainant lacked the capacity to consent and therefore proven an absence of consent?

[41] Again, the burden falls on the Crown to prove beyond a reasonable doubt that the complainant lacked the capacity to consent. As Judge Greene noted in *Tariq* at para. 77: "The issue of whether one lacks the ability to consent due to extreme intoxication is a complex one." And as several cases, including Justice Ducharme in *J.R.* noted, although not required by law, expert evidence would almost always be required.

[42] What we do know is that intoxication on its own is insufficient to vitiate consent. Further, it is clear that memory loss on its own is insufficient to show incapacity to consent. This examination is fact- and case-specific. And what we do know is that the

Crown must prove that the complainant did not have a conscious operating mind and therefore the capacity to understand and engage in sexual activity. As Ducharme J. noted in *J.R.* at para. 43:

> …The question is whether or not the complainant was able to make a voluntary and informed decision, not whether she later regretted her decision or whether she would not have made the same decision if she had been sober. Thus, an obvious example of incapacity would be the complainant who was unconscious or in a coma at the relevant time. As I have already explained, memory loss, without more, is not sufficient proof of incapacity. Similarly, while intoxication, self-induced or otherwise, might rob a complainant of capacity, this is only a possible, not a necessary, result. …

And I adopt those comments of Justice Ducharme.

[43] But let us be clear, the Crown does not have to go to the extent to prove the complainant was an automaton or a robot or even unconscious. The examination is a factual one, but the Court must be satisfied at the end of the day beyond a reasonable doubt that the complainant lacked the capacity to consent, and in this case before me, must have been intoxicated to the point where she could not understand the sexual act or be capable of consenting to it.

[44] The analysis of the facts of this case on the issue of capacity: There is no question that the complainant had been drinking to excess that evening. She testified as such. Her evidence as to the amount of consumption was vague and uncertain, but it is clear from the evidence, and the Court can easily conclude, that she was under the influence of alcohol to some extent on the night in question. Further, there is evidence that she smoked two marijuana cigarettes, though it is entirely unclear if those were

consumed entirely by her or shared with others. She just does not have a memory of that. I am also satisfied that A.G. most often "blacks out," as she described it, when she has been drinking and has little if no memory of what occurs when she drinks.

[45] Is the evidence the Court heard enough? As Judge Greene said in *Tariq,* at para. 94:

> …In order to make a finding of incapacity to consent, the case law suggests that the court must be able to identify evidence that establishes beyond a reasonable doubt that the complainant's cognitive capacity is sufficiently impaired by the consumption of alcohol so as to make her incapable of knowing that she is engaging in a sexual act or that she can refuse to engage in the sexual act.

A blackout is not enough.

[46] In this case, the Crown produced an expert to assist in determining if incapacity had occurred. Christine Dagenais testified by video link and was qualified as an expert in the mental and motor effects of alcohol and drugs on human performance and behaviour. She provided a report, filed as Exhibit 3. I do not intend to outline her testimony in depth, but she was called by the Crown for the primary purpose of proving incapacity, as such expert evidence, though not legally required, is practically needed as noted by Justice Ducharme and others as I have indicated.

[47] In this case, the complainant has memory loss. The expert, Ms. Dagenais, produced in Exhibit 3 comments which touched on memory loss. She distinguishes between fragmentary memory loss, which may be due to moderate to heavy intoxication, and blackouts. With the former, fragmentary memory loss, significant events or, as she described it, intensely experienced events are later recalled while less

memorable events are not. With blackouts, nothing is recalled, whether significant or not. Blackouts can be associated with binge drinking, with high blood alcohol in excess of 200 milligrams per cent, or with a prior history of blackouts, which is what A.G. told us she has. A blackout is simply lost time, the memory of which is never recovered.

[48] It is important to note that there is no sober independent observation of the complainant at the time or around the time that sexual activity might have occurred. Ms. Dagenais, in her report, emphasized that the most reliable assessment of the mental and motor effect of a drug, including alcohol, on an individual is formed through the interactions with that individual and the observation of behaviour and actions by independent sober individuals. All we have is a friend, T.J., who gave her evidence in a forthright manner and said she thought the complainant was intoxicated. A seven out of 10, she said, but then of course she felt herself was eight out of 10, with 10 being described as falling down drunk. This evidence, though given honestly in a straight-forward manner, was of little help to the Court.

