SUPREME COURT OF YUKON

Citation: *R. v. Sweet*, 2013 YKSC 42

Date: 20130531
S.C. No.:12-01505
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

IAN TRAVIS SWEET

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 and 486.5 of the *Criminal Code*.

Before: Mr. Justice L.F. Gower

Appearances:

Kevin McGillivray — Counsel for the Crown
André Roothman — Counsel for the Accused

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

INTRODUCTION

[1] GOWER J. (Oral): This trial involves allegations of two separate incidents of sexual touching by the accused upon C.S., who was 16 years old at the time, and who is now 18 years old.

[2] In general, the Crown's theory is that the accused and his friend, identified only as Frank, were in the accused's pickup truck on their way home to the Granger

subdivision of Whitehorse, in the late hours of May 18 or the early morning hours of May 19, 2011. They stopped at the Tags gas station on Fourth Avenue in downtown Whitehorse, where they met C.S. and her then-boyfriend, K.S., who was also 16 years old at the time. The accused offered a cigarette to K.S. and a beer to each of C.S. and K.S. There was conversation about the accused giving the two teenagers a ride to the Kwanlin Dun village (near Granger), where they were hoping to find a place to stay for the night. The group then drove to various locations within Whitehorse city limits. At one point, the accused purchased more beer and asked K.S. whether he was able to purchase some marijuana for his friend Frank.

[3] While the group was stopped at a Grey Mountain lookout point, K.S. briefly drove the accused's truck around the lookout area with Frank in the passenger seat, while the accused and C.S. remained standing at the edge of the lookout. This is where C.S. alleges that the accused first sexually assaulted her by putting his hand up under her shirt and around her breast area, as well as touching her buttocks. C.S. claimed that she was too afraid to report this incident to K.S. and the group continued on in the truck to the Royal Bank of Canada ("the bank").

[4] After the bank stop, the accused, Frank and the two teenagers drove to the Kwanlin Dun village, in order for K.S. to purchase some marijuana for Frank. While waiting for K.S. to do so, the accused parked in an open cul-de-sac area of the village near a garbage dumpster. The marijuana was eventually consumed by some of the group at a location in Granger. By then, the accused had also picked up a hitchhiker on Two Mile Hill.

[5] Later, the accused wanted K.S. to purchase more marijuana, and they returned to the same dumpster location in the Kwanlin Dun village. By this point, Frank had been dropped off at the accused's residence. The accused and C.S. got out of the truck to wait, while K.S. left briefly to walk to a nearby house where he was to make the marijuana purchase. It was here that C.S. alleged the accused sexually assaulted her a second time, by again putting his hand up underneath her shirt towards her breast area and also underneath her pants where he touched her vagina. When K.S. returned to the dumpster area, C.S. said she pushed the accused away and ran towards K.S. crying about what the accused had done. K.S. said that he called the RCMP on C.S.'s cell phone to report the matter. Shortly after that, an RCMP constable who was in the Kwanlin Dun village on another matter noticed the couple when K.S. waved him down. C.S. briefly reported to the constable what happened with the accused, and both C.S. and K.S. later gave written statements at the detachment.

[6] The facts put forward by the defence are very similar to the sequence of events relayed by the Crown witnesses, however the accused denies any sexual touching whatsoever. Rather, he asserts that the two young people were apparently homeless and without any money that night. At the dumpster location on the second occasion, the accused maintains that C.S. tried to extort money from him by threatening to go to the police with an allegation that he sexually assaulted her. When K.S. returned to the dumpster site after the second marijuana purchase, and was running towards the accused and C.S., the accused said that K.S. had his hand in his pocket and he thought K.S. might have a weapon. In fear of being robbed by the two young people, the

accused quickly drove off with the hitchhiker, who had remained in the truck the entire time.

