SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Shamsuddin*, 2018 NSSC 157

Date: 2018-06-27
Docket: CRH No. 463212
Registry: Halifax

Between:

Her Majesty the Queen

v.

Dawood Shamsuddin

LIBRARY HEADING

Restriction on Publication: Section 486.4 – Regarding the identity of JB

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	February 13, 14, 15, 16, May 18, 2018, in Halifax, Nova Scotia
Written Decision:	July 11, 2018
Subject:	Sexual assault- ss. 271, 273.1 and 273.2 *Criminal Code of Canada*.
Summary:	The accused and complainant were known to each other. The complainant arrived intoxicated around midnight at the accused's apartment. More intoxicants were consumed. The parties decided to retire for the night at approximate 4:00 a.m. The accused had sexual intercourse with the complainant. The complainant testified that she was asleep when the sexual activity took place. The accused testified that the complainant was awake. He believed that: she had subjectively in her own mind consented to the sexual activity; was capable of doing so; and based on her conduct, she communicated her consent to the sexual activity by her actions rather than her words.
Issues:	(1) Has the Crown proved beyond a reasonable doubt that the complainant:

(a) In her own mind did not consent to the sexual activity?;

(b) If not proved, was she incapable of consenting to the sexual activity?

(2) Is there an air of reality to the accused's claim of honest, but mistaken, belief that the complainant had communicated her consent to the sexual activity?

(3) If so, has the Crown disproved, beyond a reasonable doubt, that the accused had an honest, but mistaken, belief that the complainant had communicated her consent to the sexual activity?

Result:

(1) There was a reasonable doubt about whether the complainant in her own mind did not consent to the sexual activity;

(2) There was a reasonable doubt about whether the complainant was incapable of consenting to the sexual activity;

(3) There was an air of reality to the accused's claim of honest, but mistaken, belief;

(4) There was a reasonable doubt about whether the accused did not have an honest, but mistaken, belief that the complainant communicated her consent to the sexual activity, and was capable of consenting.

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Counsel:	Emma Woodburn for the Crown Peter Planetta for the Defence

Publication ban provision(s)

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
(a) any of the following offences:
(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
Marginal note: Mandatory order on application
(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
(b) on application made by the victim, the prosecutor or any such witness, make the order.
Marginal note: Victim under 18 — other offences
(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.
Marginal note :Mandatory order on application
(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
(a) as soon as feasible, inform the victim of their right to make an application for the order; and
(b) on application of the victim or the prosecutor, make the order.
Marginal note: Child pornography
(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.
Marginal note: Limitation
(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.
2005, c. 32, s. 15, c. 43, s. 8;
2010, c. 3, s. 5;
2012, c. 1, s. 29;
2014, c. 25, ss. 22, 48;
2015, c. 13, s. 18.

By the Court:

Introduction

[1] JB and Mr. Shamsuddin were acquaintances. In the evening and late hours of August 28, 2015, after visiting friends in the same apartment building in which Mr. Shamsuddin also lived, JB attended at his apartment. She was intoxicated at that time. She requested, and Mr. Shamsuddin permitted her, entry as well as the opportunity to stay for the remainder of the night. Mr. Shamsuddin's male friend IG was also there throughout. They all listened to music, danced, drank alcohol and smoked marijuana. Then, when they were all ready for sleep, she laid down in the only bed in the apartment.

[2] JB and Mr. Shamsuddin both testified. IG did not testify. English is not Mr. Shamsuddin's first language. His attempts to express himself were sometimes awkward, and were therefore at times capable of more than one interpretation. JB was distracted while testifying because she had with her a two-month old baby for whom she had no alternate caregiver. The baby was recovering from surgery and required extra attention, in addition to the time usually required for regular feedings.

[3] JB says she fell asleep. When she awoke, she felt her body "rocking" back and forth. She realized Mr. Shamsuddin was in the bed behind her. Startled thereby, she went to the bathroom. She discovered the tampon she had been wearing when she went to bed was not still in place. Moreover, she noticed a liquid discharge from her vagina which she believed was ejaculate. She immediately confronted Mr. Shamsuddin, and called the police. As I shall explain, I have a reasonable doubt that Mr. Shamsuddin is guilty.

