

SUPREME COURT OF YUKON

Citation: *R v MTL*, 2014 YKSC 74

Date: 20141219
S.C. No. 14-01503
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

MTL

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

Before: Mr. Justice LF Gower

Appearances:

Jennifer Grandy
André WL Roothman

Counsel for the Crown
Counsel for the accused

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

INTRODUCTION

[1] This is the trial of ML on the charge of sexual assault upon GC between August 30 and 31, 2013, in Whitehorse, contrary to s. 271 of the *Criminal Code*, RSC 1985, c C-46 (“the *Code*”). The two young adults were good friends before the incident. ML had been introduced to GC through GM, also a good friend whom he had known for several years.

GC and GM had been in a relationship since September 2010 and were engaged at the time of the incident.

[2] This is a “he-said, she-said” case. GC alleges non-consensual sexual intercourse, while ML testified that the intercourse was with consent. Because ML testified, I must have regard to the principles in *R v W (D)*, [1991] 1 SCR 742, which I paraphrase as follows:

- 1) if I believe the evidence of the accused, then I must acquit;
- 2) if I do not believe the evidence of the accused, but I am left in a reasonable doubt by it, then I must acquit; and
- 3) if I do not believe the accused and I am not left in a reasonable doubt by his evidence, I must consider whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt of his guilt.

[3] I am also cognizant that I am not to compare the evidence of the complainant against that of the accused to determine whom I believe. Rather, I must consider the evidence as a whole. Having said that, I will begin by focusing on the evidence of the two Crown witnesses: the complainant and Cst. DeWitt. I will then turn to the evidence of the accused and his three witnesses. Finally, I will provide my analysis of the evidence.

CROWN'S EVIDENCE

a) The Complainant

[4] GC testified that she is presently 22 years old; therefore, she would have been 21 at the time of the incident. She is a high school graduate and is employed as a waitress. GC said that she started dating GM in September 2010; that they were engaged at the time of the incident; and that they eventually broke up in February 2014. She testified

that she had been living with GM and his family in a residence in the Whitehorse subdivision of Riverdale, but that on August 25, 2013, she moved to another residence in the Mountainview subdivision, with her friends JH and CL.

[5] GC said that in August 2013, she considered ML to be a good friend and that she “hung out” with him almost on a daily basis, often also in the company of GM.

[6] On August 30, 2013, GC testified that she was picked up by ML at her Mountainview residence in ML’s vehicle at about 8:30 PM. She was not sure if their mutual friend, JW was already in the vehicle, but at some point he joined the two of them and they all drove to Fish Lake in ML’s vehicle. At Fish Lake they met a group of friends, MH, KR and a young woman who was only identified by the first name of R. These others had driven in a separate vehicle from Whitehorse to Fish Lake.

[7] At that location, the group made a fire, roasted hot dogs, drank beer and smoked marijuana. GC admitted to drinking two Budweiser beer at Fish Lake. She also admitted to smoking some marijuana from what might have been two or three joints passed around the group, although she was not sure of exactly how much was consumed. GC said that she observed ML drinking beer while driving to Fish Lake and during the party there. She described him as intoxicated. GC did not recall whether ML had consumed any of the marijuana. She said the party lasted about 3 to 4 hours and that, when the group ran out of beer, they decided to go back into Whitehorse.

[8] GC testified that her intention was to return to her residence in Mountainview. She thought she had asked ML take her home before leaving Fish Lake, but she was not sure. However, while en route, she clearly remembered reaching forward from the back seat, in between ML, in the driver’s seat, and JL, in the passenger’s seat, to turn down

the music so that she could ask ML to take her home. GC testified that ML told her to come downtown with him and JW and then turned the music back up.

[9] GC said ML parked his vehicle at his residence, a four-plex on Wheeler Street. She said that KR drove his vehicle to his own place, which was very close to ML's residence, and that R, KR's girlfriend, went to use the washroom. GC also said that JW decided to leave the group at that time. She testified that the five people remaining in the group then walked together to the Boiler Room pub, in the Yukon Inn.

[10] Just outside the Boiler Room, GC said that ML grabbed her arm to hold her back while the others went head. She said that ML told her that she could stay at his place and that she could sleep in his bed with him, back to back. GC testified that it was not an option for her to spend the night with GM in his Riverdale residence, as GM had previously indicated that he wanted some "space" from her in the relationship. She said that although she and GM had been texting back and forth that evening, she had not seen him in a couple of days. GC also testified that walking back to her residence in Mountainview would have taken more than an hour. In any event, GC said that she got angry with ML at his suggestion that they could share a bed together, told him no, and walked away from him briefly.

[11] Eventually, GC joined the group inside the Boiler Room. She said that ML purchased a mug of beer for himself and one for her. GC said that she drank about half of her beer. She said that ML was intensely talking to her and pulled her chair towards his. GC testified that ML was saying things to her which were similar to topics he had raised with her on earlier occasions, and which she found upsetting. For example, she said that ML was telling her that GM was cheating on her; that GM did not appreciate her

or deserve her; that GM was probably with another girl that very evening; and that she should consider leaving the relationship. GC further testified that while ML was telling her these things he was leaning towards her, grabbing her legs, knees and hands, and was making her physically uncomfortable. At one point she was pushing his hands off of her, arguing with him and crying. Eventually, GC said that ML told her that if she wanted a place to sleep, she had to go with him right away. She said that she got up and followed him because she did not have a place to go that night. GC said that she and ML left the Boiler Room before last call and arrived at his residence on Wheeler Street just before 2:00 AM.

