

Citation: *R. v. R.W.R.*, 2019 YKTC 6

Date: 20190208  
Docket: 17-00806  
Registry: Whitehorse  
Heard: Carcross

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Cozens

REGINA

v.

R.W.R.

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

Appearances:  
Noel Sinclair  
Kelly Labine

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] R.W.R. has been charged with having committed offences contrary to ss. 271 and 266 of the *Criminal Code*. The date of the alleged offences is on or about April 12, 2017.

[2] The alleged victim of these offences is T.H.

[3] The trial proceeded on October 2, 2018 and submissions of counsel occurred on November 1, 2018.

[4] Judgment was reserved until today's date. This is my judgment.

*T.H.*

[5] T.H. testified that she has known R.W.R. since she was 15 years old. They entered into a relationship when she was 19, (I note that R.W.R. testified T.H. was 18 when they began the relationship). At that time, T.H. was pregnant with a child from another relationship. Besides this child, T.H. and R.W.R. have two children together. These children are currently in the care of R.W.R.'s mother. This arrangement is with the agreement of T.H., as she believes this is a healthy and safe environment for the children. R.W.R.'s mother had been providing much of the care for the children for the year and one-half before April 12, 2017.

[6] There are no current legal proceedings between T.H. and R.W.R. in regard to the children, and no related conflict between them. There is, however, involvement of social workers from Family and Children Services to provide support and to assist in facilitating the arrangement between T.H. and R.W.R.'s mother.

[7] T.H. stated that the relationship between her and R.W.R. ended in approximately November or December 2016. They had made several attempts to reconcile since then. T.H. stated that reconciliation was often discussed between the two, but she could not recall whether that was a topic of discussion on April 11 and 12, 2017. T.H. testified that a lot of what took place on that occasion is very blurry.

[8] At the time of the alleged offences, T.H. testified that she and R.W.R. were not together as a couple. She was living in Whitehorse at Kaushee's Place. She was in a relationship with another individual.

[9] T.H. came to Carcross on April 11, 2017 in order to visit her children, who were living at R.W.R.'s home at the time. She is not sure what time she arrived in Carcross, saying that the events are blurry. She recalls going to R.W.R.'s home, where she and R.W.R. immediately began drinking alcohol. Her sister and her brother were also at the residence. T.H. recalls sharing a bottle of wine with her sister. R.W.R. was drinking a mickey of liquor.

[10] Sometime after arriving, after dinner, she and R.W.R. began to argue. The argument was about "everything", including her new relationship. T.H. called it "drunk arguing". T.H. believed that R.W.R. felt very betrayed and very upset and that he felt she was not being honest with him about who she was seeing.

[11] T.H. stated that she became scared and left R.W.R.'s residence. She went to the home of a friend of hers. This friend was not at the home but had told her that the home was unlocked. T.H. was unable to fall asleep at her friend's home, however, and in the early morning hours of April 12, she returned to R.W.R.'s residence.

[12] When she arrived at R.W.R.'s home, everyone was asleep or passed out. She believed that her brother had left but that her sister was upstairs. R.W.R. was passed out on the couch. T.H. stated that she lay down on the mattress that was on the floor beside the couch and went to sleep. She awoke to find her pants down and R.W.R. on top of her inserting his penis into her vagina. She stated that she and R.W.R. were both on their sides. He was still wearing his shirt and pants.

[13] In her statement provided to the RCMP, T.H. stated that when she first woke up, R.W.R. was walking around and saying that he was "still pissed off" with her. She told

the police officer that when she next woke up, R.W.R. was on top of her and pulling her underwear down and penetrating her.

[14] T.H. states that she froze and waited until it was over. She did not feel that she could move or say anything. She said nothing to R.W.R. while he was having sexual contact with her.

[15] T.H. stated that while she did not say “no” to R.W.R. about him having sex with her, she also did not feel that she was able to say this while it was happening. She testified that she was “very much not capable of saying no”. She agreed that she did not try to push him off or get away while he was having sex with her.

[16] T.H. said that R.W.R. was rough with her during the sex and she believed that he was still drunk, hungover and angry with her. She described the sex as “hate sex”. She agreed that R.W.R. did not say anything threatening to her during the sex.

[17] She did not recall whether R.W.R. was saying anything to her while he was penetrating her, other than asking her whether she “came”, to which she responded “no”. R.W.R. stopped at that time and left the house. T.H. stated that he did not ejaculate.