Overview

[4] Mr. Shamsuddin is charged with sexual assault. He does not deny that there was sexual intercourse.[1]

[1] Section 4(5) of the *Criminal Code* states: "For the purposes of this Act, sexual intercourse is complete on penetration to even the slightest degree, notwithstanding that seed is not emitted." While the descriptor "sexual intercourse" literally suggests a consensual sexual activity, in contrast to "rape", its common usage has evolved to include non-consensual penetration of the female vagina by a penis.

[5] Mr. Shamsuddin says he should be acquitted. He claims either there was actual consent to the sexual activity, or at least a reasonable doubt about lack of consent; alternatively he argues he is entitled to rely upon the defence of honest, but mistaken, belief in consent by JB.

[6] He says either: there is credible proof of actual consent by JB to the sexual activity;[2] or if there is proof beyond a reasonable doubt of a lack of consent or that JB was incapable of consenting to the sexual activity, that there is an air of reality to, and credible proof of his honest, but mistaken, belief that JB was capable of consenting to, and consented to the sexual activity.[3]

[7] Mr. Shamsuddin says he got into the bed behind JB within five minutes of her getting into the bed. He says she was awake and lying face down somewhat on her side. He hugged her. She responded by moving her body, in order to allow him to reach under her and touch her breasts and vagina area, while at the same time pushing her backside towards him. In response, he started pulling her spandex pants down. She used one of her hands to help him do so, and they were pulled down somewhere below her buttocks.

[8] Then he says:

> I felt something along her underwear, which is, was tampon.… When I pull it, it was tampon. So, it wasn't that bloody… So I threw it and she was okay. She was happy. I still continue having sex with her. As soon as I'm getting finish… I stop having sex with her and I took myself off and I laid down face up and the blanket was on top of me. And she jumped right away after as soon as I took myself off of her. She jumped on me and sit on top of me and looking towards me, the face smile and mad and upset and smile and happy. That was unusual look. Well, she was asking me if I finish inside or outside. I said 'no I didn't finish inside because I didn't want you to get pregnant'. As soon as I said that, she said 'oh yeah, you fucking [a reference to his ethnicity] piece of crap, you think I want to have a baby from you, I'm going to send you to jail, you raped me.[4]

[9] JB says that she did not consent to the sexual activity. She became very loud and berated Mr. Shamsuddin. She contemporaneously called the police.[5] She stayed in the apartment until the police arrived. In the meantime, Mr. Shamsuddin

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[2] Or at least a reasonable doubt about whether there was lack of consent.
[3] Or at least a reasonable doubt about whether there was such beliefs by him.
[4] Pages 259 – 260, certified transcription of the evidence – "Transcript".
[5] Pages 15(3) and page 51(4), Transcript.

called the security guards in order to have her removed from his apartment,[6] but they would not do so, and waited for the police to arrive.

[10] The police officers received a call from dispatch at approximately 6:16 a.m., and by 6:30 a.m. they were at the door of the apartment.

[11] Mr. Shamsuddin made three verbal utterances of note to police:[7]

1. 7:19 a.m. – [when asked where the sex took place Mr. Shamsuddin said] "On the bed in the living room";
2. 7:22 a.m. – Mr. Shamsuddin denied having sex with JB;
3. 7:33 a.m. – Mr. Shamsuddin spontaneously stated: "she wasn't happy because I did not finish inside of her – it was semen on the sheets".

The relevant law

[12] Before I can register a conviction, the Crown must prove beyond a reasonable doubt:[8]

1. (the *actus reus*) that Mr. Shamsuddin i) intentionally touched JB; ii) without her (subjective) consent (or that she was incapable of consenting to the sexual activity);[9] iii) in a manner that violated her sexual integrity (the first and third factor being assessed objectively);
2. If applicable, that JB lacked the requisite capacity to consent. This can be established by proof that, for whatever reason, JB did not have an operating mind[10] capable of:
    i. Appreciating the nature and quality of the sexual activity; or
    ii. Knowing the identity of the person or persons wishing to engage in the sexual activity; or

