Citation: *R. v. M.J.H.*, 2018 YKTC 45

Date: 20180730
Docket: 17-00019
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

M.J.H.

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

Appearances:
Noel Sinclair — Counsel for the Crown
Norah Mooney — Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS J. (Oral): M.J.H. has been charged with having committed the offences of sexual assault and break and enter and commit sexual assault, contrary to ss. 271 and 348(1)(b) of the *Criminal Code*.

[2] The evidence of the complainant, L.D., is that her friend, C.S., had brought M.J.H. to her residence on December 1 or 2, 2016, where they drank vodka together for a while. C.S. and M.J.H. left in the late afternoon or early evening.

[3] L.D. states that she fell asleep on the mattress on the floor in the living room. She woke to find M.J.H. on top of her with his penis in her vagina.

[4] M.J.H. acknowledges having been at L.D.'s residence, having drinks, and having left when C.S. did. He denies having returned to L.D.'s residence, however, or having any sexual contact with L.D. He states that he returned home after leaving the residence and went to sleep, staying there for the remainder of the evening.

[5] In support of M.J.H.'s denial of returning to the residence, M.J.H. proffered evidence from his common-law partner at the time, R.J., who testified that M.J.H. had been home asleep in bed when she arrived after work at approximately 4:35 p.m. and that he never left the residence for the rest of that evening.

Evidence of the Witnesses

C.S.

[6] Crown counsel called C.S. to provide evidence. He is 33 years of age and has been a friend of L.D.'s since they were 14. He stated that he would see L.D. from time to time weekly. They would occasionally have beers together. He had been at her residence before. He and L.D. had not been in an intimate relationship.

[7] C.S. had known M.J.H. for only a few months prior to December 2016. He would see M.J.H. from time to time and, on occasion, they would have beers together.

[8] C.S. stated that on December 1, 2016, he and M.J.H. were at his house around noon. He says that L.D. called him at around 2:30 p.m. and asked him to come over to her house.

[9] He stated that he and M.J.H. arrived at L.D.'s residence at approximately 3:30 p.m. Her home was about a seven to 10-minute walk from his home. L.D. was not intoxicated when they arrived at her residence.

[10] C.S. said that he drank some of the four or five beers he had brought over. M.J.H. was also drinking beer. L.D. was drinking some vodka that she had. They all had some shots of the vodka straight from the 26-ounce bottle. He thought that maybe one-half of the bottle had been consumed.

[11] He and M.J.H. sat on the living room couch and L.D. sat on a mattress on the floor in front of the couch. He testified that he and M.J.H. stayed there for approximately one, to one and one-half hours. They were all just talking about general things.

[12] C.S. called some friends to pick him up so he could go with them to Whitehorse to keep drinking. He estimates that he left L.D.'s house with these friends at around 4:30 to 5:00 p.m. M.J.H. left the residence when C.S. did and started walking towards his residence.

[13] C.S. estimated his and M.J.H.'s level of intoxication as being a four out of 10 when they left. He said that he and M.J.H. had consumed about three or four beers at

his residence before going over to L.D.'s. He stated that L.D. was not intoxicated when they arrived at her residence.

[14] She walked them to the door when they left. She did not invite either of them to come back later.

[15] C.S. stated that he was at M.J.H.'s residence the next day. M.J.H. told him that L.D. chased him out of the house with a stove poker.

[16] C.S. stated that he saw L.D. a couple of days later, but that she did not say much to him. In cross-examination, he said that he talked to L.D. the next day. She was panicking a bit and she had said she was not sure if something had happened the day before.

[17] C.S. denied having been over at L.D.'s residence at any other time on the day of the alleged incident. He also denied having driven over to her residence on a side-by-side. He denied having done any drugs with L.D. that day.

A.D.

[18] A.D. is L.D.'s sister. They are close. She has known C.S. since they were children. She also knows M.J.H. and has spoken to him several times. There was no animosity between herself and M.J.H.

[19] On December 1, 2016, she received a telephone call from L.D. at approximately 6:30 p.m. L.D. was upset and asked A.D. to come over. On the way over to L.D.'s residence, A.D. called her back and L.D. told her that she had been raped.

[20] I note that filed as an exhibit in the trial were telephone records showing telephone calls between L.D. and A.D. at 6:34 and 6:37 p.m. on December 1, 2016.

[21] When A.D. arrived at L.D.'s residence, L.D. was sitting on the floor, crying. L.D. told A.D. that she had been raped. She told her that she woke up to find M.J.H. on top of her.