[18] T.H. said that she lay there for a long time before passing out. She did not know whether what had happened was wrong or not. She felt like she couldn’t move or speak. T.H. stated that she had only consumed two and one-half glasses of wine. She was hungover but not drunk. She said, essentially, that she was scared and she could not ask: “anyone to help her not to be scared”, because everyone had been drinking.

[19] T.H. said that she did not want to have sex with R.W.R., that there had been no prior discussion between them about having sex and that she did not like what had happened.

[20] T.H. said that she woke up when R.W.R. returned to the house and lay down beside her. He did not touch her. She said that he was very intoxicated. She believed that he had purchased more alcohol. He asked her whether she wanted to stay and she said “no”. She testified that R.W.R. told her she couldn’t sleep all day and again asked whether she wanted to stay or go. T.H. told him that she wanted to go. They had an argument. T.H. agreed that R.W.R. accused her of cheating on him, but asserted that she and R.W.R. were not in a relationship at the time. R.W.R. was yelling at her.

[21] T.H. stated that her two older children were not in the house at that time, although their three-year-old was. She believed that her sister and her sister’s boyfriend were still there and moving around upstairs.

[22] T.H. stated R.W.R. told her to “get the fuck out”. She said that she was afraid of R.W.R. She pulled her pants on and went around the house, gathering her possessions and stuffing them into a bag. R.W.R. was following her, yelling, cursing, swearing and telling her to get out. She tried to get into the upstairs bathroom and close the door. She and R.W.R. struggled in the bathroom. He wrapped his arms around her from behind. When she tried to use her phone, R.W.R. tried to take it from her. While R.W.R.’s arms were wrapped around her, she was able to tip them both over into the bathtub and run out of the bathroom.

[23] R.W.R. then began chasing her around the house. Their three-year-old son was chasing after them and telling them to stop. When she tried to run upstairs, R.W.R. caught her at the stairs, was pushing her down them, and tore her shirt at the collarbone in two and off of her. She threw the phone at her sister, who was now holding the son in her arms. She yelled at her sister to get the “baby” out and to call the police. T.H. stated that her sister did not call the police. She believes this may have been because her sister’s boyfriend was not supposed to be there and he would have been arrested if the police showed up.

[24] R.W.R. tried to force her out the back door. She was half-naked at the time. What followed is blurry to her. She does not recall how she left the house. She said that her sister and son were with her when she left.

[25] T.H. agreed that R.W.R. was not saying threatening words to her during this altercation; he was just drunk and screaming at her to get out.

[26] T.H. said that her son went to one of his aunties or R.W.R.’s mother’s residence. She was satisfied that all three of her children were going to be taken care of by family members. She then went with her sister to her mother’s boyfriend’s residence where she was able to arrange for a ride from friends back to Whitehorse. She stated that she went directly to Whitehorse General Hospital (“WGH”) where she had a rape kit completed. She also had cuts and bruises and wanted to make sure that she was okay.

[27] T.H. went to Kaushee’s Place that night and then to the RCMP the next day. She stated that in her original complaint to the RCMP she changed her story a bit in order to try to leave out the rape.

[28] T.H. stated that the morning after the incident, April 13, she received a text on her old phone saying:

I'm sorry. I'm an asshole. I'm sorry. I don't deserve you or your forgiveness. I understand why you wanted to be with someone else because I'm worthless. I got so mad because I wanted you all to myself for the rest of my life and I'm sorry. I'm an alcoholic.

[29] T.H. believed this text was from R.W.R., as it came from his number. She could not recall if she responded to this text or not. She acknowledged that she was not sure what R.W.R. was saying he was sorry for, and that he could have been saying he was sorry for anything, including any number of things from that night to going back through the past six years.

[30] T.H. stated that on an occasion in June or July 2017, when both she and R.W.R. were drinking (separately) in the downtown Whitehorse area, and encountered each other, she spoke to him about the incident and told him that she felt raped. At that time, R.W.R. had only been charged with the s. 266 offence. She stated that R.W.R. said that he "must be a piece of shit and that he was sorry" and that he told her he does not remember much from that day because he was very drunk.

[31] When asked whether she had asked R.W.R. to move in with her in June or July 2017, and whether he said "no" because there was a no-contact condition in place, T.H. responded that they were drinking then. She stated that, despite the no-contact condition, they were still seeing each other occasionally and were on talking terms.

[32] T.H. stated that she is no longer in contact with her sister, because her sister and R.W.R. are now involved in a relationship. T.H. acknowledged that this was hard for

her. There is no evidence before me as to when this relationship between R.W.R. and T.H.'s sister started.

