PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. McRae*, 2017 NSPC 28

Date: April 11, 2017
Docket: 2725140
Registry: Halifax

Between:

Her Majesty the Queen

v.

Joshua Paul F. McRae

DECISION

RESTRICTION ON PUBLICATION – S. 486.4 - Identity of Complainant

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Judge:	The Honourable Judge Greg Lenehan
Heard:	October 13, 2016 & February 6, 2017
Decision:	April 11, 2017
Charge	s. 271 *Criminal Code of Canada*
Counsel:	James Van Wart, for the Crown Ray Kuszelewski, for the Defendant

By the Court:

Introduction

1. On April 4, 2014, C.C., enjoyed an evening of social interaction with friends and her on-again off-again boyfriend, Joshua McRae. C.C. consumed alcohol throughout the evening and into the early morning hours of April 5, 2014. Mr. McRae did not drink alcohol. Instead he consumed energy drinks. He was driving C.C.'s vehicle. At the conclusion of the social activities, C.C. and Mr. McRae went to C.C.'s residence and began to watch a movie in her bedroom. Both fell asleep. C.C. awoke to Mr. McRae performing sexual intercourse on her from behind.

2. The Crown argued that C.C. was incapable of consenting to the sexual intercourse, because she was asleep when it began. Therefore, Mr. McRae is guilty of sexual assault. Counsel for Mr. McRae argued that C.C. was awake and was a willing participant in the sexual act or, in the alternative, if she was asleep, Mr. McRae had an honest but mistaken belief in consent.

Summary of Evidence

C.C.'s testimony for events on April 5, 2014

3. According to C.C., following some preliminary drinking at home and then a friend's place, C.C. had Mr. McRae drive her to Big Leagues, a beverage room in the Dartmouth area. There C.C. met up with her aunt. C.C. danced and drank. She was drinking vodka with Red Bull energy drink. The total number of drinks consumed by C.C. was unknown. C.C. was at Big Leagues until closing. She recalled being (in her words) "pretty drunk" - in other words, intoxicated.

4. After leaving Big Leagues, C.C. and Mr. McRae drove to Halifax. From downtown, they purchased a pizza to take home. They, also, picked up burgers and fries from McDonald's. When they arrived home at C.C.'s place, the McDonald's food was placed on a kitchen counter. The pizza was taken into C.C.'s bedroom for C.C. and Mr. McRae to share.

5. The movie 'Hardball' was playing on the television in C.C.'s bedroom. She intended to watch it and asked Mr. McRae to join her. She changed into her bedclothes, a baggy sweatshirt and boxer-shorts she wore over her underwear. She did not take these off before falling asleep.

6. Mr. McRae laid down in the bed and soon fell asleep. C.C. had nudged him to confirm he was asleep. She ate some pizza, began to feel unwell, put the pizza down and went to sleep.

7. The next thing C.C. was aware of was the feeling of friction inside her vagina. It felt almost like a ripping sensation. She heard Mr. McRae moaning in her ear. When she became fully awake, she turned her head to see Mr. McRae with her underwear in his hand. It appeared he was smelling them. C.C. found her boxers caught around one ankle. She reacted by yelling at Mr. McRae and slapping him.

8. The friction she felt inside was due to Mr. McRae with his penis in her vagina having sexual intercourse on her. She could tell by the friction she experienced that he was not wearing a condom.

9. C.C. demanded that Mr. McRae get out of the residence. His response was to tell her that she was drunk and to suggest that any further discussion wait until morning. C.C. repeated that he was to leave. Mr. McRae called his mother. C.C. took the phone from Mr. McRae and informed his mother what he had done. C.C. could not recall what Mr. McRae said next, but she testified that she 'lost it' and called the police.

10. She called for one of the men she shared the residence with to come into her bedroom. That individual entered the room and told Mr. McRae he had to get out of the house.

11. There had not been any cuddling, kissing, touching or fondling in that bed on that date prior to falling asleep. She did not have an argument or discussion with Mr. McRae about him participating in text message exchanges with a female co-worker.