[22] After approximately one-half hour, A.D. took L.D. to the nursing station. A.D. noted L.D. to possibly be a bit intoxicated, but it was hard to tell because she was crying a lot. A.D. noted a red skidoo parked outside the residence. She was unsure who it belonged to. She believed that it was still parked there after they returned from the nursing station.

[23] A.D. testified that L.D., although initially willing to allow a rape kit to be prepared, ultimately decided that she did not want to do it.

Cst. Rousseau

[24] Cst. Rousseau conducted the investigation and obtained statements from the witnesses in this matter. He stated that he attended at M.J.H.'s residence on March 31, April 1 and April 2, 2017, in order to arrest M.J.H. for these offences, but was unable to make contact with M.J.H.

[25] He stated that on April 3, 2017 he spoke with R.J., who he understood was M.J.H.'s partner, and told her that he was looking for M.J.H., and to pass that message on to M.J.H. He stated that R.J. told him that she was aware of the allegations against M.J.H. and that he was at the Yukon College for a few weeks.

[26] Cst. Rousseau stated that he obtained an arrest warrant for M.J.H. on April 7, 2017, and he contacted R.J. to inform her of the warrant and to request that she pass information on to M.J.H. that he should turn himself in. R.J. advised Cst. Rousseau that M.J.H. had been made aware of this.

[27] Ultimately, on May 3, 2017, M.J.H. turned himself in to the RCMP and was arrested on the warrant.

[28] Cst. Rousseau testified that in November 2017, possibly the 13th, he obtained a statement from R.J.

L.D.

[29] L.D. testified that on December 2, 2016 she had been having drinks during the day, likely starting in the afternoon. She was watching movies and she called C.S. and asked him to come over.

[30] C.S. came to her residence on the side-by-side, watched movies with her, and they shared some vodka. C.S. left to get some cigarettes and returned to her residence.

[31] L.D. stated in direct examination that C.S. then left again and returned with M.J.H. In cross-examination, L.D. stated that C.S. returned with M.J.H. after getting cigarettes, but that he left later and returned with more vodka after the three of them had finished off her mickey of vodka. When C.S. went to get more vodka, she and M.J.H. were left alone in her residence.

[32] L.D. believed that C.S. and M.J.H. came over in the late afternoon and that they stayed a couple of hours, until approximately 4:30 p.m. when it was getting dark outside. L.D. stated that she had known C.S. as a friend since they were children. She said that she had met M.J.H. through R.J., who was her cousin. She said that M.J.H. had been to her residence before.

[33] She stated that, at that time, there was no bad blood between any of them. The three of them shared some drinks, specifically vodka with 7-UP or Sprite chasers. After doing so, as she was getting tired, L.D. asked them to leave, which they did. She closed the door and went to sleep on her bed in the living room.

[34] L.D. recalled C.S. receiving a phone call in the afternoon, possibly from his partner R.J. She was unsure whether M.J.H. made a telephone call to R.J. or whether she, herself, had spoken with her.

[35] L.D. testified that all three of them were “well on their way” to being intoxicated. They were laughing and having fun. She estimated all of them as being intoxicated at a six or seven out of 10. L.D. denied that she and C.S. had done any drugs that day.

[36] L.D. woke to find M.J.H. on top of her with his penis in her vagina. She pushed him off of her, stating: "What the fuck are you doing?".

[37] She stated that while he was dressing, M.J.H. said words to the effect of, "you told me to come back" and then repeated these words to her. L.D. testified that she stated to M.J.H. words to the effect of: "Why the hell would I want you to do that? … I have a boyfriend".

[38] L.D. testified that her pyjamas had been pulled off to one side and her panties had been removed. In cross-examination, L.D. clarified that she meant her panties had been removed to the side with her pyjamas, with both still being on her right leg.

[39] L.D. testified that she grabbed a poker from the stove and told M.J.H. to "get the fuck out" and pushed him towards the door. She stated that she did not hit M.J.H. with the poker.

[40] After M.J.H. left, L.D. began to cry and called her sister, who came over and took her to the nursing station. L.D. testified that she did not ask C.S. or M.J.H. to come back to her residence. She said that she did not want to have sex with M.J.H. that day.

[41] L.D. stated that M.J.H. was not wearing a condom and that she did not believe he ejaculated inside of her. L.D. said that she initially agreed to have a rape kit completed at the nursing station, and a swab was taken from her vaginal area. However, she said that she told the nurse she did not want the RCMP to be involved, due to a lack of trust in the RCMP as a result of run-ins she had had with the RCMP.