[12] While walking towards ML's residence, GC testified that he once again told her that if she and GM broke up that he would want to go out with her. GC said that she responded by telling ML that she needed him to be her friend and to not put pressure on her like that. GC testified that ML mentioned the "magical" northern lights that night and said that they were meant to be together. She said that she did not take that seriously and when he also tried to put his arm around her, she just ducked under. GC also said that she refused when he attempted to hold her hand. She testified that she still thought he was joking, because he had been drinking and that when he was sober he never tried to be physical with her.

[13] Just outside ML's residence, GC said that he told her he needed a hug, which she gave him willingly, but when he tried to kiss her, she pushed him away and started yelling at him angrily saying: "You know I don't want that". GC testified that ML apologized for that behaviour and then said that he would not touch her, that he would leave her alone and that she could crash on his couch.

[14] GC, who had previously slept on the floor in ML's bedroom once before with GM, accepted ML's offer and went into his residence. Once in his bedroom, GC said that she told ML that he should not make passes at her and that he should respect her relationship with GM. According to GC, ML again apologized for his behaviour.

[15] On cross-examination, GC confirmed that she consumed a total of two ordinary sized beers at Fish Lake, plus a few tokes of the marijuana and about half a mug of beer at the Boiler Room. She testified: "I'm pretty lightweight, but I wasn't blacking out or anything, I was still pretty with it... a bit buzzed."

[16] ML slept on a high bed, somewhat like the second story of a bunk bed. There was also a two-seater couch in the bedroom, to the side and below the bed, with the back of the couch against the bed frame.

[17] GC testified that she put her pack down and received a blanket and pillow from ML. She said that she took off her sweater, but kept the remainder of her clothes on, including her shirt, full-length pants, bra and underwear and socks. She plugged her phone into a charger and put it on a small table in the room. GC said that she then lay down on the couch and immediately fell asleep. Although the two-seater couch was quite short, GC, who is only 5'2" and weighed 102 pounds at the time, testified that the couch was manageable and that she fit pretty well. She said she fell asleep on her back.

[18] GC testified that the first thing that she remembered when she woke up was that ML was on top of her and that she could not move. Her shirt was still on, but her pants and underwear were down around her ankles and ML was pushing his penis into her vagina. She said to ML "What the fuck man? What are you doing?" GC testified that she was pushing on ML's chest to get him off of her, but that he bit her on the side of the neck

"really hard", which later left bruises. She said she asked him why he was doing what he was doing and that ML replied that he could not help it, while he continued the intercourse. GC said that ML kept saying that he was "sorry", over and over again, and that he said that she was "too cute". She testified that she kept trying to push ML off of her, but did not really have any leverage on the couch. When she began hitting his chest, he grabbed her arms and held them down. GC said that the intercourse continued for what felt like about 10 minutes, but was probably less than that. She said that she was crying really hard and that she told ML that she was going to tell GM about what was happening. At that point, ML got off her and, according to GC, grabbed her phone, threw it at her and told her to call GM. She said ML was shaking her by the shoulders and demanding that she tell GM that they had slept together, that she was in love with ML, and that she was ML's girlfriend now. GC testified that she complied with these demands and made the call, although what she told GM was not the truth. She said that she was really scared and did not know what else to do.

[19] GC said that eventually ML let go of her, at which point she pulled up her pants, grabbed her phone and her remaining clothing and left ML's residence. She testified: "I didn't even put my shoes on, I think I left them there."

[20] GC testified that she then ran all the way to GM's house in Riverdale. She said that this was about 5 AM and that, while she was running, she tried to call GM on her phone. On cross-examination, GC said that she tried to call GM three more times, but that he only picked up on the third call. She said that GM then stayed on the telephone until she got to his place. When she spoke to GM, she said that she was not really making any sense and that she was crying really hard. She said that she said things like:

“I didn’t want it. I didn’t mean for this to happen.” GC said that her trip to GM’s residence was “kind of like all a blur”. She finally arrived at GM’s residence and eventually told him what had happened in ML’s bedroom. On cross-examination, GC testified: “I wasn’t wearing my shoes. When I got to [GM’s] place, I didn’t have them. I don’t remember grabbing them on my way out.”

[21] The next day, August 31, 2013, GC went back to her residence in Mountainview to shower and change clothes. She testified: “I really wanted to get out of those fucking clothes. I burned my pants, actually.” On GM’s suggestion, and because she was in a lot of pain and wanted to get tested for a sexually transmitted disease, GC then went to the Whitehorse General Hospital for an examination. GC also testified that, with the help of one of her roommates, she put makeup on her neck to cover the bruise marks before attending at the hospital. On cross-examination, GC also said that she had bruising on the inside of her thighs, which she noticed while showering.

[22] GC testified that she did not recall seeing the nurse in the emergency department, but she assumed she must have done so before meeting with the doctor. In re-examination, she said: “I don’t really remember like checking in, or talking to the nurse, or coming or going.” GC testified that the attending female medical doctor, whose name she thought was Anderson, asked her if she had been raped. In response, GC said that she was crying and nodded affirmatively, but that she did not say anything to the doctor because she did not want to talk about it. GC said the doctor told her that she had a lot of “lesions, lacerations and bruising”. She testified that the doctor was “pushing” for her to have a sexual assault kit examination, but that “I just wanted to get out of there as soon as possible”.

[23] On September 3, 2013, GC gave her first statement to the police about what happened. Cst. Dewitt took the statement from GC and became the chief investigator on the complaint. In the intervening days GC testified that she moved back into GM's residence in Riverdale and that GM was very angry with ML, threatening to cause him various forms of bodily harm and property damage in retaliation for the alleged rape.

[24] After the initial meeting with Cst. Dewitt on September 3rd, GC said that she received a text from ML which said that if GC did not tell everyone that she was lying and that it never happened, ML was going to kill himself. He also texted that he was afraid of going to jail. She said she told Cst. Dewitt that ML was threatening suicide, so that they would check on him to make sure he was okay.