[6] Page 51(20), Transcript.
[7] See my decision - 2017 NSSC 310.
[8] *R. v. Al-Rawi*, 2018 NSCA 10, at paras. 20,67-70; *R. v. Hutchinson*, 2014 SCC 19.
[9] Although seemingly counter-intuitive on its face, the better analytical approach is to firstly examine the "consent" issue, not the "capacity" issue – if there is evidence of consent or a reasonable doubt about the lack of consent, then one should examine the capacity issue to see if consent is negated by proof beyond a reasonable doubt of incapacity: *Al-Rawi*, at para. 68.
[10] Comatose, insensate, or unconscious do not qualify as an operating mind -see *Al-Rawi*, paras. 60, 66 and 114.

iii. Understanding she could agree or decline to engage in, or to continue, the sexual activity.

3. (the *mens rea*) that Mr. Shamsuddin intentionally touched JB, knowing (i.e., or being reckless of, or wilfully blind to) she did not consent, or that she was incapable of consenting to the sexual activity.

[13] Section 273.1 *Criminal Code* defines 'consent' as: [11]

> Means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[14] If JB's consent (in her mind) has been otherwise established as more likely than not given, or the evidence or lack of evidence raises a reasonable doubt about her lack of consent,[12] the legal effect of these facts will nevertheless be overridden where the Crown can prove beyond a reasonable doubt under s. 273.1(2) that:

> (d) JB *expressed* by words or conduct, a lack of agreement to engage in the sexual activity; or
>
> (e) JB, having consented to engage in sexual activity, *expressed*, by words or conduct, a lack of agreement to continue to engage in the activity.

[15] Where there is proof beyond a reasonable doubt that JB did not, *in her mind*, consent to the sexual activity, I must go on to consider whether there is an air of reality to Mr. Shamsuddin's claim of honest, but mistaken, belief that *consent was communicated* by JB. If so, before I could register a conviction, the Crown must prove beyond a reasonable doubt that Mr. Shamsuddin did not honestly, but mistakenly, believe that JB consented.[13]

[16] It should be remembered that:[14]

> 21 *The "defence" of mistake is simply a denial of mens rea*. It does not impose any burden of proof upon an accused. Applied to the issue of consent in cases such as this, honest but mistaken belief is an argument that the Crown has failed

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[11] Subject to subsections 265(3) and 273.1 (2) which set out when the consent of a complainant otherwise is negated – see *R. v. Hutchinson*, 2014 SCC 19.

[12] i.e. the Crown has not proved beyond a reasonable doubt a lack of consent to the sexual activity.

[13] See s. 265(4) and *R. v. Howe*, 2015 NSCA 84, at paras. 30 and 52 – 55 ("there must be some plausible evidence in support so as to give an air of reality to the defence" quoting from *R. v. Esau* [1997] 2 S.C.R. 777); and s. 273.2 *Criminal Code*: "It is not a defence to a charge under s. 271… that the accused believed that the complainant consented to the activity that forms the subject matter of the charge, where…(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."

[14] *R. v. Orwin*, 2017 ONCA 841.

to prove beyond a reasonable doubt that the accused knew that the complainant was not consenting to the sexual activity in question: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 44; *R. v. L.S.*, 2017 ONCA 685, at paras. 37 and 39.

22 *For an accused's conduct to be morally innocent, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity alleged to constitute the actus reus of the offence*: here, anal intercourse. Speculation by an accused about what was going on in a complainant's mind affords no defence: *Ewanchuk*, at para. 46. Further, an accused's belief that silence, passivity, or ambiguous conduct constitutes consent is a mistake of law, and thus provides no defence: *Ewanchuk*, at para. 51.

23 A final point concerns the limitation on mistaken belief in consent imposed by s. 273.2 of the *Criminal Code*. *A mistaken belief in consent cannot arise from an accused's own recklessness, willful blindness, or a failure to take reasonable steps*, in the circumstances known to the accused at the time of the sexual activity, *to ascertain that the complainant was consenting*.