[42] L.D. stated that when she returned home from the nursing station she felt “disgusting” and wanted a shower. She burned her clothes and smudged the house that night.

[43] L.D. said that approximately two days later, M.J.H. called her and asked her if he had left his coat there. L.D. said that she did not go to the RCMP to report this incident until March 7, 2017.

[44] She said that she delayed reporting the incident because of the horrible process her sister and a girlfriend experienced when they had reported incidents.

M.J.H.

[45] M.J.H. testified that on December 1 or 2, 2016 he was at home. C.S. came by on his side-by-side to pick him up. C.S. took him to the store where C.S. purchased a 26-ounce bottle of vodka.

[46] C.S. then drove him to L.D.'s residence. He believed that they arrived at L.D.'s residence around 12:30 p.m. and that they did not stay that long, maybe a few hours. M.J.H. said that he had never been to L.D.'s residence before, but that L.D. had come over to his and R.J.'s residence before.

[47] M.J.H. stated that the three of them were drinking vodka with shots of a pop mix on the side. He said that L.D. was also drinking wine. He stated that L.D. and C.S. were doing crack cocaine down the hallway out of his sight. He said that he could tell it was crack from the smell.

[48] M.J.H. stated that C.S. was already under the influence of alcohol when he picked him up on the side-by-side and that L.D. was also already under the influence when they arrived at her residence. M.J.H. said that at approximately 2:30 p.m. he called his partner, R.J., while he was at L.D.'s residence. He said that L.D. spoke with R.J. on the phone.

[49] M.J.H. stated that he and R.J. had been in a relationship for approximately six years as of December 2016. He said that this relationship had ended approximately six

months before the trial date. He said that he knew he needed to get home before R.J. got off work at 4:30 p.m.

[50] M.J.H. stated that he left L.D.'s residence at the same time as C.S. C.S. was picked up by some friends. L.D. stayed on the bed while he and C.S. left and did not come to the door with them.

[51] M.J.H. denied being left alone with L.D. in the residence. M.J.H. stated that his son had used his red, skidoo, after asking permission to do so, while M.J.H. was at the store with C.S. His son had dropped it off at L.D.'s residence, but M.J.H. left it there and walked home, as he was too intoxicated to drive it. M.J.H. stated that he heard the skidoo pull up at L.D.'s residence.

[52] He estimated that all three of them were intoxicated to a seven or eight out of 10 when he and C.S. left L.D.'s residence. He agreed that he was pretty drunk when he left.

[53] M.J.H. stated that it took him approximately 10 minutes to walk home and that he arrived there before 4:30 p.m., which was the time R.J. got off work. M.J.H. stated he passed out on his bed with his clothes on, although he was pretty sure he took his shirt off, and that he never left his house again that evening. R.J. woke him up at some point in time so that he could eat.

[54] M.J.H. stated that he went back the next day to get his skidoo and that the day after that he called L.D. looking for his coat/sweater. He said that she hung up on him

and he could not figure out what was going on. He later found his coat outside of his home.

[55] M.J.H. said that C.S. came by his house two days later. He denied saying anything to C.S. about L.D. chasing him with a poker. He denied going back to L.D.'s residence that night or sexually assaulting her.

[56] He stated that he did not recall when he found out that the police were looking for him, but that he turned himself in to the RCMP in Whitehorse. M.J.H. said that R.J. was already aware of what the allegations against him were in regard to this incident, before he was arrested. He denied ever having talked to R.J. about what happened. He denied ever telling her to go to the RCMP and provide a statement.

[57] He stated that he had told L.D., while at her residence, that he would not have sex with her because he had heard she had HIV/AIDS. He denied having any other conversation with L.D. that was sexual in nature.

R.J.

[58] R.J. testified that she and M.J.H. had been in a relationship for about five years while they were in Carcross, during which they had lived together. She stated that she and M.J.H.'s relationship had ended and they had stopped living together approximately eight months ago in November 2017, although they still have contact and M.J.H. still comes to her home.

[59] R.J. knew both C.S. and L.D., saying that she believed she may be a relative of L.D. She said that her relationship with L.D. was fine at that time. She said that she and M.J.H. had never been drinking together at her or L.D.'s residence.

[60] R.J. stated that on December 1 or 2, 2016 while at work she received a telephone call from M.J.H. at approximately 2:00 pm or 2:30 p.m. M.J.H. was at L.D.'s residence and was intoxicated.

[61] She asked M.J.H. what he was doing there and politely asked him to go home. She confirmed with him that he had a house key.