[7] The issues in this case turn on an assessment of the credibility and reliability of the various witnesses. Therefore, the distinction between those two terms is important to keep in mind. Credibility has to do with the witness's veracity, whereas reliability has to do with the accuracy of their testimony and engages a consideration of their ability to accurately observe, recall and recount the events at issue.[1] In *R. v. Joudrie* (1997), 100 O.A.C. 25, at para. 28, Moldaver J.A., as he then was, further addressed this distinction:

> "…The importance of the distinction between credibility and reliability was canvassed by this Court in *R. v. S.(W.)* (1994), 90 C.C.C. (3d) 242. Like the case under appeal, S.(W.) involved allegations of a dated sexual assault where the complainant's evidence, although sincerely given, was contradicted in a number of significant ways. On behalf of the court, Finlayson J.A. wrote as follows at p. 250:
>
> > It is evident from his reasons that the trial judge was impressed with the demeanour of the complainant in the witness-box and the fact that she was not shaken in cross-examination. I am not satisfied, however, that a positive finding of credibility on the part of the complainant is sufficient to support a conviction in a case of this nature where there is significant evidence which contradicts the complainant's allegations. We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not the sincerity of the witness but the reliability of the witness's testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record: see *R. v. Norman* (1993), 87 C.C.C. (3d) 153 at pp. 170-4, 26 C.R. (4th) 256, 16 O.R. (3d) 295 (Ont. C.A.), for a discussion on this subject."

[1] Madam Justice Michelle K. Fuerst, Mona Duckett & Frank Hoskins, *The Trial of Sexual Offence Cases* (Toronto: Carswell, 2010)

[8] The main legal consideration that applies to this case is the proposition in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at para.28 (Q.L.):

> "…A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, 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 which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused."

ANALYSIS

Evidence relating to the accused's testimony

[9] Let me deal firstly with the evidence of the accused. For the reasons which follow, I do not believe his evidence and neither am I left in a reasonable doubt by it.

[10] I find the accused's testimony about his friend Frank to be simply incredible. According to the evidence of the accused, as well as that of C.S. and K.S., Frank was present with the group during most of the evening, including the stop at the Grey Mountain lookout where C.S. said she was first sexually assaulted. Therefore, he was obviously an important, if not critical, potential witness for the accused. And yet the accused took virtually no steps to procure Frank as a witness, even when he knew that the RCMP were keenly interested in interviewing him.

[11] According to the accused, he dropped Frank off at his residence in the early morning hours of May 19, 2011, after the group had stopped to smoke a joint at the mailboxes near the entry to the Granger subdivision. The accused testified that he and his wife and young baby were living in the upstairs of this residence, and Frank was staying in the basement suite.

[12] The accused further testified that after the alleged attempted extortion by C.S., he thought “I have to call the cops”, but decided not to because he had been drinking and thought he might be arrested for drinking and driving. The hitchhiker who was now sitting in the passenger seat of the truck told him that she thought the young couple might have stolen something out of the back of the truck. He asked the hitchhiker where she wanted to go and dropped her off at a location on the Alaska Highway north of the Two-Mile Hill intersection and returned home to go to sleep. His wife and young child were away that particular night. The next morning, he was woken up by Frank at about 6 AM because Frank wanted to go to work. The accused said he told Frank what had happened with C.S. and K.S. earlier. He said he told Frank to take a cab to work and that he would be along later.

[13] The evidence of Constable Hoogland was that he and another officer arrested the accused at his residence at 9:25 AM on May 19, 2011. Constable Hoogland informed the accused that he was under arrest for the sexual assault of C.S. Constable Hoogland noted a smell of liquor on the accused’s breath during the arrest procedure. I accept this evidence, as it was unchallenged.

[14] The accused testified that he felt “crushed” when he was arrested, and that he wanted to tell the police exactly what happened. He said that he was taken to the police station, informed of his rights and given an opportunity to speak to a lawyer.

[15] Notwithstanding that the accused thought C.S. had tried to extort money from him the night before, and that he wanted to notify the police about that, and notwithstanding his evidence that C.S. and K.S. may have stolen something out of his truck, and notwithstanding that he felt “crushed” when he was arrested and wanted to tell the police exactly what happened, he made no mention whatsoever of Frank to the police at that time.

[16] The evidence of Constable Penton, who was apparently the main investigating officer in this case, was that he went to the accused’s residence on June 1, 2011, and spoke with the accused’s wife about Frank and asked if she knew his last name (I infer that Constable Penton must have learned of Frank from C.S. and K.S.). She said that she did not, but thought that he worked either at the Yukon College Research Facility or at the new library downtown. According to the accused, he and Frank were doing some contract construction work at the Geological Core Library near the Two-Mile Hill intersection on the Alaska Highway. Not surprisingly, the attempts by Constable Penton to locate Frank at the Yukon College or the downtown library were unsuccessful. In any event, it is reasonable to infer that the accused would have been informed about this inquiry by his wife and therefore knew that the police were looking for Frank. Yet again, there is no evidence that the accused took any steps to inform the police about Frank’s whereabouts in response.