[25] GC testified that she offered to take her phone to Cst. Dewitt, but that the Constable did not think it was necessary. On cross-examination, she said that this happened "a couple of different times". GC also said that she had a loaner phone from her service provider when she received the suicidal text message from ML. She said that she had this phone for about a week while her other one was being fixed. GC adopted as true the following testimony from the preliminary inquiry:

Q So how long after you spoke to Constable Dewitt did you – did you get your own phone back?

A Get my other phone back? I think it was, like, four or five days after that that they sent me back my phone.

[26] On cross-examination, GC testified that during the three days she delayed reporting the matter to the police, she was constantly trying to persuade GM to stay home and not retaliate against ML. She also said that she did not want to make a big deal

about the incident. GC testified: "I did not want to have to sit here and do this", referring to her trial testimony.

[27] GC said that she had sent a text to GM at some point letting him know of her decision to sleep on ML's couch that night, but that she did not recall if GM had responded to that text. According to my notes, there is no evidence of when she sent that text, although it would probably have been sometime between midnight and 2 AM, since that was apparently when GC made the decision to sleep in ML's bedroom.

b) Constable DeWitt

[28] Constable DeWitt took an initial witness statement from GC on September 3, 2013. On that day she also took photographs of what she described as "bruising" to GC's neck, which were entered as an exhibit in this trial. On September 11, 2013, GC provided Constable DeWitt with further details about the alleged sexual assault, including the fact that ML had forced her to make a phone call to GM after-the-fact informing GM that she had consensual sex with ML and that the two of them were in love. GC further explained that this was the reason why GM got upset with her when she phoned him and he hung up on her.

[29] Constable DeWitt testified that GC called the RCMP Detachment on September 4, 2013 and left a message with the dispatcher about the suicidal text message from ML. The Constable said that it was several hours later before she was able to speak directly with GC about that. She testified that she wanted to see the text message, but that GC had told her it was gone because she had put the phone back to its factory settings and either she or GM had shipped it back to the factory or supplier company. On cross-

examination, the Constable said she was certain that GC did not offer to bring in her phone and that she did not decline to view the phone.

DEFENCE EVIDENCE

a) Dr. MacDonald

[30] Dr. Sally MacDonald testified that, based on her review of her notes in the hospital's "Ambulatory Care Form", she recalled examining GC on August 31, 2013. I allowed the Crown to file this document as an exhibit on the basis that it was evidence of past recollection recorded. Indeed, it became clear through the doctor's testimony that she had no independent recollection of any of the details of the examination beyond what was recorded in her notes.

[31] Dr. MacDonald's notes indicate that GC attended at the hospital at 3:30 PM and was seen by the doctor between 4:05 and 4:45 PM. Dr. MacDonald testified that there could have been a nurse in attendance that day with the last name of Anderson.

[32] GC reported to the doctor that she had slept at a friend's place rather than going home, and while asleep she was awakened by him having sex with her. She reported that she kept pushing him off, but he persisted. She reported that he did not ejaculate, but there was penetration. She claimed to be sore that day.

[33] Dr. MacDonald encouraged GC to have a sexual assault kit examination, but GC just wanted to be checked for sexually transmitted diseases. On examination, the doctor noted that GC had a tender and red perineum and right labial area. The notes also indicate that the doctor observed "no abrasions", no vaginal discharge and that her cervical "ectropian" was considered normal. The doctor testified that her examination included a check of the cervix because young women can have redness in that area,

which can be due either to trauma or to normal hormonal effects. In this case, the doctor concluded that it was the latter.

[34] The doctor did not note any bruising. She testified that her practice would have been to note that fact, if she had observed bruising. On the other hand, she acknowledged that while bruising is usually visible within a day of an injury occurring, the time it takes to form a bruise varies between individuals.

[35] Dr. MacDonald testified that the tenderness and redness she observed in GC's vaginal area is consistent with non-consensual sex, although it could also be consistent with rough sex or prolonged sex.

b) The Accused

[36] The accused testified that he is 23 years old and a high school graduate. At the time of the incident he resided with his mother in a four-plex on Wheeler Street in Whitehorse, and he continues to live there today. The accused said that he is 5'11" and at the time of the incident he weighed 310 pounds and had a 44 inch waist. He presently weighs about 250 pounds.

[37] On Friday August 30, 2013, the accused testified in direct examination that he worked between 1:30 and 4:30 PM, and that GC "joined" him in his work that afternoon. In cross-examination, he said that he "picked her up" from her Mountainview residence in his vehicle at about 1:15 PM. He described his work as a Yukon government contract which involved spending respite time with disadvantaged young people. On that particular day the accused said he and GC took a young man for a hike down the Schwatka Lake Road in Whitehorse.

[38] After work, the accused testified that he and GC drove to the liquor store to get some beer for the night. He said that he purchased a 24-pack of Budweiser beer, but that GC already had three bottles of her own Corona beer, which she had brought from her house when he picked her up earlier that day.

[39] The accused said that he and GC then picked up their mutual friend, JW, from his home in Riverdale, and then the three of them drove around Whitehorse, listening to music until about 8:30 PM, when they decided to meet some other friends, KR, R and MH, at Fish Lake. In direct examination, the accused testified that he, GC and JW arrived at Fish Lake at about 8:30 PM. However, in cross-examination, he acknowledged that the decision to go to Fish Lake was made at about 8:30 PM, and that it takes about half-an-hour to drive to that location from downtown Whitehorse, so that the group's time of arrival there was probably "just after" 9 PM.