[62] R.J. was surprised that M.J.H. was there, as he always drinks at home and hangs out there. R.J. said that she also spoke to L.D. on the telephone at that time.

[63] R.J. stated that when she arrived home at approximately 4:35 p.m. M.J.H. was asleep in bed. He was dressed with his shirt on. She left him sleeping and cooked supper. She remembered that she had cooked hamburger soup.

[64] M.J.H. woke up and ate some soup and then went back to bed. She said that neither she nor M.J.H. left the house again that night.

[65] R.J. said that M.J.H.'s son had borrowed the red skidoo and that it was not at their residence in the morning, and that it was at L.D.'s residence.

[66] R.J. confirmed that Cst. Rousseau had contacted her more than once in his attempts to contact M.J.H., with the first contact being in March 2017. She stated she was not told why Cst. Rousseau was trying to reach M.J.H. on the first occasion that he

contacted her, expanding that in cross-examination to include the first three times he talked to her.

[67] She said that she had heard of the allegations prior to being informed by Cst. Rousseau that a bench warrant had been issued for M.J.H.

[68] She stated that Cst. Rousseau had also informed her of the bench warrant in April 2017. She agreed that she was aware of the allegations by April 11, 2017 and that she asked M.J.H. about these allegations afterwards in mid-April 2017 and they spoke about what had occurred.

[69] When shown her statement to the RCMP given November 13, 2017 in which she said she first learned about the allegations approximately eight months afterwards, R.J. said that she had been mistaken when she said that in her statement.

[70] R.J. said that she did not provide a statement to the RCMP earlier because she was not asked to do so. She stated that she was surprised that she was not asked to provide a statement. R.J. stated that she is not a big fan of the RCMP, does not like them, and does not have a good relationship with them.

[71] R.J. denied that she made up the story that M.J.H. was home that night at his request. She agreed in cross-examination that M.J.H. told her his version of events, filling her in on some details that she told the RCMP in her statement.

[72] I note that it was agreed between counsel that notice of alibi evidence was given to the Crown just prior to the November 9, 2017 court appearance on which the trial date was first fixed.

Analysis

[73] As M.J.H. testified, this is a case in which the credibility analysis as set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and as developed in subsequent cases, applies. First, if you believe the evidence of the accused, obviously you must acquit. This assumes that the evidence of the accused is exculpatory. Secondly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit. Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence you do accept, you are convinced beyond a reasonable doubt by the evidence of the guilt of the accused.

[74] In his paper, "Doubt About Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment", David Paciocco, who now sits on the Ontario Court of Appeal, states at page 46 that:

> The principles from *W.(D.)* provide:
>
> > (1) Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred;
> >
> > (2) A criminal fact-finder that believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;
> >
> > (3) Even if a criminal fact finder does not entirely believe evidence inconsistent with guilt, if the fact-finder cannot decide whether that evidence is true, there is a reasonable doubt and an acquittal must follow;
> >
> > (4) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and

> (5) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

[75] Of importance, those principles permit the conviction of the accused, even in the face of exculpatory testimony, where the reasoned and considered evidence of incriminating evidence prevents exculpatory evidence from raising a reasonable doubt. A criminal trial is not a credibility contest where the fact finder decides which of the conflicting version of events is to be preferred over the other. (as read)

[76] As stated by Molloy, J. in para. 14 of *R. v. Nyznik*, 2017 ONSC 4392, within her exhaustive and informative analysis regarding the legal principles to be applied in sexual assault cases and in particular in assessing issues of credibility:

> [14] This instruction, commonly referred to as "the *W.(D.)* instruction," has become another standard instruction given to all criminal juries, and criminal trial judges will generally instruct themselves in the same manner. However, as was said in the *W.(D.)* case itself, and in subsequent decisions of the Supreme Court of Canada, there is no particular magic in the incantation of these three steps. It is not essential that the trial judge rigidly follow the three steps in the *W.(D.)* instruction. What is critical is for the judge to avoid turning the fact-finding exercise into a choice as to which is the more credible version of the events. This cannot be a credibility contest, with a conviction if the complainant wins the contest and an acquittal if the defendant does. To treat it as such would be to improperly shift the burden of proof. Rather, if the defence evidence, seen in the context of all the evidence, raises a reasonable doubt, then the trial judge cannot convict. Even in a situation where the trial judge completely rejects the defence evidence and has no reasonable doubt as a result of that evidence, he or she must then assess the evidence as a whole and determine whether the Crown has discharged its burden of proving guilt beyond a reasonable doubt. In some cases, even without

> any evidence from the defence, it is not possible to be satisfied beyond a reasonable doubt based on the evidence of the complainant.