<u>Pre-and post-incident issues from C.C.'s evidence</u>

12. C.C. had contact with Mr. McRae after this incident when he showed up at a pizza restaurant at which she was patronizing. She called the police. On another occasion Mr. McRae called her phone and admitted his actions for this complaint. She did not call police. Prior to this matter for which we have had a trial, C.C. complained to police about Mr. McRae damaging her property.

Mr. McRae's interview with police

13. Mr. McRae was interviewed by D/Cst. MacGillivray following arrest on April 5, 2014. The interview began at 2:09 p.m. and ended at 3:34 p.m. The transcript of the interview is 99 pages in length. D/Cst. Cross monitored the interview and introduced the recorded exchange into evidence.

14. Defence counsel acknowledged that the comments made by Mr. McRae to D/Cst. MacGillivray were given freely and voluntarily. The police officer was persistent in his efforts with Mr. McRae, but there was nothing in his conduct that could be viewed as interfering with Mr. McRae's ability to choose whether or not to speak. My review of the interview has led me to confirm that any statements made by Mr. McRae to D/Cst. McGillivray were done so freely and voluntarily. There was no issue with regard to right to counsel.

15. During the interview D/Cst. MacGillivray spent a great deal of effort attempting to connect with Mr. McRae on an emotional level. The officer did such by sharing information (whether truthful or not) about his own relationship issues. He emphasized to Mr. McRae belief in Mr. McRae's positive feelings toward C.C. D/Cst. MacGillivray encouraged Mr. McRae to remain hopeful of a brighter future.

16. Eventually Mr. McRae began to provide comments about his relationship with C.C. and described a recent argument about Mr. McRae giving attention through Facebook messaging to a female co-worker. That disagreement occurred a couple of days before April 5, 2014. Mr. McRae advised the police officer the same thing had happened in the early hours of April 5, 2014, but after assuring C.C. that he was only in love with her, Mr. McRae and C.C. watched the movie 'Hardball'.

17. At page 70 of the interview transcript, Mr. McRae said: "And I went to cuddle her. And then I grabbed her chest and I --- I was, like," and he used the complainant's name.

18. At page 81, Mr. McRae stated: "And I was talking to her. … And all of a sudden, it so happened, laying – she falls asleep, and then says whatever, whatever." Although this was the transcription, a review of the actual interview indicated that Mr. McRae was expressing his dismay that, all of a sudden, C.C. could have fallen asleep.

19. At page 84, Mr. McRae explained to the officer that he was unaware C.C. was wearing shorts in bed until he rolled over, cuddled her and put his hand on her bum.

20. At page 85, the defendant offered the following: "I said, (complainant's name), like, 'wake up'. And she – she was talking to me and whatever. And then I touched her. … And I was playing with her. And she's talking to me, and then, all of a sudden, she's sleeping. Like, I don't understand."

21. Continuing to page 86 was: "It's just … It's fucking – the situation is so fucked up. … And then … and then all the liquor has all to do with it. … And then this happened. Whatever. But however she says it happened, she's an animal when she drinks. She was on a tiff even before she went to bed, pissed off."

22. From page 88 to page 91 of the transcribed interview is the following exchange edited to avoid details that might identify the complainant and to omit comments that did not go to the incident. 'D/Cst.' references the police officer. 'McRae' signifies the defendant:

> D/Cst.: *Did you use a condom?*
> McRae: *No. We never use condoms.*
> D/Cst.: *Okay. Did you – did you finish?*
> McRae: *No.*
> D/Cst.: *You didn't …*
> McRae: *No.*
> D/Cst.: *Okay.*
> McRae: *I stuck it in maybe, I don't know, thirty seconds, that's it. And there wasn't even no, like – I don't know. It wasn't even really sex.*