[49] A.G. said she has blackouts. Certainly, she does not remember any sexual activity, nor the one or two fights she got into that night. She has no idea where she got her injuries. Those, in the Court's view, would each and all be significant events, that is, the sexual activity and the fights. If she had fragmentary memory loss, one would expect one or all of those events would be later recalled.

[50] I am satisfied based on the description of Ms. Dagenais that A.G. suffered from a blackout, not from fragmentary memory loss, on the night in question. The problem is that the Court cannot conclude with any certainty if that blackout is due to binge

drinking, a blood alcohol over 200 milligrams per cent, as the expert testified, or A.G.'s admitted prior history of blackouts. If it is the latter, which it could be, it does not assist the Court in determining if A.G. was so grossly intoxicated as to be incapable of consenting to sexual activity.

[51] Further, while it is not necessary for the Crown to show vomiting or incontinence or even severe impairment of gross motor functions or difficulty in communicating to show the lack of capacity, it is often the case that one or more of those signs might be present. In this case, there is simply no evidence of any of these factors being present. A.G. cannot tell us if she vomited.

[52] The best evidence on incontinence is the evidence of the police officer, Cst. Gillis, who searched Jackie Kodwat's residence at 7:25 p.m. on the evening of the allegation and found that the bed sheet was not wet and did not have any odour of urine. Further, we do know that A.G. was able to leave the Yukon College, get into a cab, go to J.S.'s house, converse with T.J. and J.S., leave the house, walk around the village, and then enter Jackie Kodwat's house. In doing so, it does not mean she was not incapacitated, but by the same token this evidence does not assist the Crown or the Court in establishing incapacity. There is simply no evidence of severe gross motor function impairment or difficulty in communicating.

[53] So what do we have?

[54] We have consumption of alcohol and drugs, the amount of which is uncertain. We do not know how much A.G. drank and how much she smoked, or when. While marijuana definitely adds to one's intoxication or impairment, it is not certain that any

marijuana consumed that evening had any effect at the time the sexual activity took place. Given the rate at which the effects of marijuana are processed by the body, as Ms. Dagenais testified, and given the uncertainty as to when it was ingested and when the sexual activity occurred, we just cannot be certain at all what effect, if any, the ingesting of marijuana by A.G. had on her at the material time.

[55] We have memory loss. The complainant testified she remembers little of that night. She remembers being at the party and drinking and smoking marijuana. She does not remember being in a fight. She remembers being in a cab with her friends, and later clarified to the Court that she does not really remember that, rather that it is based on something she has since learned. She remembers being at her friend's house, but does not remember why she left nor, apparently, the fight that she was involved in. She remembers wandering or walking around outside, apparently underdressed in the cold night, but not where she walked. She does not remember getting into the accused's house but only remembers sitting down, and then her next memory is waking up.

[56] But here the evidence of memory loss is troubling. It was clearly established in many questions during cross-examination that on earlier occasions the complainant gave much more detail on several aspects of what occurred that night. Now, the Court must be mindful that the complainant was young when she testified and younger still when the allegation arose. Lapses in memory, particularly given the time that has passed since the allegation arose, and reticence to share information, particularly of a personal nature, should not all be judged as necessarily negative. Taken in light of the age of the complainant, her lack of sophistication and perhaps maturity, and her

vulnerability in the court setting, certainly the rigour that one might apply to other witnesses should be relaxed. I certainly got the impression that A.G. did not wish to be testifying in court. We have to consider all of those factors in judging reliability and credibility.

[57] But I did have serious concerns with respect to the reliability of her evidence. Whether it was the passage of time or her reluctance, it was clear that at some point A.G. knew a lot more about that night than the Court heard from her. On many occasions, she simply told the Court in many different ways that she did not remember or had no memory. Fair enough. But I was ultimately not satisfied on many points that she did not remember because of a blackout or alcohol consumption. Clearly, she remembered more details on earlier occasions. Yes, she has always been consistent that she had no memory of what occurred in Jackie Kodwat's house after she sat on the chair in the bedroom; that has never changed. But the fact she did remember other details of what occurred earlier that night on earlier occasions means the Court must be cautious in concluding that her lack of memory must be such that it is consistent with incapacity and inconsistent with any other conclusion.