[17] On June 19, 2011, Constable Penton returned to the accused's residence to do a curfew check on the accused. At that time, he asked the accused if Frank was home, and the accused said no. The constable then asked if the accused knew Frank's last name, and the accused said he did not. The constable questioned how it was that the accused lived with Frank and had hired him to work for him, but did not know his last name. The accused replied that his wife "handles that stuff". The constable said that when he spoke with the accused's wife on June 1st, she said that it was the accused who was the one who "pays and hires" the guys that work for him. The constable then suggested that he believed Frank's last name was "Amadoo", and testified that the accused looked surprised when he said that. Finally, the Constable repeated that he needed to speak with Frank.

[18] At trial, the accused admitted that he lied to Constable Penton on June 19th about not knowing Frank's last name. He explained that the reason he lied was because Frank was on a "three-year house arrest" and had been drinking and out past his curfew on May 19, 2011, and he did not want to get him in trouble. The accused testified that he therefore wanted to get legal advice on the matter and did so the next morning. There is no evidence that the accused sought legal advice about Frank previously, notwithstanding that a month had passed since the alleged incident by that time. Contrary to the evidence of Constable Penton, the accused testified that he further told the police on June 19th "where we worked [i.e. at the Geological Core Library] and where Frank was staying at his campsite". By this time Frank had apparently moved out of the basement suite and had taken up residence at a campsite.

[19] The accused testified that he met Frank through a friend in Vancouver and that Frank had come to Whitehorse to work for him on May 11, 2011. Therefore, when the accused was arrested on May 19th, he had only known Frank for just over a week. As noted, the accused asserted that he had been the victim of an attempted extortion and possible theft, that he felt "crushed" by his arrest and that he wanted to tell the police "exactly what happened". The tenor of all this evidence is that he felt wronged and desperately wanted to defend himself against an unjust charge. In this context, I find it simply unbelievable that his loyalty to an employee he had only briefly known, and his desire to protect Frank from the consequences of a possible breach of his house arrest conditions, would have trumped his apparent desire for justice.

[20] The accused's explanation that he was attempting to shield Frank is simply incredible on its face. If indeed he wanted to spare Frank from a possible arrest, then why would he have told the police where Frank worked and lived?

[21] In addition, the accused's evidence that he told the police where Frank worked and where he lived is directly contradicted by Constable Penton who testified that he had no such conversation with the accused. Constable Penton's evidence on that point was not seriously challenged by the accused. Therefore, I find that the accused lied a second time, this time under oath, when he gave that testimony.

[22] The accused said in these proceedings that he had worked with Frank on June 20th and told him at that time that he wanted him to give a statement to his lawyer the next day. He said that Frank initially complained about that because of the risk of going back to jail. However, he calmed down when the accused explained that the statement would only be with the defence lawyer and would not involve speaking with Crown

counsel or the police. The accused said that, the morning after this conversation, Frank did not show up for work and that he had no further contact with him, despite attempts to phone and text him. He said that he had no other contact information for Frank, even though the accused owed him about $7000 in wages.

[23] In any event, the accused also testified in direct examination that he had decided, apparently on or about June 20th, to give the police Frank's last name if they again showed up at his door for a curfew check. However, the evidence is that when Constable Penton performed a curfew check on June 27, 2011, the accused did not do so. Constable Penton testified that when he arrived at the accused's residence that night, he was met at the door by an older male by the name of Tom, whom the accused confirmed was his brother. After some brief conversation with Tom, Constable Penton said that the accused met him at the doorway, but would not say anything to him and did not further identify Frank. There was no specific reference in Constable Penton's notes that he questioned the accused about Frank's last name on that occasion. However, when asked about that on re-examination, the constable effectively explained that he would have made the inquiry, because he had asked the accused the same question earlier and identifying Frank was a priority for him in the investigation.

[24] When the accused was cross-examined about the June 19th curfew check, he said that he intended to give the police Frank's last name if they showed up for a subsequent curfew check and if they asked him for Frank's name. This was an embellishment of his direct testimony and I find that it was a transparent attempt to explain why he did not provide Frank's last name during the June 27th curfew check.