D/Cst.: *I know what you mean. You just put it in for a little bit?*
McRae: *And – I don't know, man. It was just crazy. One of her friends, she said, talked about how she would love waking up with an orgasm and stuff.*
D/Cst.: *Yeah, yeah.*
McRae: *I don't know. And that's pretty much how – why it happened tonight.*
….
D/Cst.: *It is what it is. But I'll tell you, it's more when there's more. Okay? So you – you know, you tell me things like, you know, she likes waking up – she wants to wake up with an orgasm.*
McRae: *Well, that's what she said at (name of friend)'s.*
D/Cst.: *Well, shit, that's important stuff, man. Come on.*
McRae: *So that's what I was thinking. I was, like, well, maybe – whatever.*
D/Cst.: *Okay.*
McRae: *And then I took her pants off and whatever, and that's what I was going to do.*
D/Cst.: *Okay.*
McRae: *I was going to try to give her an orgasm. And it all fucking blew up.*
…
McRae: *And the only …*
D/Cst.: *Listen, I understand.*
McRae: *…reason I did it is because she said at (name of friend)'s about she would love waking up with an orgasm. And – yeah. So whatever.*

23. None of the remaining interview was salient to addressing the factual allegations.

24. During the course of the interview, D/Cst. MacGillivray suggested a number of times to Mr. McRae that this complaint by C.C. was not the first time this type of conduct by Mr. McRae occurred. The Crown did not seek to present an argument on similar fact. Instead, the Crown asked that I ignore that portion of the interview. Beyond acknowledging the presence of such suggestions by D/Cst. MacGillivray, I have not considered those portions of the interview when assessing the evidence in relation to the current allegation.

<u>Mr. McRae's testimony for events on April 5, 2014</u>

25. According to Mr. McRae, he got together with C.C. in the evening of April 4, 2014 at a friend's place. C.C. drank alcohol. Mr. McRae drank only energy drinks. Mr. McRae drove C.C. in her car to Big Leagues Beverage room. There they met up with C.C.'s aunt. C.C. continued to consume alcohol. She danced. Mr. McRae did neither. They remained there for about an hour or an hour and a half until closing time. Mr. McRae drove C.C.'s aunt home. Thereafter, Mr. McRae and C.C. drove to her place with stops along the way to pick up a pizza at 'pizza corner' and burgers and fries at McDonald's.

26. Mr. McRae went straight to C.C.'s bedroom upon arriving at her place. C.C. followed into the bedroom after some brief conversation with others with whom she shared the residence. In the bedroom Mr. McRae and C.C. began to eat pizza. They got into an argument after C.C. saw on his phone Facebook messages Mr. McRae had with a female co-worker. C.C. yelled at Mr. McRae. He assured C.C. that he loved only her. The argument ended. The two then finished the pizza and watched the movie 'Hardball'.

27. Mr. McRae by then had got into his pyjamas. C.C. had changed into shorts, panties and a hoodie.

28. While watching the movie, Mr. McRae felt the earlier tension subside. He and C.C. laid together in a spooning position with C.C. behind him. They fell asleep together. Mr. McRae awoke sometime later. C.C. awoke too. He rolled over and spooned with C.C. from behind her. Mr. McRae kissed her neck. He talked with her. Mr. McRae touched C.C.'s breast when he put his arm around her. He fondled C.C. by touching her vagina over her clothes. She liked it. She was moaning. The fondling lasted about a minute. Her body language indicated that she liked it.

29. Mr. McRae pulled down C.C.'s shorts and took them off her. He took her panties down. Mr. McRae, then, stuck his penis into C.C. from behind. He was in her for twenty to thirty seconds and then C.C. blew up at him saying: "What the fuck are you doing?" Mr. McRae stopped instantly what he was doing.

30. In response to C.C.'s outburst Mr. McRae asked C.C. what was going on. She yelled at him: "You're sick! I was sleeping." In Mr. McRae's own mind C.C. had not been sleeping. Although she had been sleeping earlier, C.C. was awake

when Mr. McRae began fondling her. If she did fall back to sleep, he believed she was still awake and consenting to his sexual conduct.

31. Mr. McRae confirmed that he was truthful when speaking with D/Cst. MacGillivray. He had never been interviewed like that before. It was "terrifying". He was exhausted during the interview because he had been up all night and was saying "delusional things". He was "overwhelmed".

32. Mr. McRae believed that C.C. was still somewhat angry with him about his interactions with his female co-worker when C.C. awoke and yelled at him.

33. Mr. McRae said that no other person entered the bedroom when C.C. yelled at him. He did, however, acknowledge that one of the men living there told him he should leave. Mr. McRae gathered his things and sat outside waiting for his mother to pick him up. The police arrived and arrested him. Mr. McRae had no further discussions with C.C. on April 5, 2014, after he went out the front door of the residence.