[33] T.H. stated that at first she was not sure if she was going to report the incident to the police. This was partly because R.W.R. is the father of her children, because she was not really sure if what had happened was wrong or was rape or not, and because she did not want all of them to go through this ordeal.

[34] T.H. testified that in the end she decided to pursue the charges for her children's sake and to hold her and R.W.R. accountable for their actions. She stated that R.W.R. is a wonderful father when he is sober. She wants him to be healthy and involved in his children's lives. She says that she worries about her and R.W.R. "...being good people for them, being good influences, taking responsibility for the things we've done wrong".

[35] T.H. testified that she considers this incident to be one moment in their lives that they can all move on from.

[36] T.H. stated that she did not want to be in court testifying and saying these things.

*Cst. Rousseau*

[37] Cst. Rousseau testified that he received a telephone call from dispatch on April 12, 2017, at 1:22 p.m. R.W.R. had made a complaint that T.H. was in his house and causing problems.

[38] While en route to R.W.R.'s residence, Cst. Rousseau encountered T.H. walking. He noted her to be very upset and possibly to have been crying. He was unable to say whether she was intoxicated or not. T.H. did not appear to have any injuries.



[39] As a result of the information T.H. provided him, Cst. Rousseau commenced an assault investigation. In the course of this investigation he spoke to T.H.'s sister. He stated that she refused to participate in the investigation.

[40] Cst. Rousseau obtained the medical records and rape kit from WGH. The rape kit was not sent to the RCMP laboratory for forensic analysis.

*R.W.R.*

[41] R.W.R. testified that when T.H. came to his residence on April 11, 2017, he believed that they were still in a relationship. He said that they had never talked about being single and that he and T.H. were always talking about reconciliation. He stated that the relationship ended after this incident. That is when he gave up on the idea of reconciliation. R.W.R. stated that he was unaware T.H. was seeing another individual at that time. He said that T.H. had asked him and the children to move into Whitehorse where they could live together.

[42] R.W.R. stated that he and T.H. were drinking on April 11 and 12, 2017. He stated that T.H. told him about her other relationship at some point that evening. He agreed that he was jealous, angry and upset. He agreed that they had argued.

[43] He was unsure whether T.H. left the residence at some point. He stated that he had passed out on the couch and, if T.H. left the residence, it must have been while he was sleeping.

[44] R.W.R. stated that he woke up in the morning and got into bed with T.H., holding her and caressing her for some time, just like a normal couple. He said that things seemed normal to him. He testified that:

Well, in my eyes, you know, everything – everything seemed normal because we had done that previous times, you know. We'd get drunk, argue, and then wind up going to sleep in the same bed together, waking up and everything would seem back to normal, at least to a certain extent until we were completely sober again.

[45] T.H. seemed to him to be as hungover as he was.

[46] R.W.R. recalls waking T.H. up. He stated that he did not, however, wake her up by being on top of her. He testified that they were both on their sides.

[47] R.W.R. stated that it was not uncommon for he and T.H. to have morning sex. I note that Crown counsel had objected to this line of questioning of T.H. in cross-examination as there had been no s. 276 application made. At that time, counsel for R.W.R. did not pursue this line of questioning. Although Crown counsel did not object to R.W.R. testifying to this point in direct examination, I note that R.W.R. stated this in the context of responding to how everything was going in the morning, and not to his counsel specifically seeking to elicit this evidence. As with the Crown's objection to the questioning of T.H. as to whether morning sex was a common occurrence between T.H. and R.W.R., as there has been no s. 276 application in which such evidence was ruled admissible, I cannot consider this evidence.

[48] R.W.R. testified that he "...assumed if she didn't want it she would have tried to push me off or tell me 'no' or anything. If that was the case then I would have stopped

there on the spot". R.W.R. asked T.H. if she "came" and, when she said that she did not, he assumed it was because she was too hungover. He said that he left T.H. alone and he went out for a walk for a couple of hours. He purchased another mickey of liquor to drink. He agreed that he was intoxicated when he returned to the residence.

[49] R.W.R. stated that when he returned to the house, he woke T.H. up and started to talk to her about their relationship. T.H. told him that she wanted to leave, so he asked her to. However, T.H. did not go. When she continued to refuse to leave he stated that he called the RCMP.