[my italicization added]

[17] And that:[15]

42 With respect, there is nothing in the words of s. 273.1(1) that suggest the Crown need establish communication of a voluntary agreement to prove the *actus reus* of the offence of sexual assault. The issue of communication, or lack thereof, of a voluntary agreement is highly relevant to the issue of the *mens rea* of the offence--that the accused knew that the complainant did not consent to the activity in question--particularly in light of the statutory requirement in s. 273.2 of the *Code* that an accused took reasonable steps to ascertain the existence of consent.

…

49 This is also reinforced by the majority reasons for judgment later written by McLachlin C.J. in 2011 in *R. v. J.A.*, *supra* where she stressed the difference between the *actus reus* and *mens rea* of the offence of sexual assault. The issue of communication of consent is only relevant to the issue of *mens rea*. She explained:

> [37] The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering these provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea*: *Ewanchuk*, at paras. 48-49. **Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent***. Conversely, the only question for the *actus reus* is whether the complainant was subjectively

[15] *Al-Rawi*, at paras. 42 and 49-50.

> consenting in her mind. The complainant is not required to express her lack of consent or her revocation of consent for the *actus reus* to be established.
>
> [Emphasis in original]
>
> 50 This is not to say that evidence tending to demonstrate a complainant's incapacity to communicate consent is irrelevant. Far from it. Incapacity or patent defects in being able to communicate may well be cogent circumstantial evidence of lack of capacity to consent.
>
> **[my emphasis added]**

[18] For criminal offences, such as sexual assault, which imprint a significant stigma on such offenders, our constitutional principles require that before an accused can be convicted they must be proved to have known[16] that a complainant was not consenting to the sexual activity in question. Because an accused cannot know whether a complainant, in her mind, is voluntarily agreeing to engage in the sexual activity, an accused must rely on the words and actions of (i.e. communicated by) a complainant to decide whether a complainant is in her mind consenting.

[19] These principles must be kept in mind when considering whether the Crown has proved beyond a reasonable doubt that Mr. Shamsuddin did not have an honest, but mistaken, belief that JB consented to the sexual activity in question.

[20] Consequently, an accused is to be considered not guilty, or not proved to have had a guilty mind (*mens rea*), if they honestly believed a state of facts existed (i.e. that there was communication of consent by the complainant) which, if true, would render his or her conduct lawful.

[21] As Justice Major stated for the court in *R. v. Ewanchuk,* [1999] 1 S.C.R. 330:

> (2) Mens Rea
>
> 41 Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic mens rea requirement. See *R. v. Daviault*, [1994] 3 S.C.R. 63.
>
> 42 However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the

[16] i.e. know, or be reckless, or wilfully blind, beyond a reasonable doubt.

injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, [1993] 3 S.C.R. 3. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. See Park, supra, at para. 39.

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.

44 The defence of mistake is simply a denial of *mens rea*. It does not impose any burden of proof upon the accused (see *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 936) and it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the court, including, the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

> (a) Meaning of "Consent" in the Context of an Honest but Mistaken Belief in Consent

45 As with the actus reus of the offence, consent is an integral component of the mens rea, only this time it is considered from the perspective of the accused. Speaking of the *mens rea* of sexual assault in *Park*, supra, at para. 39, L'Heureux-Dubé J. (in her concurring reasons) stated that:

> **. . . the mens rea of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes".**

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.

48 There is a difference in the concept of "consent" as it relates to the state of mind of the complainant vis-à-vis the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea*. For the purposes of the actus reus, "consent" means that the complainant in her mind wanted the sexual touching to take place.

49 In the context of *mens rea* - specifically for the purposes of the honest but mistaken belief in consent - "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.

(b) Limits on Honest but Mistaken Belief in Consent

50 Not all beliefs upon which an accused might rely will exculpate him. Consent in relation to the mens rea of the accused is limited by both the common law and the provisions of ss. 273.1(2) and 273.2 of the Code, which provide that:

> 273.1
> . . .
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

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.

51 **For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence**: see *R. v. M.* (M.L.), [1994] 2 S.C.R. 3. Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. An accused cannot say that he thought "no meant yes". As Fraser C.J. stated at p. 272 of her dissenting reasons below:

> One "No" will do to put the other person on notice that there is then a problem with "consent". Once a woman says "No" during the course of sexual activity, the person intent on continued sexual activity with her must then obtain a clear and unequivocal "Yes" before he again touches her in a sexual manner. [Emphasis in original.]