[25] The accused initially said that he could not remember much of the June 27th conversation with Constable Penton. He thought the constable had told him that he already had Frank's last name, but he did not know whether he was told that on June 27th or on another day. I find this was likely a reference to Constable Penton's statement to the accused on June 19th that he believed Frank's last name was "Amadoo". In any event, the accused testified that he did not volunteer Frank's last name on that, or any other, occasion.

[26] Defence counsel argued that Constable Penton's evidence that he asked the accused about Frank during the June 27th curfew check should not be believed or given any weight, because there is no reference to such a question in his notes. I reject that argument. In the context of all of the evidence, it was clearly "top of mind" for Constable Penton in his investigation to locate Frank. The accused knew that and had supposedly promised himself that he would reveal Frank's last name during that curfew check. The fact that the accused failed to do so suggests to me that he was not genuinely seeking the assistance of a witness who was potentially so important to his defence.

[27] In these circumstances I think is appropriate to draw an adverse inference against the accused. I recognize that, as in the situation where the defence fails to call a witness at trial, drawing such an inference could raise the danger of placing a burden on the defence to adduce evidence and that it should only be drawn with a great degree of caution (see *R. v. Lapensee*, 2009 ONCA 645). However, I can find no plausible reason here to explain the accused's consistent failure to pursue Frank's evidence, given his testimony that he felt wronged by the allegations, Frank's obviously relevant and

presumably exculpatory evidence, and the accused's professed resolution to help Constable Penton with his inquiries.

[28] I am similarly troubled by the failure of the accused to make any attempt to involve the unnamed female hitchhiker in his defence. This person was potentially an eyewitness to the second alleged sexual assault near the dumpster in the Kwanlin Dun village. Although the accused did not know at that time that he was going to be charged with sexual assault, he clearly thought that there had been an attempt to extort money from him by C.S. and also feared a robbery by both her and K.S. He was also told by the female hitchhiker that the teenagers may have stolen something from the back of his truck. The accused further testified that he thought about calling the police as a result of the circumstances. Although his explanation for choosing not to do so is understandable, i.e. that he did not want to risk being charged for drinking and driving, his failure to procure any contact information from the hitchhiker is difficult to understand. He testified that he drove the hitchhiker from the Kwanlin Dun village to the Two-Mile Hill intersection on the Alaska Highway, and then turned north for further 10 minute drive, until dropping the hitchhiker at a gas station. Thus, there was ample opportunity during that time for the accused to have obtained the hitchhiker's name, at the very least, as well as some contact information for future reference if need be. Once again, with due regard to the caution in *Lapensee*, the fact that the accused failed to do so suggests that an adverse inference can be made against him.

[29] The third and final area of the accused's testimony that I found unbelievable is regarding the marijuana purchase and usage. The accused testified that he did not smoke pot that night, because he is not a marijuana user. While a collateral matter, I do

find that his evidence on this point affects his credibility overall. First of all, this evidence was contradicted by C.S. and K.S., and even by his own language during his testimony, when he repeatedly referred to places where ‘we’ could smoke a joint, and where ‘we’ could purchase the drugs. Secondly, I find that the accused’s efforts to find some marijuana that night, purportedly only for Frank, to have been quite extraordinary. Thirdly, for a non-user, the accused seemed to be unusually familiar with marijuana terminology and purchasing details.

[30] On his own story, the accused drove to at least three different places to try to secure marijuana and rolling papers for Frank. It was the accused that approached K.S., and the accused that negotiated the purchase price and amount. It was also the accused who paid for the marijuana, not just once but twice. I find that his story about spending the night trying to locate marijuana for Frank strains credibility and raises concerns about his truthfulness with respect to other aspects of his narrative.

[31] As noted at the outset, I do not believe the evidence of the accused and it is incapable of raising a reasonable doubt for me.

Evidence relating to the complainant’s testimony

[32] The third leg in the *R. v. W.(D)* analysis is that, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt of his guilt. For the reasons which follow, and in particular because of numerous problems with the credibility and reliability of C.S., I am not convinced beyond a reasonable doubt of the accused’s guilt.

[33] It is important to note at the outset of this discussion that this is largely a “he said, she said” case on the allegations of sexual assault. While much of C.S.’s testimony about the events that night were corroborated by K.S., and indeed the accused, there was no independent eyewitness to the two occasions of alleged sexual touching. This highlights the importance of C.S.’s credibility and reliability to my eventual conclusion.