[50] R.W.R. agreed that he followed T.H. throughout the residence, but denied that he ever chased her. He said that he told her numerous times, at least 10, to leave. He said that he told her he would get her stuff to her. R.W.R. agreed that he wanted T.H. out of the residence. He denied ever preventing her from leaving. He stated that he did not want to argue or fight with her; he just wanted her out of the residence. R.W.R. stated that he wanted T.H. to leave so that he would not become angry with her. He stated that, while he was calm at first, when T.H. refused to leave, he became angry and called the RCMP.

[51] R.W.R. could not recall ever attempting to grab T.H.'s phone but acknowledged that he may have. He agreed that they had fallen into the bathtub. He denied ever intentionally ripping T.H.'s clothes. He agreed that he did grab her in an effort to stop her from continuing to go around the house, and that when he did so her shirt ripped.

[52] R.W.R. admitted that he sent T.H. a text message the following morning and apologized for ripping her shirt and for becoming angry and yelling at her.

*Submissions of Counsel*

Counsel for R.W.R.

[53] Counsel for R.W.R. submits that he should be acquitted on the basis that T.H. was consenting to the sexual activity or, alternatively, R.W.R. had an honest but mistaken belief that she was consenting.

[54] She also submits that R.W.R. was entitled to act as he did in order to have T.H. leave his residence.

[55] She submits that R.W.R. was a credible and honest witness and that his testimony should be believed, or otherwise is not capable of being rejected.

[56] Counsel submits that T.H.'s evidence is not credible and is negatively impacted by her blurry memory and level of intoxication. Counsel further submits that T.H.'s testimony that she was afraid of R.W.R. is inconsistent with her decision to return to the residence and lay down on the mattress beside the couch where he was passed out. It is also inconsistent with her refusing to leave the residence when he asked her to.

[57] Counsel points to the lack of medical evidence about T.H. having any cuts and bruises, despite her having attended at WGH and her medical records having been obtained.

[58] Counsel also submits that T.H. has a motive to fabricate evidence, as R.W.R. began to date her sister some time after these events.

Crown Counsel

[59] Crown counsel submits that the evidence of T.H. is reliable and credible and should be believed. He notes that T.H. was sympathetic to R.W.R. throughout her testimony. Her evidence is largely corroborated by R.W.R.'s testimony.

[60] Counsel submits that R.W.R. can be convicted on his own evidence, as there is no evidence that T.H. actually consented to the intercourse and that there is no plausible and admissible evidence for an argument that R.W.R. honestly but mistakenly believed that T.H. was consenting to the sexual activity.

[61] Counsel reiterated that the evidence given by R.W.R. as to the prior sexual activity of T.H., insofar as he testified that it was not uncommon for he and T.H. to have sexual activity in the morning as occurred on this occasion, is inadmissible as there was no s. 276 application.

[62] Counsel further submits that the use of force by R.W.R. exceeded what was acceptable for the purpose of trying to have T.H. leave his residence.

[63] Counsel notes that R.W.R. was inconsistent within his testimony as to the "normality" of the day. He submits that R.W.R.'s testimony that he was of a forgiving nature in regard to T.H. disclosing she was seeing another man does not accord with common sense. He submits that R.W.R. minimized the impact of his level of intoxication on the events that occurred and his recall of these events.

[64] Counsel submits that R.W.R.'s evidence insofar as it contradicts that of T.H., should be rejected and that his evidence does not raise a reasonable doubt with respect

to him having committed the offences of sexual assault and assault. Counsel further submits that the evidence of T.H. is sufficiently credible and reliable to establish all the requisite elements of the offences that R.W.R. is charged with having committed.

## Analysis

[65] As R.W.R. testified, the principles in *R. v. W.D.*, [1991] 1 S.C.R. 742, apply. As Cory J. stated in paras. 28 and 29:

28 Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. 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.

If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

29 Nonetheless, the failure to use such language is not fatal if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply: *R. v. Thatcher*, supra.

[66] As stated by Vertes J. in *R. v. Campbell*, 2018 YKSC 37 in para. 4:

I must remind myself that a criminal trial is not a credibility contest. It is a trial to determine whether the Crown has proved the guilt of the accused

on the specific charge alleged beyond a reasonable doubt. Therefore, it is wrong to decide a criminal case where, as here, there is conflicting evidence simply by deciding which version of events is the preferable one. The decisive question is whether, considering the evidence as a whole, the Crown has proved the guilt of the accused beyond a reasonable doubt.