Issues

34. There is no question there was sexual activity performed on C.C. by Mr. McRae. The issues to be decided are:
    a) Has the Crown established beyond a reasonable doubt that C.C. did not consent to Mr. McRae's admitted sexual conduct?
    b) If lack of consent has been satisfactorily proven, did Mr. McRae have an honest but mistaken belief that C.C. did provide consent?

The Law

Burden of proof

35. Every person charged with a crime is presumed innocent by the criminal courts. That is the most basic principle for every criminal matter.

36. The responsibility to prove a person guilty is carried by the prosecution. This can be an onerous task, because the level of proof that must be met at trial is

'beyond a reasonable doubt'. This is a very high standard. We have it so for good reason. Our belief in this free and democratic society is that it is better that the guilty should go free before we ever convict an innocent person.

37. The requirement that the Crown prove beyond a reasonable doubt a charge before the court is more properly understood as a need to prove to that standard each essential element of the alleged offence.

38. Greene J. in *R. v. Tariq*, [2016] O.J. No. 5386 explained the burden of proof at paragraph 51,

> The starting point in understanding any decision in a criminal court is understanding the burden of proof. The Burden lies on the Crown to prove each essential element of the offence beyond a reasonable doubt. This is a high standard. Reasonable doubt is based upon reason and common sense. It is logically connected to the evidence or the lack of evidence. It is not enough for me to believe that Mr. Tariq is possibly or even probably guilty. Reasonable doubt requires more. As a standard, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities. In order to convict, a trial judge must be sure that every essential element of the offence has been made out.

39. The burden of proof requires that a judge be convinced of a person's guilt, not just believe in a person's guilt.

Sexual Assault

40. Once again borrowing from Green J. in *R. v. Tariq*, supra, at paragraphs 56 and 57 he concisely stated,

> All offences in the Canadian Criminal Justice System have both an *actus reus* and a *mens rea*. The same is true for the offence of sexual assault. The *actus reus* of a sexual assault is made out where the Crown has proven beyond a reasonable doubt that: the defendant touched someone; where the contact was sexual in nature; and, the person did not consent. The Crown must prove all three of these essential elements beyond a reasonable doubt. In other words, the test is not whether the victim consented. The test is whether the Crown has proven beyond a reasonable doubt that the complainant did not consent.

> The *mens rea* for sexual assault is made out where the Crown proves beyond a reasonable doubt that the defendant intended to touch the complainant in a sexual manner and knew, or was reckless or willfully blind to the complainant's lack of consent.

41. In the matter before me the Crown must establish that Mr. McRae touched C.C., that it was sexual in nature, that Mr. McRae intended the touching to be sexual, that C.C. did not consent or was incapable of consenting, and that Mr. McRae knew C.C. did not consent or was willfully blind to the lack of consent.

42. There is no argument in this case about whether or not Mr. McRae touched C.C. in a sexual nature. He clearly admitted in his testimony and in his interview with police that he did. The touching by Mr. McRae on C.C. involved fondling her breasts, rubbing his hand over clothing in the vaginal area, removing her shorts and underwear, and inserting his penis into C.C.'s vagina from a position behind her.

43. The issue left to be determined is whether the Crown has proven that C.C. did not consent or was incapable of consenting to the admitted sexual activity.

Consent

44. Again, I refer to Greene J. in *R. v. Tariq*, supra, for a thoughtful, but succinct, explanation of consent in sexual assault matters. At paragraphs 61 to 64, the following was stated:

> The concept of consent in a sexual assault trial cannot be divorced from the purpose of criminalizing non-consensual sexual acts. As noted above the offence of sexual assault is premised on protecting personal integrity and that having control over who touches one's body lies at the core of human dignity and autonomy. It is for this reason, that the definition of consent is not mere silent acquiescence. In *R. v. J.A.* [2011] S.C.J. No. 28, McLachlin C.J. stated that consent in the context of a sexual assault case is "the conscious agreement of the complainant to engage in every sexual act in a particular encounter" (see para 31). McLachlin C.J. further stated at paragraph 34 "consent for the purpose of sexual assault is defined in s.273.1(1) as the

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

The issue of consent in the context of a sexual assault trial was also explored by the Supreme Court of Canada in *R. v. Ewanchuck,* [1999] S.C.J. No. 10. In this case, Major J., speaking for the majority of the court stated that the absence of consent is "subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred". Major J. went on to note that on the issue of the absence of consent "the actual state of mind of the complainant is determinative" (at paragraph 27). Moreover, under Canadian Law, there is no such thing as "implied consent". Either the complainant consented or she did not.