[34] Defence counsel argued that there were numerous inconsistencies between the evidence of C.S. and K.S. While that appears to be true, I must remind myself that the pair were each 16 years old time, and approximately two years has passed since the incidents. Several of the inconsistencies raised by counsel I dismiss as simply trivial.

[35] Having said that, there are a number of internal and external inconsistencies, as well as other weaknesses in C.S.’s evidence, which I find troubling. Where, as here, the Crown’s case is entirely dependent upon the evidence of the complainant, this evidence must be tested in light of the evidence as a whole. As noted by the British Columbia Court of Appeal in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1:

> “[28] … Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.
>
> [29] In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the

> witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here."(my emphasis)

[36] An important aspect of a credibility assessment is the consistency between the evidence given by the complainant at trial versus on other occasions (*R. v. C.H.* (1999), 182 Nfld. & P.E.I.R. 32 (Nfld. C.A.).

[37] C.S. admitted that her memory was "pretty foggy" since this incident happened. This is, to a large extent, understandable, given the amount of time that has elapsed and the fact that she and K.S. were smoking marijuana on the night in question. However, while I recognize that, at 16, she was considered a child when these events took place, she was nevertheless not a young child. She was of sufficient age to understand the importance of giving an accurate statement to the police at the time of the events. And presently, at age 18, she should clearly understand the significance of an oath and the importance of responding accurately to questions posed to her at trial. Certain aspects of her evidence and inconsistencies between what she said in this court and to the police raise concerns for me about her credibility and reliability.

[38] There were many details about the night of May 18-19, 2011 which C.S. could not remember, and, when refreshed, it was not clear which of her several statements may have been the most accurate. At one point in her cross-examination, C.S. testified that her memory was "best" when she gave her statement to the police. Later, when she was asked about her earlier testimony at the preliminary inquiry on September 5, 2012, she acknowledged that her recollection was "better last year" than at the trial. Still later in her cross-examination, C.S then testified that her memory was "better today", i.e. at the trial.

[39] Although numerous, no one of the inconsistencies in C.S.'s recollection is, in and of itself, significant enough for me to discount her evidence to the point where I have a reasonable doubt about the accused's guilt. However, I find that the cumulative effect of the inconsistencies leaves me with such a doubt. I am simply unable to find C.S.'s credibility and reliability sufficient for me to safely convict the accused. On numerous occasions C.S. conceded that what she had told the police was not true, not accurate, or a lie. There is nothing in the way of corroborative evidence to convince me that what she has testified to in court is any more credible or reliable than what she has said before. The onus is always on the Crown to prove its case beyond a reasonable doubt.

[40] For example, when asked in direct examination at trial about the first sexual assault at the Grey Mountain lookout, she said that the accused had put his hand under her shirt, on her stomach and around her breast and that he also touched her on the "outside" of her "butt area". C.S. confirmed that evidence in cross-examination, until she was asked about her written statement to the police made on May 19, 2011, in the early morning hours shortly after Constable Penton noted her and K.S. in the Kwanlin Dun village. In the statement, she was asked the following question and gave the following answer:

> "Q: Okay, so you said he was trying to touch you, can you describe and tell me how he was trying to touch you?
> A: like he was putting his hands under my shirt, <u>under my like pants and just like grabbing me</u>." (my emphasis)

When asked to explain this inconsistency, she said that her memory was 'pretty foggy since this incident happened'.

[41] A second inconsistency arising from the first alleged sexual touching had to do with whether the accused said anything to C.S. at the time. In direct examination, C.S. did not remember if he said anything. In cross-examination, when asked if the accused made any suggestions to her at the time, C.S. replied, “Not that I remember.” When she was further asked if the accused said anything like “Hey, let's go in the bushes for a quickie?”, she replied that he did not, and agreed that she would have remembered something like that. C.S. was then asked about her statement to the police where she was asked the following question and gave the following answer:

> “Q: Yeah. Was he saying anything?
> A: Well he was just saying that, I do not know what it was, INAUDIBLE, like he wanted wanted me and he’s like, he’s like after, how about we go to the back seat…” (my emphasis)

When asked to explain this inconsistency, C.S. said, “I don’t remember telling the police that”, and she further agreed that this answer to the police was “not true”.