I take the reasons of Fraser C.J. to mean that an unequivocal "yes" may be given by either the spoken word or by conduct.

52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 79, the Court stated:

> An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(a)(ii).

[my bolding added]

[22] In *R. v. JA*,[17] McLachlin C.J. stated:

[17] 2011 SCC 28.

48 The cases on the *mens rea* defence of honest but mistaken belief in consent take the same view. At common law, this was a standard defence of mistake of fact: the accused was not guilty if he honestly believed a state of facts, which, if true, would have rendered his conduct lawful: *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at pp. 134 and 139. **In *Ewanchuk*, this Court held that it is not sufficient for the accused to have believed that the complainant was subjectively consenting in her mind: "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" (para. 46 (emphasis in original)). See also *R. v. Park*, [1995] 2 S.C.R. 836, at para. 39 (*per* L'Heureux-Dubé J.). It thus is not sufficient for the accused to have believed the complainant was consenting: he must also take reasonable steps to ascertain consent, and must believe that the complainant communicated her consent to engage in the sexual activity in question. This is impossible if the complainant is unconscious.**

49 The respondent argues that my dissenting reasons in *Esau* suggest that an individual may consent while unconscious for purposes of the *actus reus* of the offence. The issue in that case was whether the defence of honest but mistaken belief was available where the complainant asserted that she was unconscious due to drunkenness at the time of the sexual activity. The majority of the Court, *per* Major J., held that the evidence sufficed to raise a basis for the defence. My dissenting reasons argued that the defence did not arise because an unconscious complainant "lacks the capacity to communicate a voluntary decision to consent. ... To put it another way, the necessary (but not sufficient) condition of consent -- the capacity to communicate agreement -- is absent" (para. 73). I further stated:

> The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent. [para. 73]

50 Simmons J.A. read this passage as supporting the view that an individual may consent while unconscious (para. 82). **However, the point of the passage is simply to cast doubt on whether the defence of honest but mistaken belief can arise with respect to an unconscious complainant, assuming (without deciding) that the *actus reus* could be made out**. The passage thus does not support the view that advance consent prior to unconsciousness can establish consent for purposes of the *actus reus* of the offence.

[my emphasis added]

[23] In *R. v. Barton*,[18] the Alberta Court of Appeal stated:

> 237 Consequently, to avoid misleading the jury as to what is meant by "did the accused know that the complainant did not consent" -- and to what -- it is critical that the jury charge on this point circle back to the *Code* language of consent and to the "sexual activity in question". Only in this way will the jury be properly instructed on the law on the *mens rea* of sexual assault. To accomplish this objective, the jury could be instructed along the following lines which accord with Parliament's change in the definition of consent in the 1992 *Code* Amendments:[103]
>
> > Did the accused know that the complainant did not affirmatively communicate either expressly through her words or through her unambiguous conduct her agreement to engage in the sexual activity in question with the accused? In other words, did the accused know that the complainant did not effectively say yes through her words and/or actions?
>
> 238 The problem with current pattern jury charges extends beyond the need to clarify the meaning of consent for purposes of the *mens rea* of sexual assault. A further complication is this. What must the Crown prove where there is no live issue of mistaken belief in consent? In *Ewanchuk, supra* at para 41, Major J made the point that: "Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement." He then added at paras 42, 49 [Emphasis added]:
>
> > However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a *defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant*. To do otherwise would result in the injustice of convicting individuals who are morally innocent ... . *As such, the mens rea of sexual assault contains two elements*: intention to touch and knowing of, or being reckless or wilfully blind to, a lack of consent on the part of the person touched ... .[104]
> >
> > In the context of *mens rea- specifically for the purposes of the honest but mistaken belief in consent*- "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.
>
> 239 If the Crown must prove the *mens rea* that applies for the purposes of the honest but mistaken belief in consent defence regardless of whether mistaken belief in consent is even a live issue, then that would lead to this result. The Crown would bear the burden of disproving mistaken belief in consent in every sexual assault case even where mistaken belief is not a live issue whether because the air of reality threshold has not been met or the accused has advanced no such