In other words, if the trial judge finds beyond a reasonable doubt that sexual touching took place and that the complainant did not consent, the *actus reus* has been proven. The *actus reus* does not take into account the defendant's state of mind. Only the victim's state of mind.

Consent cannot be given ahead of time. In assessing the issue of consent, the only relevant time frame for the consent is while the touching is taking place. As noted by McLachlin C.J. in *R. v. J.A., supra,* at paragraph 46,

> The only relevant period of time for the complainant's consent is while the touching is occurring: *Ewanchuck*, at para 26. The complainant's views towards the touching before or after are not directly relevant. An offence has not occurred if the complainant consents at the time but later changes her mind (absent grounds for vitiating consent). Conversely, the *actus reus* has been committed if the complainant was not consenting in her mind while the touching took place, even if she expressed her consent before or after the fact.

45. While Mr. McRae argues that C.C. provided consent, the Crown argues that C.C. was incapable of consenting; she was asleep when the sexual activity began. On the issue of capacity to consent it is helpful to look at how section 273.1(2) has been interpreted by the Supreme Court of Canada. In *R. v. J.A.*, [2011] S.C.J. No. 28, McLachlin, C.J. at paragraph 36 said:

> Section 273.1(2)(b) provides that no consent is obtained if 'the complainant is incapable of consenting to the activity'. Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental

> capacity to give meaningful consent. This might be because of mental impairment. It also might arise from unconsciousness; see *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Humphrey* (2001), 143 O.A.C. 151, at para. 56 *per* Charron J.A. (as she then was). It follows that Parliament intended consent to mean the conscious consent of an operating mind.

46. Then at paragraph 44, McLachlin, C.J. summarized the case law:

> The jurisprudence has consistently interpreted consent as requiring a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act.

47. If at any time during Mr. McRae's sexual touching of C.C. the Crown establishes that C.C. did not or could not consent to the particular sexual act, then the Crown will have met its burden.

48. A sleeping person is unconscious. While asleep that person would be incapable of giving consent to any type of activity, sexual or otherwise. Once a person is unconscious, any prior consent to sexual activity ceases. Any continued sexual act perpetrated on the unaware person would be a sexual assault.

Assessing Testimony

49. Witnesses testify about their perceptions and memories for specific events from each person's unique perspective. For this reason, there are often discrepancies in the versions recalled in court for the same incident. That is to be expected. Furthermore, everybody possesses varying degrees of comfort when called upon to answer questions in court. As well, some people are naturally at ease when telling the story of an event and others are not so at ease.

50. When assessing testimony, a judge must be mindful of these variables and look for the truth in the facts by comparing each witness' evidence with all other evidence. I must examine what has been received in evidence for consistency within each version given for the event and for consistency between versions of the same incident. I am permitted to accept as credible and trustworthy all, part, or none of what any individual witness says.

51. While demeanour may be considered when measuring the credibility and trustworthiness of individual witnesses, it should not influence the assessment greatly. In the often-cited case of *Faryna v. Chorny*, [1951] B.C.J. No. 152, O'Halloran, J.A. had the following to say at paragraphs 11 and 12 of the reported oral decision:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth, it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

52. In the matter involving Mr. McRae and C.C. I have been required to assess what both persons have stated in court for internal consistency and for consistency with each other's recollection. Also, Mr. McRae's testimony has been compared to the comments provided in his police interview. From those sources, I have gleaned the conditions that existed in C.C.'s bedroom in the early hours of April

5, 2014. The facts for what happened in that room will be determined by considering the preponderance of probabilities recognized as reasonable in the circumstances that existed then and there.