[42] A third inconsistency in relation to the first alleged sexual touching at the Grey Mountain lookout arose on cross-examination when C.S. was asked whether the accused tried to get her alone and out of the truck. She replied, “No”. She was then asked about her statement to the police where she was asked the following question and give the following answer:

> “Q: What happened there?
> A: I do not know. So, Ian I think [his] name is, was trying to get me alone like out of the car and alone with him. And that’s when he like started like trying to grab me and touched me.”

C.S. further acknowledged that this answer to the police was “not true”.

[43] A further internal inconsistency arose in relation to C.S.'s testimony about her ability to get a good look at the accused that night. In cross-examination she agreed that she had such an opportunity when she was inside the lighted foyer of the bank, when the accused was withdrawing money from the ATM. She was then asked about her statement to the police where she was asked the following questions and gave the following answers:

> "Q: … Okay. Can you describe what he looked like to me?
> A: He was big, uhm, I don't really can't, I never really saw him because like we were in the truck and it was all dark and when we were outside it was all dark so I never really saw him I just saw, all I saw was like a…
> Q: Okay, was he white? Or native or?
> A: White, he was, pretty sure.
> Q: Pretty sure he was white? Did he have a beard? Any glasses? Anything like that?
> A: I can't remember."

When asked to explain these answers to the police, C.S. said "I guess it was not the truth."

[44] C.S.'s evidence about who went into the bank when was also externally inconsistent with both the evidence of K.S. and that of the accused. She testified that when the group stopped at the bank, the accused wanted her to go with him when he went in to get some money from the ATM. She further stated that when K.S. was about to accompany her, the accused said "just me", i.e. indicating that he only wanted C.S. to go into the bank with him. C.S. further testified that she did go into the bank with the accused and that he showed her how much money he took out of the ATM. She then

stated that K.S. came into the bank “about one minute later, not even”, and then all three left to return to the truck.

[45] In her statement to the police, C.S. said:

> “A: After that, we went like, we drove down Grey Mountain and we went to, the, Royal Bank and that’s when he, I don’t know about I but he wanted to get me alone again. And [K.S.] ran into the bank with me and him and, I don’t know and then when we went out we went to go back into the truck, so I could get dropped where it was I wanted to go…” (my emphasis)

When asked to explain this inconsistency, C.S. testified that her answer to the police was “not accurate”.

[46] K.S. testified that when the group arrived at the bank, there was no discussion of who would go into the bank with the accused. Rather, K.S. said that he stood outside of the truck for few moments to finish his cigarette, then went inside the bank, at which point the accused asked him how much money he should take out. K.S. said that he replied “$500”, and that C.S. entered the bank, just as he and the accused were about to walk out.

[47] The accused testified that he went into the bank alone, but that after he withdrew the $500 from the ATM, he turned around and saw C.S. standing beside K.S. and that the two of them were kind of whispering back and forth. The accused then said that C.S. walked out of the bank first and that he followed with K.S. behind him.

[48] C.S. was also inconsistent about when and how many times the group drove up to the Kwanlin Dun village and for what purpose. While I understand that she may have been reluctant to disclose to the police that her boyfriend was purchasing marijuana,

this transaction clearly formed a critical part of the evening's narrative by the time the matter came to trial. The fact that she could not recollect whether K.S. had been able to purchase marijuana and any details about where and when she had been smoking it enhances concerns for me about the reliability of her recollection of the evening overall.

[49] C.S. testified in cross-examination that, on the occasion of the alleged sexual touching near the dumpster in the Kwanlin Dun village, at no time did she go with the accused "behind" the dumpster. She drew a diagram of the position of the accused's truck relative to the dumpster, which depicted the two objects being more or less parallel with the front of the truck facing into the cul-de-sac where the dumpster was located. She also depicted where she and the accused were standing when the alleged sexual touching took place. This was in a position roughly adjacent to the front driver's corner of the truck at about a 10 o'clock position relative to anyone sitting in front of the truck. C.S. confirmed in cross-examination that where she and the accused were standing when the alleged sexual touching took place would have been in "full view" of anyone sitting in the truck. However, she was also cross-examined about her statement to the police where she gave the following answer:

> "A: Well I went out of the truck because I wanted to go with [KS] because I didn't want to be alone with him and like I don't know he wouldn't let that happen, and like so [KS] like, and like he do [KS] doesn't know it was didn't know what was happening so, INAUDIBLE just started walking away to like get the thing, and like I don't know <u>he took me behind a dumpster and like started trying to grab me and stuff</u>…" (my emphasis)

Obviously, "behind" can be a relative term depending upon the position of the observer. However, in this case, C.S. believed that both the female hitchhiker and Frank were still

sitting in the truck. Therefore, relative to them, “behind” would have been on the side of the dumpster which could not have been seen by the hitchhiker and Frank. In any event, C.S. acknowledged that this answer to the police was “not correct”.