[18] 2017 ABCA 216, Leave to Appeal granted [2017] S.C.C.A. No. 387.

defence. This is another area in which we would invite further consideration by the national jury committee on how best to instruct jurors in this instance.[105]

…

248 The trial judge failed to address the threshold issue of whether this defence had an "air of reality" and thus ought to have gone to the jury at all. The defence is not available simply because an accused asserts it. Instead, the trial judge must first determine if there is an air of reality to the defence: *Esau*, *supra* at para 15; *R. v. Osolin*, [1993] 4 SCR 595 at 682 [*Osolin*]. If there is no air of reality, for any reason, including that the statutory preconditions are not met, then the defence should not be left to the jury.

249 In this case, mistaken belief in consent was the subject of discussion amongst the trial judge and counsel when addressing what to include in the jury charge. But as this case demonstrates, talking about it and understanding there is a legal threshold that needs to be met -- with statutory requirements that must also be met -- are two different things. While the air of reality threshold may not be onerous, it is an error of law to omit it: *Park*, *supra* at para 16; *Ewanchuk*, *supra* at para 57. At this stage, a trial judge should consider whether what is advanced was a mistake of fact and not law; is grounded in admissible evidence and the legal definition of consent; and complies with the statutory terms. In the context of this case, the trial judge should have ascertained what evidence was capable of supporting Barton's belief that Gladue communicated consent to the sexual activity that caused her death.[111] A belief that Gladue gave her consent because she was silent, did not resist or object is a mistake of law, not a mistake of fact: *Ewanchuk*, *supra* at para 51.

250 Moreover, there will be no air of reality if one of the statutory bars in s 273.2 is present: see *R. v. Dippel*, 2011 ABCA 129, at paras. 22-23, 505 AR 347 [*Dippel*]; *Despins*, *supra* at para 6; *Cornejo*, *supra* at para 19.[112] Since the trial judge never considered the threshold air of reality issue, he failed to consider any of these limitations too.

…

253 Assuming, without deciding, that this sexual conduct evidence was admissible and Barton's claimed mistaken belief in consent passed the air of reality threshold, there are four problems with the way in which this issue was dealt with.

254 First, for an accused to claim that he thought the complainant consented based solely on what the two did the night before constitutes a mistake of law not a mistake of fact. The mistake of law is that the accused does not understand that consent must be given to what happened the second night. If an accused's personal beliefs do not accord with the legal definition of consent, then his belief is grounded in a mistake of law, not a mistake of fact. An accused's belief must be grounded in the complainant's *communication of consent* at the relevant time to the "sexual activity in question". Therefore, the jury should have been instructed

to consider what evidence there was to support Barton's claimed "mistake" that Gladue "affirmatively communicated consent" on the second night to the sexual activity in question that caused her death.

255 Second, factually, even though Barton said he inserted part of his hand into Gladue's vagina on each occasion, it was not the "same" activity on both nights. The defining characteristic of the sexual activity in question on the second night was arguably the amount of force used. Even on his own evidence, Barton admitted he used greater force the night Gladue died: he thrusted in further, harder and longer.[114] Instructing the jury to consider whether the sexual activity was "similar", as the trial judge did here, misled this jury. It invited them to conclude that as long as it was similar, that would do to validly ground Barton's claimed mistaken belief in consent. But again, the degree of force Barton used would be relevant in the jury's assessment of whether Barton honestly believed Gladue had consented to the sexual activity that caused her death. One of the factors that would necessarily weigh in that analysis would be whether it was objectively foreseeable that Barton's actions the night Gladue died would put Gladue at risk of bodily harm, if not actual bodily harm. This would be an important factor for the jury to consider in determining the honesty of Barton's belief. But this jury received no such instruction.

256 Third, an accused is not entitled to rely on his subjective "perceptions" of a complainant's "non-verbal responses" to his actions to ground a mistaken belief in consent where those responses are either the complainant's silence or ambiguous in themselves. Consent must be affirmatively communicated through express words or unambiguous affirmative conduct. To suggest otherwise is wrong in law.