[40] In direct examination, the accused was asked whether he was aware of any problems in the relationship between GC and GM. He responded: "When me and [G] were driving around, she was telling me they were broken up and that she was moving out of his house." However, in cross-examination, the accused was reminded that he said he had picked GC up at her Mountainview residence earlier that afternoon before going to work, and therefore had to have already known that she had moved out of GM's house. He acknowledged that his earlier answer in direct examination was "not quite correct".

[41] The accused testified that while the group was having a campfire and hot dogs at Fish Lake, he consumed "maybe six" beer. In direct examination, he said that he started drinking the beer when the group arrived at about 8:30 PM, and that the group returned

to Whitehorse at about midnight. However, in cross-examination, he acknowledged that if the group had arrived at Fish Lake just after 9 PM, and then left for Whitehorse at about midnight, then he would have consumed the six beers in about three hours. When asked whether he was okay to drive, he responded: "Well, everyone had about the same amount. I just felt like driving. I drove the car there and I wanted to drive the car back." The accused continued that he felt "okay to drive" and that he was "hardly" affected by the alcohol. In direct examination, when asked about his state of sobriety at that time, he responded that he was "just buzzed, not really drunk at all."

[42] The accused denied that GC asked to be taken home after the group left Fish Lake to return to Whitehorse. He said the general plan was that they were all going to go to the Boiler Room. In cross-examination, the accused testified that the group left Fish Lake "around midnight", but he couldn't be "100%" sure of that time. After the half-hour drive back to Whitehorse, parking his vehicle at his residence, and coordinating with KR and R, who had parked their vehicle at KR's residence nearby, the accused acknowledged that it had to have been "at least 12:45 AM, if not later" by the time the group arrived at the Boiler Room. He testified that the group all went inside the pub at the same time. He denied having any conversation separately with GC outside before entering.

[43] In cross-examination, the accused was asked whether he discussed with GC at that time where she was going to stay that night. He responded: "That offer was way earlier. She asked if, or, if she could have a place to stay and I said 'yeah' she could stay on my couch." The accused continued that he thought this conversation had taken place

at Fish Lake, and that the reason he did not mention it in his direct examination is because he was not asked a question about the topic.

[44] At the Boiler Room, the accused acknowledged purchasing a pint of beer for himself and one for GC. He said that he finished his before leaving, but that GC had left a bit at the bottom of her glass. The accused said that the group were all playing pool and sitting together. He denied “coming on” to GC in any way, or that she was upset.

[45] The accused testified that the group left the Boiler Room at about 1:45 AM and that they all went back to the alley behind his house before separating. In direct examination, he said: “I asked [G] if she needed a place to stay and she said she would be okay at my house.” In cross-examination, the accused acknowledged that he had an earlier conversation with GC at Fish Lake about where she was going to spend that night. He explained that the reason he asked her again was that he was “just making sure”. He again denied that GC mentioned anything about going to her own house.

[46] After the others left, and he and GC were alone, the accused denied any discussion with her about her relationship with GM or that he told her that GM had been cheating on her. He also denied trying to kiss GC and the mutual hugging.

[47] In direct examination, the accused was asked whether he offered to drive GC to her Mountainview residence. He responded that he did not do so because “I was too drunk to drive. I didn’t want to drive a vehicle.” However, on cross-examination, the accused testified that he “felt okay” on the walk home from the Boiler Room and denied feeling affected by alcohol. When further asked why he did not drive GC to Mountainview, he explained that his earlier statement that he was “too drunk” was with reference to the legal limit. He continued to say that a total of seven beers is “hardly a

buzz” for him. Nevertheless, he conceded that he probably should not have been driving from Fish Lake to Whitehorse earlier. He agreed that this was an example of “poor judgment” on his part.

[48] The accused testified that he and GC entered his residence, and ultimately his bedroom, at about 2:00 AM. He said that he gave GC a pillow and a blanket for her to sleep on the couch in his room. He said that GC asked if he had any “sleeping pants” and he gave her a pair of his boxer shorts, which she accepted. The accused said that he then undressed himself down to his own boxers and got onto his bed, while GC laid down on the couch.

[49] The accused testified that about 10 minutes after they both lay down to go to sleep, GC came up onto his bed. He said the two of them laid there for a while talking and that GC was upset with GM. He described the conversation as GC telling him how she actually loved him. He said he responded: “I love you too”, because he had said that to GC before as a friend and it did not seem strange to him. However, the accused said that GC responded: “No, I actually do love you. You are the nicest guy I’ve ever met.” He said that GC then kissed him and he returned her kiss. The accused said that the two then continued to kiss each other for about 15 minutes.

[50] The accused then testified that GC took off her shirt, that they both removed the remainder of their clothing, and that she asked him to get on top of her. He said that she asked him to go slow and to be gentle. The accused said the two of them then had sexual intercourse for about 15 minutes. He did not climax and eventually rolled off.

[51] The accused then testified that GC offered to give him a blow job, which he accepted. He said this lasted for about another 15 minutes. Again, he did not climax.

[52] The accused then testified that GC climbed on top of him and continued the sexual intercourse. At that time she did not say anything about going slow or being gentle. He described the pace of the intercourse at that time as “a lot faster”. The accused said that this lasted for about another 15 minutes, and again he did not climax. He said that came to an end when GC got off of him, and the two of them lay together cuddling for a while.

[53] The accused testified that he told GC that it would be a good idea if they did not tell GM right away what had happened because she and GM had just broken up. He said that she did not say anything in response to that suggestion, but that she grabbed her cell phone, got off the bed and moved down to the couch, where she texted on her phone. The accused said that he asked her what she was doing and she said that she texted GM and told him everything that happened. He said GC then started to get dressed and told him she had to go.