[58] I will turn now to A.G.'s evidence with respect to her drinking history and the issue of credibility. Key to the expert's testimony, and relating it to what the Court heard from the complainant, is determining what kind of drinker A.G. was at the time of the allegation. The exhibit filed by the Crown through Ms. Dagenais gave examples of symptomology at various blood alcohol levels. It was predicated on someone who was described as a social drinker. The expert testified that for those unaccustomed to the

effects of alcohol or having a low tolerance for alcohol, these effects can be seen at lower blood alcohol levels, while experienced drinkers can demonstrate a high level of tolerance.

[59] We do not know if A.G. has a low tolerance to alcohol. We suspect she might, but we do not know. But she did testify on several occasions that she really was not much of a drinker. She did admit that she smoked marijuana regularly, but she said she was not a drinker. This issue came up on several occasions during her direct and cross-examination. Early on she said, "I haven't drank that many times in my life." Elsewhere she said she only drank twice a year or a couple of times a year. Another time it was once a month; another time, "not very often"; another time, "just on the weekend." Another quote was "Only three or four months in the year I would drink once or twice." Another quote was "Not even 10 times a year." Yet in a Facebook page tendered in Court as evidence, A.G. was talking about her life going downhill since 2014 and the need to "sober up, I guess." As well, D.C. testified that three years ago in 2014 or so A.G. stayed with her at her house in Whitehorse every weekend and that A.G. got drunk "every other weekend."

[60] Now, it is natural for anyone to want to minimize what their alcohol consumption might be. But in this area, the Court has serious concerns that A.G. seriously understated her familiarity and drinking history with alcohol. In that regard I found her to be less than credible and certainly not believable or reliable on her drinking history as she put it to the Court.

[61] I will turn next to uncertainty as to what A.G.'s blood alcohol content was at the time of the sexual activity. The expert, Ms. Dagenais, in her report extrapolated back from A.G.'s blood alcohol content at the time the blood sample was taken from her. It was 83 milligrams per cent at 12:40 to 12:45 p.m. on December 20, 2015. So just after noon on December 20th, a few hours after the sexual activity took place, she registered at 83 milligrams per cent. Depending on when the sexual activity took place, A.G.'s blood alcohol level could have been as high as between 181 and 278 milligrams per cent at 3:00 a.m. or as low as 140 milligrams per cent at 7:00 a.m.

[62] The readings are significant, because at readings over 250 milligrams per cent for a social drinker the expert says one would normally expect to see severe intoxication to stupor, including but not limited to loss of consciousness, incontinence, gross disorientation, et cetera, while at a reading of 141 milligrams per cent there is mild to moderate intoxication. Of course, I recognize all of this depends on many factors, including the drinking history of the subject and other factors, and are only what usually happens, but not necessarily happens, to any one particular individual.

[63] But the problem is we do not know the time the sexual activity took place. The estimates of time are all over the place. T.J., though quite unsure, said she thought A.G. left the Yukon College at 3:00 a.m. and that the cab ride was 15 minutes to J.S.'s house, and that there was a time spent there as well. T.J. thought she herself was there for about 30 minutes. A.G. said she thought she arrived at Jackie Kodwat's house between 2:00 a.m. and 4:00 a.m. Unfortunately, we just do not know times and we cannot find within a certainty, that at the time the sexual activity took place, that A.G. was severely intoxicated. Maybe she was and maybe she was not.

[64] And certainly there is no specific independent evidence that would corroborate the symptomology one would normally expect from someone who was so heavily, to severely, intoxicated according to the chart produced by Ms. Dagenais. No severe impairment of gross motor function, no severe balance or coordination difficulties, no difficulties in communication, and others that have already been mentioned. There is just too much uncertainty here. And unfortunately, as already noted, no reliable independent evidence on the state of the complainant at the time in question or even beforehand.

[65] What we have, as already stated, is T.J., who described herself as being drunker than A.G., saying A.G. was seven out of 10. That is all we have. It does not help the Crown at all.

[66] Further, the Court notes that when A.G. woke up, as she did around 10:00 a.m. she thought, although D.C., who I think is much more reliable on this, thought it was about 9:30 a.m., A.G. immediately sought out D.C. who has known her for six years.