Analysis

53. The testimonies of C.C. and Mr. McRae did not differ on many of the important details of the incident that gave rise to this charge of sexual assault. They were consistent with each other for the social activities before arriving back at C.C.'s place; the drinking and dancing by C.C., collecting pizza and McDonald's take-out on the way home, and Mr. McRae along as the driver. They, also, agreed they ended up together in C.C.'s bedroom, they had the pizza with them, C.C. changed into a hoodie, underwear and shorts, and they were intending to watch the movie 'Hardball'. While both described C.C. as being intoxicated, neither of them suggested she was unaware of her surroundings or any conscious interactions between them. Furthermore, it was stated by both that they fell asleep and that when C.C. yelled; "What the fuck are you doing?", Mr. McRae's penis was inside C.C.'s vagina and her shorts and underwear had been removed. I accept these to be the surrounding conditions in which the actions of Mr. McRae toward C.C. must be considered.

54. The two differ on what happened in that bedroom prior to Mr. McRae penetrating C.C.'s vagina:

1) Mr. McRae described an argument about messages on his cellphone from a female co-worker. C.C. did not recall seeing any messages April 5, 2014;
2) Mr. McRae described cuddling with C.C. after the argument with her being positioned behind him. C.C. denied they cuddled at all. She said Mr. McRae fell asleep first and she nudged him to make certain he was asleep;
3) Mr. McRae suggested that after waking up, C.C. talked with him and reacted favourably to him rubbing and fondling her by moaning. C.C. denied any such talk or being aware that Mr. McRae rubbed or fondled her because she was asleep; and
4) Mr. McRae stated that he removed C.C.'s shorts and underwear after perceiving C.C.'s positive response to him rubbing her vagina over that

clothing. C.C. denied being aware in the moment that Mr. McRae had removed her clothing because she was asleep.

55. There were some inconsistencies between Mr. McRae's comments in the police interview and his testimony at trial worth noting:

1) In the police interview Mr. McRae said he had grabbed C.C.'s chest when he awoke and began to cuddle, but in response to his counsel's suggestion at trial that Mr. McRae had grabbed C.C.'s chest, Mr. McRae explained that his arm touched her breast when he put his arm around C.C.;
2) Mr. McRae told D/Cst. McGillivray that he spoke with C.C. after he awoke and he began to cuddle with her and fondle her vagina. In response to his counsel's question at trial about whether C.C. said anything during this activity, however, Mr. McRae answered that her "body language" told him she liked it and in re-direct Mr. McRae confirmed with his lawyer that he continued to engage in sexual activity on C.C. after reading her "body language";
3) Mr. McRae acknowledged in the police interview that C.C. fell asleep when he was touching her sexually, but in his direct examination at trial he said C.C. was awake when he inserted his penis in her, then in cross-examination when it was put to him that he had sex with C.C. while she was sleeping, Mr. McRae agreed: "That's what happened, yes.";
4) In the police interview Mr. McRae stated that he was unaware C.C. had changed into her hoodie, shorts and panties for sleeping. At trial, Mr. McRae said the two of them changed into bedclothes before cuddling and falling asleep and he described what C.C. put on;

56. Defence Counsel argued that this case is one in which I should assess the evidence as set out in *R. v. W(D)*, [1991] 1 S.C.R. 742. The testimony received, however, does not lend itself to such an analysis. The evidence of the accused, if believed, indicates that he did engage in sexual activity on C.C. without her express permission. His testimony is corroborated by C.C., not contradicted.

57. If I accept at face value the evidence of Mr. McRae (and I see no reason not to on this point), his last comment given to his lawyer in re-direct questioning is a clear admission that at the time he engaged in sexual intercourse on C.C., he did

so after interpreting her "body language" and not as a result of any actual spoken agreement. C.C.'s reaction when she became aware of the reason for the sensation she experienced in her vagina, (as described by both C.C. and Mr. McRae, C.C. yelling at Mr. McRae) is entirely consistent with her having been previously unaware of the sexual activity. I accept that she was unaware, because she had been asleep, unconscious. Mr. McRae in response to Crown counsel's cross-examination accepts that to be the case. C.C.'s testimony was clear, unequivocal, and unshaken on this crucial point. Her evidence is accepted without reservation by me and Mr. McRae. She was indeed asleep when penetrated by Mr. McRae. This finding is "in harmony with the preponderance of the probabilities a practical and informed person would recognize as reasonable in that place and in those conditions" (*Faryna v. Chorny*, supra).