[50] During what she subsequently clarified to be the second stop at the dumpster, C.S. initially testified in direct examination that she felt she could not go with K.S. when he left to purchase the weed “because I didn't know the person he was going to get the weed off of.” However, in cross-examination she said that answer was “not correct”. She was then asked about her statement to the police, and in particular her answer that the accused would not let her leave with K.S. When questioned further, C.S. said “I don’t think it was [the accused] saying “No, don’t go with him”” and confirmed that the accused did not prevent her from going with K.S. at that time. She also added “I can’t really remember much of what happened. It’s confusing how things played out.”

[51] I am also troubled by C.S.’s reaction and response after the first incident of alleged sexual touching at the Grey Mountain lookout. I recognize that it is dangerous to expect stereotypical responses from victims of sexual assault, e.g. the long-discredited “hue and cry” reaction. However, having said that, I find it puzzling, if not contrary to common sense, that C.S. did not tell K.S. about the first incident and that she did not attempt to leave the company of the accused with K.S., despite opportunities to do so.

[52] C.S. testified that after the first incident on Grey Mountain she felt “scared” and was trying to get K.S.’s attention “to give him the idea of “let’s go” when we were going back downtown.” Although the two were sitting side-by-side in the rear seat of the truck on the way back downtown from Grey Mountain, C.S. chose to communicate with K.S. by texting messages on her cell phone and then passing the phone to K.S. to read the

messages. This was corroborated by K.S. who testified that she texted “These guys are scaring me”, but would not explain to K.S. why that was the case, despite repeated requests from K.S. to do so. Rather, C.S. texted that she would tell him later.

[53] It also seems that there was an opportunity for C.S. to tell K.S. what had happened when the group stopped at the bank. Regardless of whose version one was to accept of who went into the bank and when, in none of the versions was there any suggestion that C.S. did not have an opportunity to talk quietly with K.S. at some point during the stop, at which point she could have suggested that they leave the group.

[54] In addition, during the first stop at the dumpster in the Kwanlin Dun village, when K.S. first went to purchase some weed, there was no suggestion in the evidence of either C.S., K.S. or the accused that C.S. was not free to simply get out of the truck and either accompany K.S. or agree to meet him later at the house of their friend, J. which was only about a block away.

[55] During the second stop at the dumpster, there was conflicting evidence from C.S. and K.S. about whether the accused had attempted to prevent C.S. from leaving him and the truck. K.S. testified that, after the accused gave him $50 to purchase some more weed, he walked about 15 to 20 feet and then said to C.S., “Why don’t you come for a walk with me and go get some pot?” C.S. agreed, but the accused stopped her saying, “No, one of you has to stay here so I know you’re not ripping me off.” However, as I noted earlier, when C.S. was asked about her statement to the police in which she said that the accused would not let her leave with K.S., she testified, “I don’t think it was [the accused] saying “No, don’t go with him””, and said that the accused did <u>not</u> prevent her from going with K.S.

[56] If the accused had in fact prevented C.S. from going with K.S., especially given that C.S. was purportedly fearful of him after the first incident of alleged sexual touching, I would expect her to remember that fact. Since she testified that the accused did not stop her, I am inclined to accept her version over that of K.S. on the point. Consequently, there was another opportunity for C.S. to speak with K.S. about what happened, and to leave the company of the accused for J.'s house. However, C.S. took no steps at this time either.

CONCLUSION

[57] In summary, I do not have a reasonable doubt about these allegations arising from the evidence of the accused. However, given the numerous weaknesses with the evidence of the complainant, I do have such a doubt. Although I am left with a suspicion that something untoward probably happened between the accused and the complainant, that is not the test in a criminal trial. Accordingly, I conclude that there is a reasonable doubt that the accused committed a sexual assault upon C.S., and I find him not guilty of the charge.

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Gower J.