[67] I find that, in the circumstances of this case, the version of events testified to by T.H. and R.W.R. are not markedly different. The perception of events by each is somewhat and perhaps at times markedly different, but the occurrence of the events themselves is very similar. I find that there is little of significance differing in the testimony of T.H. and R.W.R. This is not a case where I consider one witness as being truthful and the other witness to be lying.

[68] I am concerned that there is no medical evidence before me, as T.H. testified to having attended at WGH and as having some minor cuts and bruises. However, when assessing the credibility of T.H., I must distinguish this from a circumstance where there is a medical report that showed no cuts and bruises. I simply do not have any medical evidence that corroborates, or is inconsistent, with T.H.'s testimony. This is evidence I expect either Crown or defense counsel could have adduced at trial had it been considered by them to be necessary or probative.

[69] I also find that the evidence in relation to R.W.R. beginning to date T.H.'s sister is not capable of raising a concern that this forms the basis for T.H. to testify falsely. T.H. was cross-examined briefly on this point, asking whether it was hard for her and she agreed that it was. No more evidence was adduced. I have no evidence as to when R.W.R. began to date T.H.'s sister in relation to the decision to proceed with the sexual

assault. While the situation may have been “hard” for T.H., I certainly cannot stretch that in these circumstances to constitute a motive to fabricate evidence in her testimony

[70] Regardless, the initial contact with the RCMP and the attendance at WGH was right after the incident and could not be said to be related to T.H. having this motive to fabricate. Further, the evidence T.H. provided is generally not inconsistent with the evidence of R.W.R. with respect to how events unfolded, so hardly is indicative of being false.

[71] I am not prepared to find, nor does the evidence establish or put into issue as a reasonable prospect, that T.H. decided to go forward with the sexual assault complaint because she was upset about the relationship between R.W.R. and her sister.

Regardless, even were this the case, this would have no impact on whether the sexual assault had or had not in fact occurred. That event took place on or about April 12, 2017.

[72] I also do not have a concern about T.H.’s testimony that she was not sure if what had happened in regard to the sexual contact was wrong or not. This event took place in the context of a long-standing relationship that was somewhat fractured, uncertain and dysfunctional. Legal distinctions, so readily available to us in the courtroom environment, are not necessarily so clear to individuals operating in the real world and in the relationships that exist there.

[73] I am not concerned about T.H.’s actions that counsel submit are contradictory to her testimony that she was afraid of R.W.R. Certainly, had T.H. testified that she was afraid he was going to imminently assault her, in particular in a manner that was likely to



harm her, yet chose to stay in his home and presence with other avenues of escape from the situation available to her, my concern would be greater. However, I am not certain that T.H.'s stated fear was so defined or went to this extent. It is also not unusual that people, particularly in a domestic context, remain in an environment in which there may also be an element of fearfulness. There can be a balance and tipping point in such real-life situations. In the circumstances of this case, I am not satisfied that the actions of T.H. are so inconsistent with her stated fear that it should undermine the reliability and credibility of her evidence.

[74] I am also not concerned about R.W.R.'s expressions of remorse as being indicative of guilt on his part for having committed these offences, and therefore undermining any of his evidence that would otherwise be exculpatory. There was clearly, on the evidence, much in the relationship between these two that could cause either of them to be sorry for their role in harming or otherwise acting poorly within the relationship. I look at R.W.R.'s expressions of remorse in the texts and subsequent conversations with T.H. as being no more than what she saw them as capable of being; he could have been saying he was sorry for anything in the history of the relationship. I find that these are not indicative of his guilt for having committed the offences for which he is charged.

[75] Nor is the fact that T.H. and R.W.R. had contact on occasion following these events of any assistance in assessing the credibility and the reliability of their evidence. These things happen in real life, notwithstanding no-contact provisions of undertakings or recognizances, not that I am intending to undermine the importance of compliance with such conditions. The evidence as to how these occasions unfolded do not show

anything that would have any impact on T.H.'s and R.W.R.'s testimony, such as, for example, intimidation or coercion.

[76] Generally speaking, I find that both T.H. and R.W.R. provided their testimony in a fairly straightforward manner without any apparent hostility towards the other or towards counsel that would cause me concern about the credibility or reliability of their evidence.

### Sexual Assault

[77] The components of sexual assault require:

...proof beyond a reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched. (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 23)

[78] As stated in *R. v. Nyznik*, 2017 ONSC 4392, at para. 8:

...For sexual assault, the *actus reus* consists of three essential elements, each of which must be proven by the Crown beyond a reasonable doubt. In this case, the Crown must establish: (1) that the defendants knowingly touched the complainant; (2) that the touching was of a sexual nature; and (3) that the complainant did not consent to that sexual contact.