[77] In *R. v. Abdullahi*, 2010 YKTC 44, after considering the cases of *R. v. Hull*, [2006] O.J. No. 3177 (O.N.C.A.); *R. v. Jaura*, 2006 ONCJ 385; *R. v. J.J.R.D.*, 218 O.A.C. 37 and *R. v. Dinardo*, 2008 SCC 24, I stated:

> [16] A summary of the principles that have developed in these cases is that there is now, right up to the Supreme Court of Canada, authority for the proposition that accepting the complainant's evidence on its own can lead to a rejection of an accused's testimony as long as the trier of fact does not fall into the error of moving from disbelieving the accused directly to a finding of guilt. Those are the principles that apply to this case.

Application to this Case

[78] The testimony of L.D., in the absence of the consideration of any other evidence, would result in a finding that M.J.H. sexually assaulted her. I find that her testimony is not internally inconsistent, and that nothing in the manner in which she testified and in her demeanour when testifying gives me any reason to find her evidence not reliable and credible.

[79] As stated in *Nyznik* in para. 15:

> Typically, the outcome of a sexual assault trial will depend on the reliability and credibility of the evidence given by the complainant. Reliability has to do with the accuracy of a witness' evidence -- whether she has a good memory; whether she is able to recount the details of the event; and whether she is an accurate historian. Credibility has to do with whether the witness is telling the truth. A witness who is not telling the truth is by definition not providing reliable evidence. However, the reverse is not the case. Sometimes

> an honest witness will be trying her best to tell the truth and will fervently believe the truth of what she is relating, but nevertheless be mistaken in her recollection. Such witnesses will appear to be telling the truth and will be convinced they are right, but may still be proven wrong by incontrovertible extrinsic evidence. Although honest, their evidence is not reliable. Only evidence that is both reliable and credible can support a finding of guilt beyond a reasonable doubt.

[80] The reliability and credibility of L.D.'s evidence must, of course, also be considered in the context of the entirety of the evidence. The evidence of C.S. is corroborative of L.D.'s evidence to the extent that he was at her residence with M.J.H. in the afternoon of December 1 or 2, 2016, that they were all drinking, and that he and M.J.H. left together in the late afternoon some time between 4:30 and 5:00 p.m.

[81] C.S.'s evidence is inconsistent with L.D.'s evidence with respect to whether he had been at her residence and watching movies with her earlier that day and whether he drove there on his quad or he walked there. I find, however, that these inconsistencies between L.D.'s evidence and C.S.'s are not of particular significance and do not impact upon the reliability and credibility of L.D.'s testimony and her version of events.

[82] C.S. had no particular reason to mark that date as memorable, and it was not until much later when L.D. went to the RCMP with her complaint and the matter was brought to C.S.'s attention that he was recalling what occurred that day.

[83] C.S. also testified that M.J.H. had told him shortly after that day that L.D. had chased him out of her house with a poker. This is a somewhat more memorable

occurrence and is consistent with L.D.'s testimony that she “chased” M.J.H. out of her residence after she woke up to find him sexually assaulting her.

[84] Where the evidence of L.D. and C.S. differ, I prefer the evidence of L.D.

[85] I also find that A.D.'s testimony does not cause me to doubt the reliability and credibility of L.D.'s testimony. A.D.'s testimony as to when she was called by L.D. and told of the incident, going to L.D.'s residence and then accompanying her to the hospital is consistent with the timeframe of events as testified to by L.D.

[86] I recognize that A.D.'s testimony that L.D. told her she woke up and M.J.H. was on top of her, she passed out again and awoke to find him on top of her, at which point she pushed him off of her differ, from L.D.'s testimony that she woke up only once to find M.J.H. on top of her and then pushed him off. In my opinion, this inconsistency is not of any particular significance in the circumstances. It is not indicative of any change or contradiction in the nature or the timing of the alleged sexual assault.

[87] I find that L.D.'s level of intoxication does not cast any doubt on the reliability and credibility of her evidence on the points that are most relevant. None of the witnesses testified that they or the others were so intoxicated such as to cause me to believe any of them were unable to have a reasonable recollection of events at the time these events were happening, due to intoxication.

[88] I also find that L.D.'s decision at the nursing station not to allow for a sexual assault kit to be prepared does not negatively impact the reliability and credibility of her testimony. Her explanation is plausible given her circumstances at the time. While it

would have been preferable for this process if she had allowed the sexual assault kit to be prepared, as it may have provided relevant and probative evidence, her decision not to do so does not mean that I should therefore somehow find her evidence to be not reliable and not credible.