[54] The accused denied giving GC her phone, throwing it at her or telling her to call GM. He said that it was about 5:30 AM when GC decided to leave. He testified that he observed GC starting to call GM as she was leaving. While he denied that GC was crying, he described her as follows: “She was just upset and started muttering under her breath, not really making sense.” He added later that GC also seemed “confused”. The accused said that soon after GC left, he texted her saying that she should not be telling GM right away, and that they should come up with a plan to bring it up to him, so as not to hurt GM’s feelings.

[55] When asked in direct examination about the marks on GC’s neck, the accused initially replied that he “kissed” her on the neck. Then, in answer to a leading question from his counsel, he said that he could have given her a “hickey” by sucking on her neck

a “little bit” at the beginning of the sexual intercourse when he was on top. However, he said that this would only have lasted for “three seconds”.

[56] The accused testified that he did not wear a condom during the sexual intercourse. He also said he did not discuss birth control with GC before the sex, and that this was another example of his poor judgment on that occasion. The cross-examination on this point was as follows:

Q Did you discuss birth control with her at all?

A No.

Q Is that normal for you to have sex with someone without a condom?

A Ahh, yeah.

Q Normal for you to have sex with someone without discussing the use of birth control?

A Ahh, no.

Q Now you would agree with me that it's pretty risky to have sex with someone without a condom?

A Yeah.

Q Risk of pregnancy?

A Yeah.

Q Risk of STD?

A Yeah.

Q So that was not the greatest judgment there either, it's fair to say?

A That is fair to say, yeah.

[57] The accused testified that he had known GM since about grade 8, and that in 2013 the two of them were good friends.

[58] In cross-examination, the accused initially denied having a “crush” on GC, but then conceded that he liked her enough to have sex with her even though GM was a good friend of his. Crown counsel returned to this subject later in cross-examination and the accused testified as follows:

Q You said that, having sex with [G], that you enjoyed it?
A Yeah.
Q You were attracted to her?
A Slightly, yeah.
Q You thought she was cute?
A Kind of yeah.
Q You told her you thought she was cute?
A Ahh, no.
Q You've been attracted to her for a little while?
A Ahh, not really, no.
Q Well you testified you told her you loved her before August 30 and 31st?
A Yeah, we were really good friends, so...
Q You wouldn't tell someone that you loved them if you weren't attracted to them would you?
A Yeah, I say 'I love you' to all my friends, they are really good friends of mine so, so it wasn't a big deal between us.
Q How about [GM]? Have you told him you love him?
A I told him that before yeah.
Q And despite the fact that you love him, you slept with his girl?
A Yes.
Q Mr. [L], I'm going to suggest to you... That you wanted to sleep with her for some time?
A Alright.
Q Alright, you did?
A Yeah, sure, yeah, she's an attractive girl.

c) The Accused's Mother

[59] The accused's mother, JL, testified that she was sleeping in her bedroom the night of August 30-31, 2013, which is immediately adjacent to, and shares a common wall with, the accused's bedroom. She said that she heard the accused and GC coming into the residence in the early morning hours, but did not look at the clock to note the time. She said she is a light sleeper and that the door to her bedroom remains open because of her cats. JL testified that she got up at 5 AM and went to the bathroom. When she was in

the hallway, she noticed GC's shoes, which she recognized from an earlier visit, on the floor beside the doorway to ML's bedroom. JL then went to the kitchen, where she made coffee, and then to the living room, where she turned on the television to watch the news and drink her coffee. Just after 5 AM, she heard the entrance door to the four-plex squeaking. She got up, looked down the hallway and noticed that GC's shoes were gone. JL testified that between hearing her son and GC entering the residence and the entrance door squeaking just after 5 AM, she did not hear any sounds like people crying or talking loudly. However, she conceded that the two of them could have had sex in ML's bedroom while she was sleeping.

d) GM

[60] GM testified that he is 23 years old and that on August 31, 2013, GC was his fiancée. He said that during the night of August 30, he exchanged texts with GC, in which she invited him to Fish Lake and subsequently to the Boiler Room, but that he declined because he did not want to drink. He said that he did not receive a text from GC indicating that she was going to spend the night in ML's residence. However, in cross-examination, he acknowledged that he went to sleep about midnight and does not know if he received another text after that because he was asleep.

[61] In the early-morning hours of August 31, GM received a phone call from GC, where she said: "I have something to tell you, I slept with [ML]". He said she sounded sad. GM threw his phone at the wall, but then called GC back about 30 seconds later, asking her why she did that. He said that GC asked if she could come over to his place and he responded that she could. GM then testified that GC called him back about five minutes later. He said she arrived at his place at about 6 AM. He noticed that GC was

wearing her shoes and that she had marks on her neck. GM testified that GC had told him that ML had “sucked” on her neck.

[62] GM said that his relationship with GC was “good” at that time, although he conceded that there were issues between them that could have prompted GC to think that he needed a bit of “space”. GC had moved out of GM’s residence about two weeks earlier and was living somewhere near the Takhini subdivision in Whitehorse, although he had never been to that residence.

[63] In cross-examination, GM conceded that he was having some trouble remembering what happened in relation to this incident, because it took place over one year ago and that it was difficult for him to remember that far back.

[64] On the other hand, GM acknowledged that when he was speaking to GC on the phone on her way to his residence, she was crying and sounded confused, upset and scared of ML. GM said that the information GC was providing was confusing to him and was not always making sense.

[65] GM testified that after her arrival, GC went to sleep for a couple of hours. At about 8 AM, they had a further conversation in which GC described what happened with ML. According to GM, GC told him: that she woke up to find ML on top of her having sex; that she tried to push him off; that ML said to her “I’m sorry, you’re too cute”; and that it was not until she told ML that she was going to call GM that he got off of her.