[79] There is no question in the present case that R.W.R. intentionally touched T.H. and that the touching was of a sexual nature. The question then becomes whether T.H. consented to the sexual touching.

*Consent*

[80] The burden remains on the Crown to satisfy the trier of fact, beyond a reasonable doubt, of the absence of consent on the part of the complainant.

[81] The defence of consent allows for an accused:

...to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. ... (***Ewanchuk***, at para. 29)

[82] The Court in ***Ewanchuk***, in the same paragraph, further states:

If...the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

[83] With respect to the circumstances of the sexual contact in this case, the evidence of T.H. and R.W.R. does not differ significantly. While T.H. testified that she was not awake, she also testified that she awoke to R.W.R. pulling her underwear off and then penetrating her. To that extent, both T.H. and R.W.R.'s versions are not necessarily in conflict.

[84] On the testimony of both T.H. and R.W.R., it is clear that there were no words or actions on the part of T.H. that could be construed as her providing explicit consent to R.W.R. to sexual contact. I accept that there were also no words or actions on the part of T.H. that could be construed as her explicitly indicating that she did not want to have sexual contact with R.W.R. In other words, T.H. did not "resist" the sexual contact.

[85] On the testimony of both T.H. and R.W.R., the sexual contact occurred in a manner that, viewed objectively, could perhaps be described in appearance as “passive acquiescence” on the part of T.H.

[86] I am satisfied on the evidence of T.H. that she was not consenting to the sexual activity. There is nothing in her or R.W.R.’s testimony that forms an evidentiary basis to find that T.H. was consenting to the sexual activity. I accept T.H.’s testimony that she was not consenting.

[87] The fact that T.H. was in R.W.R.’s residence and that she lay down on the mattress on the floor beside him to sleep is not consent. The fact that she did not display any outward resistance to the sexual contact initiated by R.W.R. is not evidence of consent. (*R. v. M. (M.L.)*, [1994] 2 S.C.R. 3, at para. 2). The fact that there was no threatening behaviour on the part of R.W.R. towards T.H. at the time of the sexual contact, thus ostensibly providing a “reason” for non-resistance, does not mean that T.H. was consenting to the sexual contact. The notion that passive acquiescence, silence or ambiguous conduct on the part of a complainant is evidence of “consent” or “implied consent” has been rejected in law (*Ewanchuk*, at paras. 31 and 51; *Campbell*, at paras. 15 and 96; and *Nyznik*, at para. 20).

[88] This said, I am satisfied, on the evidence that R.W.R. did not explicitly know that T.H. was not consenting to the sexual touching. There is nothing in the evidence to suggest that there was any indication by T.H. in either words or through her body language, such as pushing R.W.R. away or trying to position her body so as to prevent the intercourse from occurring, that would have clearly communicated to R.W.R. that

T.H. was not consenting to the sexual touching. I believe that it is quite probably the case that, as R.W.R. testified to, if T.H. had attempted to push him away from her or said “no” to him in regard to the sexual contact, R.W.R. would have stopped. I am not prepared to reject his evidence in that regard and find it quite possibly to have been the case.

[89] That, however, is not the end of the matter. The obligation was on R.W.R. to ensure that he had the consent of T.H. prior to the sexual touching; the obligation was not on T.H. to communicate her non-consent to R.W.R. In law, R.W.R. was not entitled to begin to touch T.H. in a sexual manner and then, simply because she did not say “no” either through her words or actions, assume that he therefore had her consent to proceed to have sexual intercourse with her. In law, there must be an affirmative indication by each of the parties involved in contact of a sexual nature that the parties are consenting to this contact.

[90] There are all kinds of reasons why a person does not resist or “fight back” in the context of an unwanted sexual contact. T.H. reacting in the passive way that she did, for the reasons that she stated, does not mean that she was consenting to the sexual contact. Further, this does not mean that R.W.R. could assume that the sexual contact was with the consent of T.H.

[91] It is clear that, in the context of sexual assault cases, it is not a question of whether the complainant says “no” by words or actions; it is a question as to whether the complainant has said “yes” by words or actions, or whether the accused has an honest belief that the complainant has said “yes”. In the absence of a clearly

communicated or honestly believed, “yes”, which in appropriate circumstances can take into account evidence deemed admissible at trial pursuant to a s. 276 application, sexual contact simply cannot take place.