[89] There was nothing in the evidence before me that would cause me to consider that L.D. had a motive to falsely accuse M.J.H. of sexually assaulting her. This said, the absence of any evidence of motive does not somehow enhance the testimony of L.D. It is a neutral factor.

[90] Having considered the testimony of the Crown witnesses and being satisfied that the evidence considered to this point would tend towards the finding that M.J.H. sexually assaulted L.D., I must now consider whether the evidence of M.J.H. raises a reasonable doubt.

[91] Certainly much of M.J.H.'s testimony is fairly consistent with that of L.D. To me, the only significant difference is L.D.'s testimony that he returned to her house and sexually assaulted her and his testimony that he did not.

[92] R.J. testified in support of M.J.H.'s testimony that he did not return to L.D.'s residence by providing an alibi for him and saying that he was home with her. Obviously, if I accept R.J.'s evidence, I must acquit M.J.H. He could not have committed the sexual assault as testified to by L.D. or, at a minimum; I would have to have a reasonable doubt about whether he did.

[93] If I am unsure about whether to accept or reject R.J.'s evidence, I would have a reasonable doubt. If I do not accept R.J.'s evidence, my reasoning in doing so could potentially have an impact upon my assessment of M.J.H.'s credibility.

[94] As stated in *R. v. Bradey*, 2015 ONCA 738:

> [167] ...We distinguish between an exculpatory statement that is disbelieved, and thus rejected by the trier of fact, and one that can be found to have been fabricated, concocted to avoid culpability: *Coutts*, at para. 13; *R. v. O'Connor* (2002) 62 O.R. (3d) 263, [2002] O.J. No. 4410 (C.A.), at para. 17 (later "*O'Connor* (2002)").
>
> [168] The distinction between exculpatory evidence that is disbelieved, on the one hand, and exculpatory evidence that is found to have been fabricated or concocted, on the other, often arises where the exculpatory explanation is an alibi. But the distinction extends to any exculpatory statement: *O'Connor* (2002), at para. 18. [page 754]
>
> [169] An alibi or other exculpatory statement that is disbelieved is not and does not become an item of evidence that adds to the strength of the case for the Crown: *O'Connor* (2002), at para. 17. On the other hand, where the Crown adduces evidence from which the trier of fact can infer that the exculpatory explanation has been fabricated, that evidence is capable of supporting an inference of guilt: *O'Connor* (2002), at para. 17; *Coutts*, at para. 13.

[95] In *R. v. Hibbert*, 2002 SCC 39, the Supreme Court of Canada summed up the principles in regard to the rejection of alibi evidence and the use that could be made from this rejection.

> 67 Before turning to the application of the proviso in light of the above, it may be useful to summarize briefly the state of the law with respect to the rejection of a defence of alibi.
>
> -- In the absence of evidence of concoction (deliberate fabrication) an alibi that is disbelieved has no evidentiary value.

-- A disbelieved alibi is insufficient to support an inference of concoction or deliberate fabrication. There must be other evidence from which a reasonable jury could conclude that the alibi was deliberately fabricated and that the accused was involved in that attempt to mislead the jury. It is the attempt to deceive, and not the failed alibi, that supports an inference of consciousness of guilt.

-- In appropriate cases, for instance if there were multiple accused, the jury should be instructed that the fabricated alibi may be used to place the accused at the scene of the crime, but may fall short of directly implicating him in its commission.

-- When there is evidence that an alibi was fabricated, at the instigation or with the knowledge and approval of the accused, that evidence may be used by the jury to support an inference of consciousness of guilt.

-- In cases where such an inference is available, the jury should be instructed that it may, not must, be drawn.

-- A fabricated alibi is not conclusive evidence of guilt.

[96] In *R. v. Johnson*, 2017 ONSC 1052, Boswell J. states that:

> [27] ...according to our law the facts that establish the falsity of a statement may not also be used to establish its fabrication. This is because Canadian appellate courts have established a policy that requires the Crown to offer evidence of fabrication that is *independent* of the evidence relied upon to establish the falsity of a statement. The policy is considered a necessary hedge against improper reasoning. It was explained by the Court of Appeal in *O'Connor*, at paras. 19-21, as follows:
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> > [19] 19 The distinction between mere disbelief and a finding of fabrication has regard to the fundamental principle that the onus of proof remains on the Crown throughout a criminal trial and helps ensure that the trier of fact properly applies the burden of proof in cases where statements of an accused are tendered or an accused testifies. The distinction reduces the risk that a trier of fact may blur the need for the Crown