The Court notes that D.C., who was sober, noted that A.G. appeared sober and not hung over. And D.C. knew A.G. and had seen her drunk on earlier occasions. So she was familiar with her.

[67] Furthermore, Dr. MacDonald, whose later examination at the hospital showed no medical evidence of forcible vaginal penetration, said A.G. had no indicia of impairment. Cst. Hoogland noted no signs of intoxication or consumption of alcohol. All of this is consistent with a blood alcohol level of 83 milligrams per cent, even though that is over the legal limit for driving.

[68] But it does leave the Court with a nagging question that the Court cannot answer. If A.G. was so grossly intoxicated to the extent of incapacity, how could she so soon after appear to be sober to a doctor, to a trained professional in the position of a police officer, and to someone who knows her? Yes, it is not definitely inconsistent with being grossly impaired, but it does leave the Court with some doubt.

[69] I will touch briefly on the medical evidence, and this was tendered in the exhibit on the joint admissions of fact. Dr. MacDonald reports that the complainant "had no real vaginal symptoms." There was no evidence of debris in A.G.'s vaginal area and no external bruising. The labia and surrounding tissue appeared to be normal. Upon palpitation of the vaginal area, A.G. exhibited no real tenderness or injury other than a mild tenderness in the lower posterior labial area. There was no evidence of damage to A.G.'s hymenal area. These observations are inconclusive as to whether or not A.G. had been vaginally penetrated forcibly earlier that morning.

[70] Now, let us be clear. There does not need to be evidence of forcible penetration or sexual intercourse to find the lack of consent. That is clear. However, if such were present it might be a factor to consider in determining consent was not being given. So in other words, there does not have to be that evidence. But if it is there, it is helpful to the Crown, of course. It is not here in this case, which does not mean of course that that proves there was sexual intercourse with consent. But what it shows is that it is of no assistance to the Court, because I cannot infer anything from that that might assist the Court in determining that no consent was given.

[71] Furthermore, Dr. MacDonald observed that A.G. had a number of bruises and scratches on her body. These included a bruise and palpable tender bump in the crown of her head, fresh bruises on her upper arms, slightly bruised and tender knuckles on two fingers of her right hand, and significant bruising to her legs, particularly her left leg. There is no explanation for these injuries and it is equally consistent with injuries that could have been sustained from the couple of fights that we have described. We just do not know. So on the evidence of the medical evidence, the medical evidence does not assist the Court in any way in determining that consent was not given.

[72] In evaluating whether the Crown has established incapacity to consent beyond a reasonable doubt, the Court obviously needs to look at all of the evidence. Yes, A.G. had been drinking and was intoxicated to some degree. Yes, she has no memory of the significant events of the night. And yes, the act of entering a stranger's house in the middle of the night is consistent with a decrease in risk awareness. But in this Court's view, all of that is not enough to prove incapacity beyond a reasonable doubt in this case.

[73] In the end, all that this Court can conclude is that there is evidence before it, which would be consistent with incapacity or just as consistent with someone who was drunk and blacked out, but was not intoxicated to the degree that she was incapable of providing consent. In other words, this Court is unable to say beyond a reasonable doubt that the only inference to be drawn from the evidence before it was that A.G. was incapacitated, and I must be able to say that in order to find incapacity. A.G. might very well have been incapacitated, but "might" is not enough.

[74] Where there is doubt, as there is here, it resolves in favour of the accused. As it was stated in *Tariq*, at para. 54:

> …Even if an inference that she did not consent or could not consent, is the most likely inference, this is still not enough to convict. [The Court must find it is] the only reasonable inference.

And as I have said, I cannot find that this is the only reasonable inference.

[75] I want to be clear. This Court is not saying that a sexual assault did not occur on the evening of December 20, 2015. This Court has a deep concern that Mr. Kodwat, an older stranger to a 16-year-old woman, had sexual relations with her. But concern and suspicion is not enough. The Court must be satisfied beyond a reasonable doubt.

[76] In this case, while I am satisfied he may be guilty, probable or likely guilt is not sufficient. I am not satisfied that the onus of proving his guilt beyond a reasonable doubt has been met. Therefore the accused is acquitted of the charge.

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WYANT T.C.J.