ANALYSIS

a) The Theory of the Defence

[66] The theory of the defence is that GC felt rejected by GM the evening of August 30, 2013, because he indicated he wanted some “space” in their relationship. She therefore

sought out comfort with ML and spent the evening with him. She was “buzzed” from the beer and the marijuana and had the urge for intimacy with ML. She also knew that GM had cheated on her before. Therefore, this was “payback time”. On arrival at ML’s residence, GC was in a slightly intoxicated state, which affected her rational decision-making. By the time the sex was over, GC had sobered up and regretted what she had done. She also had a big concern that it would get back to her friends and GM that she had had sex with ML

[67] As will become evident from my discussion below, I do not accept this view of the case.

b) Do I Believe the Accused?

[68] I do not believe the accused’s evidence that he had consensual sexual intercourse with GC on August 31, 2013 for the following reasons.

[69] The accused was internally inconsistent with his evidence about when he offered GC the opportunity to spend the night at his house. In his direct examination, he testified that this was while he and GC were in the alley behind his four-plex, after KR and R had left them and gone home. He testified: “I asked [G] if she needed a place to stay and she said she’d be okay at my house.” However, on cross-examination, the accused testified as follows:

Q You didn’t discuss outside the Boiler Room where she was going to stay that night?

A No.

Q You didn’t offer to allow her to sleep in your bed?

A Ahh, that offer was way earlier.

Q That offer was earlier?

A Yeah, we, she asked if, or, yeah she asked if she wanted to, or if she could have a place to stay. And I said yeah you can stay on my couch.

Q So that was earlier than outside the Boiler Room before you went in?

A Yeah.

Q Earlier as in when you were still in the vehicle?

A Ahh, at Fish Lake I think.

This last testimony does not make any logical sense. There would have been no need for GC to ask ML at Fish Lake if she could stay at his place, because there had not yet been any decision about where the group was going or what they were going to do. In particular, even on the evidence of ML, the issue of GC needing a place to stay that night had not yet arisen. Plus, the hesitancy in the manner in which ML testified above also causes me to disbelieve that evidence.

[70] Further, according to ML, he and GC went into his bedroom at about 2 AM. He then testified that, about 10 minutes after each of them laid down to go to sleep, GC came up onto his bed. He then described about 15 minutes of kissing, about 15 minutes sexual intercourse, a blow job which lasted about 15 minutes, and then further sexual intercourse of about 15 minutes. Therefore, on the evidence of the accused, the sex would have been over by about 3:10 or 3:15 AM. However, he testified that when GC left his bedroom, it was about 5:30 AM. Therefore, the accused has failed to account for approximately 2¼ hours of time that he spent with GC in his bedroom. In my view, that seriously compromises his credibility.

[71] The accused was also internally inconsistent with his evidence about how he became aware of problems in the relationship between GC and GM. When asked about that by his counsel, ML replied:

“When me and [G] were driving around, she was telling me that they were broken up and that she was moving out of his house.”

This is inconsistent with ML’s later evidence in cross-examination where he said that he picked GC up from her Mountainview residence at about 1:15 PM on August 30, 2013, so that she could join him with his work that afternoon. Based on that evidence, the accused must have already known that GC had moved out of GM’s residence and therefore was not in the process of “moving out”, as he earlier testified. Indeed, the accused conceded in cross-examination that his earlier answer was “not quite correct”.

[72] I also have a significant concern about ML’s evidence regarding the “hickey” that he said he gave to GC during the sex. First of all, the accused made no mention of this at all during his initial account of how the sex took place. Further, even when his counsel specifically brought the bite marks on GC’s neck to ML’s attention, ML testified: “I kissed her on the neck. I didn’t bite or nothing.” Then, it was only after his counsel asked a leading question suggesting that he might have given her a hickey that the accused replied: “I could have given her a hickey, yeah.” However, the accused then continued that he only did so for “seconds really, like three seconds for the hickey”.

[73] I find as a fact that the marks on GC could not have been caused by the accused simply sucking on her neck for three seconds. Rather, I am satisfied that, upon close examination of the photographs, the marks are more consistent with a bite than with a hickey. I also find support for this conclusion in Cst. DeWitt’s description of the injury as “bruising”, as opposed to a mere hickey. Thus, the evidence tends to corroborate the complainant’s version of the sexual event.

[74] Then there is the evidence of the accused's state of intoxication. On his own evidence, the accused admitted to consuming six Budweiser beers at Fish Lake over a period of approximately three hours or less. In cross-examination, when initially asked about whether he was "okay to drive" given that consumption, the accused gave what I interpret to be an evasive answer:

A Well, everyone had about the same amount, so I just felt like driving. I drove the car there and I wanted to drive the car back.

...

Q Not affected by the alcohol?

A Hardly, yeah.

The accused then admitted to consuming one more pint of beer between 12:45 and 1:45 AM. He continued that he felt "okay" on the walk home and denied feeling affected by the alcohol. Yet, in his earlier direct examination, when he was asked why he did not offer to drive GC home, he replied: "I was too drunk to drive. I didn't want to drive a vehicle." When challenged about this evidence on cross-examination, the accused attempted to explain that what he meant by that was that he was over the "legal limit". He also said that seven beer is "hardly a buzz" for him. Nevertheless, when pressed by Crown counsel that he obviously had a "concern" about not driving over the legal limit, the accused admitted that he probably should not have driven back from Fish Lake either, conceding that that was "poor judgment" on his part.

[75] Another example of the accused exhibiting poor judgment that night arises from his evidence that he did not use a condom during the sexual intercourse and did not previously discuss birth control with GC. He also gave rather inconsistent testimony in this regard:

Q Is that normal for you to have sex with someone without a condom?

A Ahh, yeah.

Q Normal for you to have sex with someone without discussing the use of birth control?

A Ahh, no.