> to prove the offence charged beyond a reasonable doubt with the failure of the accused to provide a credible defence. The distinction also recognizes the danger that a trier of fact may attach undue weight to the rejection of an accused's explanation and may move too readily from mere disbelief to a finding of guilt...
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> [20] In [R. v. Coutts, (1998), 126 C.C.C. (3d) 545 (C.A.)], Doherty J.A. explained the rationale underlying the rule as follows at pp. 551-52:
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> > If triers of fact were routinely told that they could infer concoction from disbelief and use that finding of concoction as evidence of guilt, it would be far too easy to equate disbelief of an accused's version of events with guilt and to proceed automatically from disbelief of an accused to a guilty verdict. That line of reasoning ignores the Crown's obligation to prove an accused's guilt beyond a reasonable doubt. By limiting resort to concoction as a separate piece of circumstantial evidence to situations where there is evidence of concoction apart from evidence which contradicts or discredits the version of events advanced by the accused, the law seeks to avoid convictions founded ultimately on the disbelief of the accused's version of events. [references omitted]
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> 21 Despite the fact that in many cases an inference of fabrication will flow logically from disbelief of an accused's statement, the policy underlying the distinction between disbelief and the finding of fabrication militates against using disbelief to infer fabrication. The courts have, therefore, attached the requirement that a finding of fabrication must be founded on evidence that is independent from the evidence which contradicts or discredits the accused's version of events: R. v. Hibbert, supra, at p. 151; R. v. Coutts, supra, at p. 552; and R. v. Tessier, supra, at p. 556.

[97] And then further citing from *Johnson*:

> [29] In terms of the type of independent evidence required to establish fabrication, the Court of Appeal has repeatedly confirmed that evidence of fabrication may be found in the circumstances in which a disbelieved, out-of-court statement was made...

[98] It is not to be expected that the required independent evidence will be in the form of a "smoking gun" such as someone overhearing the plan to concoct the alibi or a tape recording of the same. Often the independent evidence will be found in the circumstances in which the alibi statement was made. Examples of circumstances to be considered include the timing of the statement, the scope of the statement and the degree of detail provided in the statement.

[99] In her statement to the RCMP given in November 2017, R.J. stated that she had only learned the details of the allegations of sexual assault approximately eight months after the incident. However, it became clear on examination and cross-examination that R.J. was aware of the charges against M.J.H. and had discussed them with him as early as mid-April 2017.

[100] She also testified that Cst. Rousseau had informed her of these details at around the same time. She testified that she was mistaken when she told the RCMP in her statement that it had been eight months later.

[101] As noted, when asked why she had not told the RCMP until November 2017 that M.J.H. had been home with her the night of the alleged sexual assault, she stated that it was because the RCMP did not ask her to. I find it rather odd that, on her evidence, her

partner was accused of sexually assaulting L.D. on a specific date and time and she did not bother going to the RCMP to tell them that he could not have, until almost six or seven months after she became aware of the allegations, and just after the trial date for the matter was set.

[102] Her reasons for not going earlier are that the RCMP did not ask her to provide a statement and that she did not particularly like the RCMP. However, it seems to me that, given R.J.'s relationship with M.J.H., she would have more likely have taken steps to get him out from under the charge of sexual assault that was hanging over him earlier, regardless of her opinion of the RCMP.

[103] Further, I have trouble believing that R.J. is able to recall enough detail of the date of the incident to know that she fed M.J.H. hamburger soup and what he was wearing despite the fact that the incident is alleged to have occurred over four months before she became aware of the allegation against M.J.H. and the associated date.

[104] R.J. also recalled that M.J.H.'s son borrowed the red skidoo from him that day, dropped it off at L.D.'s residence and that it was at L.D.'s residence the morning after the date of the alleged incident. She recalled the details of the telephone conversation that she had with M.J.H. and R.J. and the time of that phone call.

[105] I have trouble believing that R.J. would have such a recollection of minute details associated with the date of the alleged sexual assault. I find it highly questionable that she would leave M.J.H. hanging under the shadow of these charges by not telling anyone that he could not possibly have committed the sexual assault until at least six or seven months after she learned of the allegation.

[106] I observed R.J.'s demeanour as she testified. She was clearly angry and argumentative with Crown counsel in cross-examination. Her evidence on direct examination seemed to me to be structured and somewhat forced, tinted with a shade of the anger that became apparent in cross-examination.