58. The law is very clear when it comes to consent in these circumstances. There is none. The person who is being touched is incapable of giving consent while unconscious. If there had been prior consent, it ceased at the moment of unconsciousness. Therefore, at the time that Mr. McRae removed C.C.'s clothing and inserted from behind his penis in her vagina, he did not have her consent. C.C. was asleep. This is enough to establish the *actus reus* of sexual assault.

59. The sexual activity against C.C. began, however, (according to Mr. McRae and I accept his testimony to be truthful on this fact) with him rubbing and fondling C.C. Mr. McRae argued C.C. was aware and was consenting in those moments, because she was moaning and her body language suggested she was enjoying what he was doing. C.C. said she was asleep and was unaware of any of that activity. This does not amount to a true discrepancy between the two testimonies on the issue of consent. Both individuals appeared to be truthful in their recollections; Mr. McRae to his interpretation of C.C.'s physical reactions and C.C. to her being unaware due to sleeping of him touching her. It comes down to a matter of each person's perspective.

60. I do not interpret C.C.'s physical reaction to being touched (as described by Mr. McRae) as a clear affirmation of her willingness to receive sexual touching. The mental state to be examined is that of the complainant in the moment. Although she had been drinking beforehand, there was no suggestion that C.C. was so intoxicated as to be incapable of giving consent if it was sought. There was nothing in her testimony or that of Mr. McRae which would cause me to believe C.C. was lying or merely forgetting that she was agreeable to Mr. McRae's

actions at the time. I accept that C.C. was asleep from shortly after she decided to go to sleep until she awoke with Mr. McRae's penis inside her. At no time in between did she gain sufficient consciousness to be cognizant of her surroundings or anything that was happening around her. I accept as truthful from C.C. that she did not consent to any sexual activity with Mr. McRae on April 5, 2014. His interpretation of her physical reactions to his touch does not amount to evidence of actual consent.

61. Mr. McRae at trial was given the opportunity to talk about the conversation he suggested he had with C.C. at the time of his sexual actions, but chose to respond by referring to C.C.'s "body language" and how she moaned. Mr. McRae's interpretation of body language and moaning is not equivalent to consciously communicated express consent from C.C. to the sexual activity. While I accept that Mr. McRae might have been speaking to C.C., I do not accept that she responded verbally to Mr. McRae. Not once in his police interview or in his testimony did Mr. McRae state any of the conversation he suggests he had with C.C. during the sexual activity. His evidence when pressed on these details was to say C.C. was "moaning."

62. I am satisfied that the Crown has proven beyond a reasonable doubt that there was no consent to the sexual activity Mr. McRae perpetrated on C.C. Mr. McRae did not have C.C.'s conscious consent to him fondling her vagina, removing her shorts and panties, and inserting his penis in her vagina.

63. Once the Crown proves the *actus reus* of sexual assault as I find it has done here, then there is an evidential burden on Mr. McRae to show that he had an honest, but mistaken belief in consent. Even though C.C. was not consenting, Mr. McRae would not be guilty of sexual assault if he can establish that he had an honest but mistaken belief that C.C. was consenting to the sexual activity. Pursuant to Section 273.2 of the Criminal Code, however, Mr. McRae must demonstrate that he took "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."

64. Mr. McRae told police and this court that in the early morning hours of April 5, 2014, he and C.C. argued over messages from one of his female co-workers. Mr. McRae, also, stated to police that C.C. is "an animal when she drinks" and she was angry before she went to bed. Furthermore, C.C. had not engaged in any sexual activity prior to falling asleep. In those circumstances, however, Mr.

McRae interpreted C.C.'s sleeping behaviour as indicating lowered tension between them.