[76] In addition, there are a couple of areas of the accused's evidence which simply seem improbable. He testified that GC brought three Corona beers with her when he picked her up at her Mountainview residence at about 1:15 PM on August 30, 2013. This seems strange to me. According to the accused's evidence, the two of them were about to begin working with ML's respite client. There is no evidence that there was any plan in place to go partying or drinking beer afterwards. Indeed, it appears that decision was not made until 8:30 PM, on the accused's evidence. Therefore, why GC would have brought the three beers with her at that time of the day seems puzzling. Rather, I prefer GC's evidence that she met with the accused at 8:30 PM.

[77] I also found strange the accused's testimony that before the two of them went to sleep in his bedroom, GC asked for a pair of "sleeping pants" and that the accused supplied her with a pair of his boxer shorts. Given that the accused admitted to having a 44 inch waist at that time, and noting the slender build of GC during her testimony, as well as her evidence that she was only 5 foot 2 inches and 102 pounds at the time, the prospect of her actually wearing such shorts seems somewhat unlikely at best.

[78] The final reason why I disbelieve the accused is because he was internally inconsistent and evasive about his true feelings for GC. I quoted his testimony in this regard above at para. 58, so I will not repeat it here. Suffice it to say, that the accused initially denied having a "crush" on GC, but then immediately acknowledged that he liked

her enough to have sex with her even though GM was a good friend of his. Then, later in his cross-examination, he flip-flopped again on the issue by stating that he was only attracted to GC “slightly” and denied that he had been attracted to her “for a little while”. However, by the end of his cross-examination, he conceded that he had wanted to sleep with GC “for some time” and that he found her “an attractive girl”.

b) Even If I Disbelieve the Accused, Does His Evidence Raise a Reasonable Doubt?

[79] As stated, for the reasons above, I disbelieve the evidence of the accused. I further conclude that his evidence is incapable of raising a reasonable doubt.

c) Given My Conclusions Above, On the Basis of the Evidence Which I Accept, Am I Convinced Beyond a Reasonable Doubt of the Accused’s Guilt?

[80] I begin this portion of my analysis by stating that I found the complainant to be a credible and impressive witness. She was also obviously a reluctant witness and did not initially want to engage the criminal justice system in response to being sexually assaulted. Indeed, GC took three days to consider her position in that regard before making her first statement to the police. There was nothing in her attitude or demeanour during her testimony that gave me concerns about her credibility. GC did not exaggerate her evidence and she readily acknowledged those facts about which she was unsure. She did not demonstrate undue hostility towards the accused. On the contrary, GC continued to show concern towards him when she contacted the RCMP about his suicidal text message. Her evidence was largely corroborated by that of GM, regarding her phone calls to him on her way to Riverdale and her distraught state. GC’s evidence was also corroborated by the bruising on her neck. With a few exceptions, which I will come to below, she was not significantly challenged on cross-examination. In short, I accept and

believe GC's evidence that the accused had non-consensual sexual intercourse with her in the early-morning hours of August 31, 2013.

[81] That is not to say that GC's evidence was flawless. However, that is not standard which the Crown must meet. To the extent that there were arguable flaws in her evidence, it is trite to say that I may accept none, all or any part of a given witness' evidence. At the end of the day, I must be satisfied that I am sure that her allegations regarding the sexual assault are true in order to find the accused guilty.

[82] Defence counsel raised a number of points in argument here that he says should raise a reasonable doubt about the accused's guilt.

[83] First, he asked why GC agreed to sleep in ML's bedroom, when she had all of the concerns she testified about regarding ML coming on to her throughout the evening. I suggest the answer to this question came from GC herself. She acknowledged that her intuition was telling her that she ought to be more cautious, but in the end, she relied on the strength of her long-time friendship with ML, and the fact that he seemed to be acting out of character because he was intoxicated. When sober, she said, he never acted amorously or physically towards her. Also, GC really had little or no practical choice. It was 2 o'clock in the morning and she was over an hour's walk from downtown Whitehorse to her residence in Mountainview. Further, she did not feel that she would be welcome at GM's residence in Riverdale, because she felt he needed some space in their relationship.

[84] Second, defence counsel asked why GC did not sleep on the longer couch in the living room, rather than on the cramped two-seater couch ML's bedroom. The first difficulty I have with this proposition is that although GC was asked about being aware of

the couch in the living room, she was not asked why she did not choose to sleep there instead of in ML's bedroom. Further, the gist of GC's testimony was that the vast majority of times that she had been in ML's residence, she had spent her time in ML's bedroom. In fact, she said she had only been in the living room couple of times. Finally, given that she trusted ML, that she had slept on his bedroom floor on a previous occasion with GM, and that ML told her his mother was at home, it is not surprising to me that she would feel more comfortable preferring the privacy of his bedroom.

[85] Third, defence counsel questioned why GC did not wake up when ML pulled down her pants and underwear. While that is a fair question, one must remember that GC had apparently consumed enough beer and marijuana to cause her to fall asleep very quickly, which she said was unusual for her. Also, according to GC's evidence, she was sexually assaulted roughly between 5:00 and 5:30 AM. Therefore, she would have been asleep for almost three hours by the time of the assault. In all of the circumstances, it does not strike me as unusual or unbelievable that she would not immediately have woken up when the accused undressed her.

[86] Fourth, defence counsel questioned why GC did not scream for help when she was being sexually assaulted, knowing that ML's mother was present in the residence. A related point was to question why GC did not seek out the mother's help after leaving ML's bedroom. A further related point was to ask why GC did not attend the RCMP Detachment to report the incident on her way back to Riverdale. The simple answer to all three propositions is that trial judges are regularly cautioned by the Supreme Court of Canada not to stereotypically expect victims of sexual assault to respond in predictable or consistent ways. In short, these propositions smack of the long-discredited historical

expectation that victims of sexual assault were expected to raise a public “hue and cry” over such wrongdoing. It would also be unfair to draw any inference against GC on these points, when none of them were put to her on cross examination.