[92] To the extent that R.W.R. proceeded to have contact of a sexual nature with T.H., I find that he was reckless in doing so. The fact that this recklessness may have been a result of his level of intoxication and other surrounding circumstances is not, in law, an excuse for his actions that absolves him of legal responsibility and fault. R.W.R. initiated sexual contact with T.H. and proceeded to have sexual intercourse with her without any positive indication on her part, either through her words or actions, that she wished for any of the sexual contact to have occurred. R.W.R. did not take the requisite steps to ensure that T.H. was consenting to the sexual touching. That, on its face, constitutes a sexual assault.

#### *Honest but Mistaken Belief in Consent*

[93] The defence of honest but mistaken belief in consent considers the accused’s state of mind and the accused’s perception of the complainant’s state of mind.

[94] As stated in ***Ewanchuk*** in para. 43:

43 The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The nature of this defence was described in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 148, by Dickson J. (as he then was) (dissenting in the result):

Mistake is a defence...where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who

acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.

[95] Section 273.2 of the *Criminal Code* reads:

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from the accused's
  - (i) self-induced intoxication, or
  - (ii) recklessness or wilful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[96] In order to successfully utilize honest but mistaken belief as a defense to a sexual assault charge, the accused must demonstrate, on the evidence, that it was reasonable to believe that the complainant had communicated consent to the sexual activity. As stated in paras. 46 and 47 of ***Ewanchuk***:

46 In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

47 For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the *Code* by Parliament in 1992 is consistent with the common law:

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and

273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[97] In conclusion, the Court in ***Ewanchuk*** stated in paras. 64 and 65:

64 In cases such as this, the accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence.

65 Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

[98] In order for R.W.R. to be convicted of the offence of sexual assault, the Crown must prove beyond a reasonable doubt that R.W.R. did not have a mistaken but honestly held belief that T.H. was consenting to the sexual contact, and that she communicated that consent to him (***R. v. Shamsuddin***, 2018 NSSC 157 at para. 15).

[99] There must firstly be an air of reality to this defence before I can consider whether the evidence is sufficiently reliable and credible to raise a reasonable doubt as to R.W.R. having committed the sexual assault offence.

[100] On his own evidence, R.W.R. is unable to satisfy me that there is an air of reality to his having an honest but mistaken belief that T.H. was consenting to the sexual contact. As with my findings on the issue of consent, I find that there is nothing in the



circumstances that would provide an air of reality to R.W.R. stating that he honestly believed that T.H. was consenting to the sexual contact.

[101] The fact that R.W.R. had been in a relationship with T.H., that they had two children together, that T.H. was there in his residence, that she lay down to sleep on the mattress beside where he was sleeping on the couch, and that he believed their relationship was not over, does not provide an air of reality to his submission that he had an honest but mistaken belief that T.H. was consenting to sexual contact when he first touched her in a sexual manner. Nor does the fact that T.H. did not resist, either through words or actions, R.W.R.'s continued sexual touching, provide an air of reality to this belief.

[102] As stated earlier, while R.W.R. testified, briefly, as to it not being uncommon for he and T.H. to have had sexual contact in somewhat similar circumstances, and counsel for R.W.R. began to question T.H. about such prior sexual contact, there was no s. 276 application before me and, absent such an application, the evidence given by R.W.R. with respect to prior instances of sexual contact between himself and T.H. is inadmissible. The fact that Crown counsel did not object to this evidence at the time R.W.R. proffered it is not relevant. Crown counsel quite properly objected when this line of questioning was put to T.H. in cross-examination. As stated earlier, I note that R.W.R. said this in direct examination in the context of responding to how everything was going in the morning, and not to his counsel specifically seeking to elicit this evidence. Regardless, absent a s. 276 application, this evidence is inadmissible at trial.

[103] Even if I were to find that there was an air of reality to R.W.R.'s belief, the evidence I accept in this case would not have caused me to find that R.W.R. had an honest but mistaken belief that T.H. was consenting to the sexual contact.

[104] Whether R.W.R. possessed an honest belief that the sexual contact was consensual requires a consideration of his subjective state of mind at the time. While his subjective belief that T.H. was consenting to the sexual contact may be objectively unreasonable, this does not necessarily mean that his subjective belief is not honest. However, the reasonableness of R.W.R.'s belief, viewed objectively, may be a factor in assessing whether his belief can be considered to be an honestly held one. In

***Shamsuddin***, at para. 78, the Court stated:

Did Mr. Shamsuddin take reasonable steps, in the circumstances known to him at the time, to ascertain whether JP was communicating her consent and capable of consenting? His belief must be honest, but it does not have to be reasonable. However, the reasonableness of his belief may be an important factor to consider in deciding whether he actually had the honest belief he claims.