65. In his police interview Mr. McRae said that he believed C.C. had expressed to a friend the desire to awaken sometime having an orgasm. A review of the interview has satisfied me that Mr. McRae was not saying anything delusional at the time. Neither was it the first thing that came to his mind (as he tried to explain in his testimony at trial). He was attempting to make the police officer understand why he did what he did to C.C. As explained to D/Cst. MacGillivray, Mr. McRae engaged in his sexual actions toward C.C. on April 5, 2014 because he wanted to try to have her awaken whiling experiencing an orgasm. It follows logically from that belief, therefore, that C.C. would have to be asleep if she was to awaken with an orgasm and Mr. McRae knew or believed C.C. to be asleep when he started to try to excite her sexually.

66. In his statement to police Mr. McRae said that before he grabbed C.C.'s chest, he spoke her name and told her to wake up. He added that she talked to him and then he touched her. Recall, however, at trial Mr. McRae explained that he did not actually grab C.C.'s chest, he merely touched her breast while putting his arm around her while cuddling. He admitted that he was playing with her (fondling her vagina over the clothes) when "all of a sudden she's sleeping." Despite his comment to police that he was talking with C.C. prior to touching her over her clothing, his subsequent statements in the interview and his testimony at trial leads me to conclude that Mr. McRae believed or suspected that C.C. was asleep when he began to touch her. Mr. McRae emphasized to D/Cst. MacGillivray and repeated in his testimony that he felt C.C. was consenting because she was moaning and because of "her body language." When given the opportunity at trial to talk about the conversation he might have had with C.C. prior to sexual activity, Mr. McRae spoke about "her body language", nothing about actual spoken words. All of this was taking place while he was intent on giving her an orgasm she could wake up to. I do not find that reading somebody's body language equates to talking with the person and it does not in the circumstances Mr. McRae was in on April 5, 2014 amount to taking reasonable steps to ascertain consent to sexual activity.

67. I am convinced that Mr. McRae was hoping C.C. would like what he was doing to her. He assumed that when she moaned, she was getting pleasure. If she was pleased with what he was doing and was not objecting, Mr. McRae concluded

that C.C. was consenting or would give future consent to his touch and his continued sexual activity. It was around the discussion of moaning and body language in his police interview and his testimony at trial that Mr. McRae asserted the sexual activity was consensual. An honest but mistaken belief, however, cannot be based on nothing more than an assumption or a hope.

68. The consent Mr. McRae needed to believe he had was a present conscious agreement from C.C. The evidence does not support that he held such a belief or that he took reasonable steps to obtain such consent. C.C. was not conscious and Mr. McRae knew or suspected that to be the situation. There was no evidence that Mr. McRae sought any words of encouragement from C.C. There was no suggestion that he looked for any reciprocal sexual activity from C.C. toward Mr. McRae when he was touching her. There was no suggestion that Mr. McRae tried to make or did make any eye contact with C.C. to be certain she was indeed awake and aware. To be clear, the sound of moaning from a person in the absence of talk, eye contact, or reciprocal actions cannot amount to an indication of consent to sexual touching.

69. Mr. McRae chose to act without permission and to seek forgiveness later from somebody he said he argued with prior to falling asleep. This was reckless. Mr. McRae's hope that C.C. would be pleasured by his actions on her while she slept does not equate to an honest but mistaken belief in consent. Mr. McRae clearly intended to touch C.C. in a sexual manner. He admitted to this in his interview with D/Cst. MacGillivray. He reiterated the presence of such intent in the trial testimony. Mr. McRae knew, or was reckless or willfully blind to C.C.'s lack of consent. He did not take reasonable steps to obtain consent. I am satisfied, therefore, that the *mens rea* for sexual assault has been established beyond a reasonable doubt.

Conclusion

70. The Crown has established beyond a reasonable doubt that on April 5, 2014 at or near Halifax, Nova Scotia, Joshua McRae did: touch C.C.; that touching violated her sexual integrity; and C.C. did not consent to those actions. Furthermore, Mr. McRae with the intent to touch C.C. in a sexual manner failed to take any reasonable steps to obtain C.C.'s conscious and on-going consent. Therefore, Mr. McRae is found guilty of the single count before the Court, a sexual assault on C.C.