[107] I also note that, although there were not questions asked in this regard, that the timing of the break-up between R.J. and M.J.H. in November 2017 is proximate in time with her providing the alibi to the RCMP. I do not believe her evidence.

[108] My reasons for disbelieving R.J. are due to:

- The circumstances surrounding the late disclosure of the alibi evidence, including her comment in her statement that she had not heard the details of the incident for at least eight months, after when she heard them as early as April 2017;
- The recollection of details that I find unusual given that there was no particular reason for her to have such a recollection on a day that was apparently unremarkable, such as what she made for dinner, the telephone conversation and the location of the red skidoo;
- Her demeanour on the stand, in particular with respect to the manner in which she answered questions both in direct and in cross-examination; and
- The evidence of the other witnesses, in particular that of L.D., which I found to be reliable and credible on the circumstances of M.J.H. coming back to her residence and sexually assaulting her.

[109] This is not a case where my reasons for not believing the testimony of R.J. are due to her being imprecise, struggling with recalling important details, possibly being mistaken, or being inconclusive or vague. It is also not a case where I simply decided to believe the evidence of L.D. and moved from having done so to therefore finding the evidence of R.J. to be incapable of belief. I do not believe R.J.'s testimony because I

believe her evidence to have been fabricated in order to assist M.J.H. in his defence for all the reasons stated above. As such, I find that her testimony was contrived.

[110] I further am satisfied that her evidence was contrived in association with M.J.H., and that M.J.H. and R.J. together decided to have R.J. provide him with an alibi in order to avoid him being found guilty of having sexually assaulted L.D.

[111] R.J. and M.J.H. discussed the circumstances of the sexual assault at a point or points prior to the alibi statement being made. Although not cross-examined on it, the timing of the break-up of the relationship proximate to the timing of the statement could lead to a common sense inference that the providing of the alibi was a source of contention between them. I will not, however, in the absence of any questioning on this point, place any particular weight on this.

[112] There was opportunity for M.J.H. and R.J. to discuss: the timing and the details that would allow for an alibi to provide exculpatory evidence for M.J.H.; details like the red skidoo; the content of the phone call while M.J.H. was at L.D.'s residence; what time M.J.H. would have needed to be home; and that R.J. made supper for him after waking him up; all pointing to a discussion between them about the fabrication of an alibi.

[113] None of these alone are of great significance. It is the entire body of the evidence that leads me to conclude that the alibi was fabricated with M.J.H.'s cooperation, if not at his request.

[114] I conclude that I am, therefore, able to draw an inference of guilt with respect to M.J.H. When considered with the other evidence which I have heard in this trial, insofar

as M.J.H.'s testimony differs from that of L.D., with respect to his having returned to L.D.'s residence and sexually assaulting L.D., I reject M.J.H.'s evidence and I accept L.D.'s evidence.

[115] Again, I am not rejecting M.J.H.'s evidence because I have chosen to believe L.D.'s testimony. Regardless of my assessment of L.D.'s testimony, M.J.H. was still able to testify or call evidence that is only required to raise a reasonable doubt. In my opinion, he has not done so and the Crown has proven its case beyond a reasonable doubt.

[116] In the event that I am wrong in having deciding that M.J.H. was collaborating with R.J. to contrive the alibi evidence and that it was her decision on her own to do so and, therefore, erred in drawing a negative inference against M.J.H., I would nonetheless have rejected the evidence of M.J.H. insofar as it is inconsistent with that of L.D. with respect to the break and enter and sexual assault.

[117] After disregarding the evidence R.J., I do so because of my findings with respect to the testimony of L.D., A.D. and that of C.S. to the extent that it is corroborative of L.D.'s testimony such as the comment made to him by M.J.H. of being chased L.D. with a poker.

[118] I note that M.J.H. denied in his testimony having discussed the incident with R.J., while she said that they did. I otherwise found M.J.H.'s testimony to be unremarkable, including his demeanour while testifying.

[119] In many ways, M.J.H.’s testimony is consistent with that of L.D. In the end, it differs significantly only in becoming little more than a straight denial of coming back to L.D.'s residence and sexually assaulting L.D.

[120] In my opinion, after consideration of the whole of the evidence and disregarding R.J.'s evidence, I would also find that M.J.H.'s denial does not raise a reasonable doubt in my mind.

[121] I am satisfied beyond a reasonable doubt that M.J.H. returned to L.D.'s residence and sexually assaulted her as she testified he did. Therefore, I find M.J.H. to be guilty as charged.

[122] Pursuant to the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729, the s. 271 conviction is conditionally stayed.

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COZENS T.C.J.