[105] An honestly held belief must be based upon something in the circumstances surrounding the sexual contact that provides a foundation for the belief. What in the words or actions of the complainant did the accused rely on in believing that consent to sexual contact had been given? What steps did the accused take to ensure that consent to sexual contact had been given? Recklessness or wilful blindness, as found to exist in the surrounding circumstances, on the issue of consent, will serve to render a belief in consent, although perhaps subjectively held, a belief that cannot be said to be an honest one.

[106] What distinguishes the facts of this case from those in **Campbell** is that Vertes J. found that there was some evidence of at least partial consent on the part of the complainant, [para. 99], troublesome aspects of the complainant's evidence, and exculpatory evidence of the accused that he could not reject.

[107] With respect to the other cases filed by counsel for R.W.R. I note as follows:

- (a) In **R. v. Dufresne**, 2017 YKTC 45, I found on the evidence that the accused's exculpatory evidence was plausible and could not be rejected.
- (b) In **R. v. Smith**, 2018 ABQB 199, the Court was concerned with the contradictions and frailties in the complainant's testimony that impacted the reliability of her evidence. The Court found that the Crown had not proven lack of consent. The Court further found that the accused's exculpatory evidence was plausible and capable of belief.
- (c) In **Shamsuddin**, the Court found that, while it was likely that the complainant did not consent to the sexual contact, there was nonetheless a reasonable doubt on the issue of consent. The Court was also not prepared to reject the accused's evidence that the complainant had moved her body in such a way as to facilitate his continued sexual contact with her.

[108] These factors distinguish these cases from the circumstances in the case before me.

[109] I find that offence of sexual assault has been proven by the Crown beyond a reasonable doubt.

[110] I wish to add, however, that, notwithstanding the subjective belief of T.H. that this felt like "hate sex", a subjective belief that I am not questioning the validity of, I am satisfied on the evidence that R.W.R. was not having sexual contact with T.H. with the specific intention in his mind of committing a sexual assault. I am satisfied that,

although T.H. was not consenting to the sexual contact and there was no basis for a finding that R.W.R. had an honest but mistaken belief that she was, R.W.R. did not set out to deliberately sexually assault T.H.

[111] The simple reality, however, is that he did, in fact, sexually assault her, because he did not take the requisite steps to ensure that T.H. was consenting to the sexual contact, and in his failure to do so he was reckless and/or wilfully blind in his actions.

[112] As such, R.W.R. is guilty of having committed the offence of sexual assault.

### Assault

[113] I am also satisfied beyond a reasonable doubt that R.W.R. committed the offence of assault. T.H. had been a welcome guest in the house. She appeared to have been able to come and go as she wished, at least on the evening and morning in question. She had personal possessions in the residence.

[114] While R.W.R. was certainly within his right to ask T.H. to leave his residence, and it is clear that T.H. did not immediately do so, that does not mean that R.W.R. could take the steps that he did in order to remove T.H. from the residence. R.W.R. became angry when, after T.H. said that she wanted to leave and not stay, she did not do so immediately after he repeatedly told her to leave. R.W.R. then used physical force against T.H. in a manner that constituted an assault.

[115] R.W.R. should not have followed T.H. into the bathroom and wrapped his arms around her, pushed her down the stairs, tearing her shirt in the process, and pushed her as he was trying to force her out of the door. The police had been called; he had other

options that did not involve the use of force. His actions need to be considered in the context of the circumstances that existed at the time and his use of force, as described above, was unlawful and constituted an assault.

[116] I find that the distinction between R.W.R. “chasing” or “following” T.H. is likely more a question of each of their perceptions of what was occurring, differing perceptions that I consider could reasonably be held by each of them.

[117] Again, in saying that R.W.R. has committed the offence of assault, I am satisfied that R.W.R. was not attempting to intentionally physically harm or injure T.H. He was not saying threatening things to her. He was angry and upset at what he perceived to be the situation in their relationship and acted out in a manner consistent with his emotions at the time and his level of intoxication.

[118] That is not, however, an excuse for his actions.

[119] Therefore, I find R.W.R. also guilty of the offence of assault.

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COZENS T.C.J.