[87] Fifth, defence counsel questioned why GC said she was told by Dr. MacDonald that she had “bruises, lacerations or lesions”, when the doctor’s notes indicate “no abrasions”. One response to this is to remember that an abrasion is commonly defined as a scraping or wearing away of the skin, i.e. commonly a scratch. While it may be true that Dr. MacDonald observed no such injuries, she nevertheless did note the tenderness and redness of GC’s perineum and right labial area. She also likely discussed the issue of the cervical ectropian with GC, as that would have involved an internal examination of the cervix. Therefore, it also seems likely that she would have discussed the issue of redness in that area and that it could be caused either by trauma or normal female hormones. Finally, it must be remembered that Dr. MacDonald had no independent recollection of what she discussed with GC and that her memory was entirely dependent upon her notes. Therefore, there is a good deal of the roughly 40 minute conversation between her and GC that there is no evidence about. In all of the circumstances, it does not seem wildly inconsistent that GC would have recalled bruises, lacerations or lesions being discussed.

[88] Sixth, defence counsel pointed to the inconsistency between GC’s evidence that she gave no details of the sexual assault to Dr. MacDonald, and the doctor’s evidence that she would have asked GC what happened and that GC did provide several details of the sexual assault, which Dr. MacDonald recorded in her notes. Again, this is a fair point. However, in the context of considering all of the evidence, it does not rise to the level of

raising a reasonable doubt about whether GC's evidence should be believed in its entirety. According to GC, she was clearly uncomfortable about attending the hospital at all. She admitted that she did not recall coming or going to the hospital and that she had no recollection whatsoever of meeting with the nurse, which Dr. MacDonald indicated would be standard procedure before the medical examination. GC was also adamant that she did not want to have the full sexual assault kit examination, but that she only wanted to be tested for sexually transmitted diseases. In addition, she said that she wanted to get out of the hospital as soon as possible. Finally, it must be remembered that this examination took place within approximately 12 hours of the sexual assault being committed. Therefore, it is reasonable to infer that GC would still have been in a heightened and traumatized emotional state while at the hospital.

[89] Seventh, defence counsel questioned the inconsistency over GC's claim that she left ML's residence on August 31, 2013 without her shoes, which conflicts with that of JL and GM. This is another fair point, as one would have expected GC to remember walking to Riverdale without them. Nevertheless, the point must be considered in the context of GC being traumatized and highly upset over the sexual assault. In such a context, it would not be fair to expect GC to remember every single detail flawlessly. Indeed, GC testified that her trip to Riverdale was "all a blur" Further, one should also remember that GC did not testify about this issue in absolute terms. In her direct examination, she said she thought she left without her shoes; and in cross-examination, she said she did not remember grabbing her shoes on her way out of the residence.

[90] The final point raised by defence counsel was the inconsistency about GC claiming that she offered to bring her cell phone to Cst. DeWitt for inspection of the text

messages, but that the Constable declined the offer. Cst. DeWitt testified that she asked to see GC's cell phone, but was told that it had been sent back to the factory for repair. The Constable further denied any offer by GC to provide her phone for inspection.

[91] I concede that this is perhaps the most troublesome point regarding the assessment of the complainant's credibility. She may have simply been mistaken when she testified that she offered to Cst. DeWitt to bring in her phone for her to examine. On the other hand, the evidence of Cst. DeWitt and GC on this point may support another reasonable inference.

[92] Cst. DeWitt testified that GC left a message with the RCMP dispatch on September 4, 2013 that she had received a text message from ML in which he said that he would kill himself if she did not tell the police that she had lied about being sexually assaulted. That is the extent of the evidence that I have about the message left by GC. Cst. DeWitt then said that she attempted to call the complainant a number of times over the next few hours, but that there was no answer on GC's phone. When she finally got through to GC, Cst. DeWitt testified that GC told her that the text messages on her phone were gone because she had put the phone back to its factory settings and shipped it off to the company or service provider from which she purchased the phone. I have no reason to dispute the veracity of this testimony from Cst. DeWitt.

[93] However, Cst. DeWitt's evidence contradicts that of GC in cross-examination, where she testified that she had a "loaner phone" from her service provider when she received the suicidal text from ML and that her other one was then being repaired. She further testified that she had the loaner phone for about a week altogether. When cross-examined about her evidence at the preliminary inquiry, she acknowledged that she was

truthful when she testified there that she had the loaner phone for four or five days after she spoke to Cst. DeWitt. Whether GC had the loaner phone for four, five or seven days is largely irrelevant. Rather, what is relevant is why she would have had the loaner phone when she received the suicidal text from ML. According to Cst. DeWitt's evidence, that text message would have been received on GC's own phone, which she then somehow erased before sending it back to the supplier for repair.

[94] GC also testified that there were "a couple of different times" when she offered to bring her phone in for inspection. GC was not asked about the details of the message she left with the RCMP dispatch. However, it seems a reasonable inference that, in leaving that message, she may have also offered to bring the phone in for inspection.

[95] In any event, the fact that GC appears to have been mistaken in this regard must still be considered in light of the fact that this was on September 4, 2013, only four days after the sexual assault. That GC was still in a confused and traumatized emotional state at that time is consistent with the fact that it was not until September 11, 2013, that GC was able to provide to Cst. DeWitt the further details of being forced by ML to call GM to report that she and ML had just had consensual sex.

[96] In the result, even if GC was mistaken about this evidence, it does not raise a reasonable doubt about the truthfulness of her evidence overall regarding the sexual assault.

[97] Accordingly, I find the accused guilty as charged.

Gower J.