257 Fourth, the jury should have been given guidance about how to evaluate Barton's claimed mistaken belief in consent. At a minimum, the jury should have been told:[115]

> I am instructing you as a matter of law that a mistake by Barton that Gladue's silence, passivity or ambiguous conduct constituted consent to the sexual activity in question provides no defence. Nor does Barton's speculation about what was going on in Gladue's mind provide any defence. A mistaken belief in consent cannot be based on any of these considerations.

v. Instructions on Reasonable Steps Were Inadequate

258 The trial judge did tell the jury that the defence was only available if Barton took reasonable steps in the circumstances known to him to ascertain her consent. But the jury needed to know what s. 273.2(b) of the *Code* required of them. Under this section, mistaken belief in consent is not a defence where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." *This requires the application of a "quasi-objective test". The jury would first need to decide the*

circumstances known to Barton and then decide on an objective basis what reasonable steps should have been taken to ascertain consent.

259 Reasonable steps depend on the circumstances and these may be as many and varied as the cases in which the issue arises. That said, we reject the view that reasonable steps can equal no steps whatsoever. An accused's asking himself whether he should take a reasonable step is not itself a reasonable step. To suggest that reasonable steps means *no steps* flies in the face of the definition of "consent" under s. 273.1(1) and Parliament's requirement under s. 273.2(b) that an accused must have taken reasonable steps to ascertain *consent* in order to advance the defence of mistaken belief in consent. This idea resurrects yet again the debunked theory that unless and until a woman objects to, or resists, sexual activity, she is consenting to that activity.

260 It also assumes that all women in Canada, single, married or in an intimate relationship, are walking around this country -- whether in their home, on a date, at work, at a restaurant or wherever -- in a state of continuous consent to sexual activity unless and until they say "no". This is not the law. As for those who question, as defence counsel did here, "what's a man to do", the answer can be summed up in one word: "ask".[116] This is hardly an onerous obligation to impose on anyone intent on engaging in sexual activity with another person. It is respectful of sexual autonomy and human dignity. It is also consistent with the equality rights of women.[117]

261 Parliament introduced the reasonable steps requirement to prevent sexual assault through miscommunication. Its objective in doing so was to restrain a defence based on an unreasonable belief in consent. There is no doubt that the reasonable steps requirement was intended to remedy an unfair imbalance in the criminal law as between men and women involving sexual offences. Mistaken belief in consent is a common law defence. It was the judiciary that decided this defence could be advanced no matter how unreasonable an accused's belief might be. Parliament overruled these discriminatory aspects of the common law through amendments to the *Code*.

262 Section 273.2(b) is one of several statutory reforms implemented through the years in an effort to overcome the inequities that disadvantaged women under the common law. Section 28 of the *Charter* provides that notwithstanding anything in the *Charter*, the rights and freedoms contained therein are guaranteed equally to male and female persons. This includes not only equality rights under s 15 but also the right to security of the person under s. 7. Given women's equality rights, including s 28 of the *Charter*, the criminal law in substance and in application must balance rights so that women substantively enjoy the equal benefit and equal protection of the law as do men. Sexual prerogative is not a guaranteed right under the *Charter*. But equality is. In the context of sexual offences, it comes down to this. An accused is entitled to a fair trial, not a fixed one.

> 263 *Therefore, this jury needed to understand that they were required to consider*:
>
> (1) *What facts were known to Barton* when he decided to repeatedly thrust his hand up and into Gladue's vagina with an increased degree of force, invasiveness and duration?
>
> (2) *What steps would a reasonable person have taken in those circumstances to ascertain whether Gladue was consenting to what he proposed to do?*
>
> (3) *Were those steps taken?*
>
> 264 These or similar organizing questions were never provided to the jury: see *R. v. Malcolm*, 2000 MBCA 77, at para 24, 147 CCC (3d) 34, leave to appeal to SCC refused, 28153, [2000] S.C.C.A. No. 473 (18 January 2001). The result was necessarily a flawed and incomplete understanding of the tests to be employed. This too was fatal to the verdict: *Dippel*, *supra* at para. 15.
>
> [my italicization]

[24] In relation to determining whether there is proof beyond a reasonable doubt of the essential elements of the offence, I am guided by the so-called *WD* instruction:

1. If I believe Mr. Shamsuddin's evidence that he did not commit the offence charged, I must find him not guilty;
2. If, after a careful consideration of all the evidence, I do not believe Mr. Shamsuddin's evidence that he did not commit the offence, but I am left with a reasonable doubt by his evidence.[19] I must find Mr. Shamsuddin not guilty, because the Crown would have failed to prove his guilt beyond a reasonable doubt; and
3. Even if Mr. Shamsuddin's evidence does not leave me with a reasonable doubt about an essential element of the offence, I may only find him guilty on the rest of the evidence that I accept, if it proves his guilt beyond a reasonable doubt.

The evidence presented beyond that of Mr. Shamsuddin and JB

[19] Although sometimes this situation is described; where the accused testifies, as "I am unable to decide whether to believe Mr. Shamsuddin or JB", that statement standing alone, is misleading, because it wrongly suggests that deciding on guilt involves a court picking whether "he" or "she" should be believed. Moreover, there is no burden on the accused to prove they are "not guilty". The Crown always has the burden to prove an accused is guilty beyond a reasonable doubt.

[25] Photos were introduced through Sgt. Patrick Tucker, as Exhibit 1.

[26] Brian Arbuckle was working as one of two security guards for the building on a shift, 6:00 p.m. on August 28 to 7:00 a.m. on August 29, 2015. He testified that sometime between 4:30 a.m. to 5:00 a.m. there was an altercation when he was doing his rounds and his partner called him to come to the first floor. Upon his arrival at the entrance area by Apartment 106, they heard loud noises and screaming. They heard two voices. As he went towards the door it "came flying open" within a minute of his arrival. JB was standing there saying "she had been raped" and was not leaving the apartment until the police came. She was holding a tampon in front of her the whole time, and was pointing at her crotch while holding it claiming it was inside of her vagina when she arrived at the apartment. He spoke to her for 3 to 4 minutes and then then the door slammed shut again. He called for police although he believed she may have already called them or was going to call them shortly. He continued to hear screaming from the apartment. He monitored the door thereafter and it was only opened again after police showed up.[20]

[27] Constables Oostveen and Comer received a call from dispatch at approximate 6:16 a.m. They attended at the scene by 6:30 a.m. They recited their observations of Mr. Shamsuddin, JB and IG, and the premises at 106, 101 Nova Court, Dartmouth.[21]

[28] Generally, the evidence establishes that throughout the evening and early morning, there were three persons present in the apartment: Mr. Shamsuddin, JB, and IG, a friend of Mr. Shamsuddin. All the evidence suggests that IG slept on the floor on a rug and under a blanket nearby to the only bed in the apartment. The officers saw him in the apartment when they first entered it. IG did not testify.

[29] JB claimed that she was raped after she had "passed out" due to intoxication and the need for sleep. Around 7:05 a.m., they made arrangements for her to be taken for an examination at a hospital by SANE (Sexual Assault Nurse Examiner) personnel. Constable Penfound drove JB to the Dartmouth hospital for the examination. They arrived at 7:14 a.m.

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[20] Insofar as his suggestion that the time was 4:30 – 5:00 a.m., I accept that he went directly to the first floor when he was called, and approached Apartment 106 within a short time thereafter, and that shortly after JB's contact with him just outside the apartment, he called police. Although the police dispatch called Constables Oostveen and Comer at 6:16 a.m., I bear in mind that they testified in the *voir dire* that their shift only started at 5:50 a.m., and conclude it likely that the calls from JB and Brian Arbuckle to police, were made between 4:30 – 5:00 a.m. In this respect I note, and accept Mr. Shamsuddin's evidence, that the police did not come for one and a half to two hours after they were contacted – p. 260(17), Transcript.

[21] Counsel agreed their evidence from the *voir dire* could be applied to the trial to supplement their trial testimony.

[30] Constables Oostveen and Comer testified that they observed several "cold shots" cans on the floor. Their opinions were that JB had been drinking and might still be impaired by alcohol; she remained upset and angry throughout their contact with her. Although Mr. Shamsuddin and IG were considered to be in a similar state of impairment by Constable Oostveen, they were observed to be calm and were "giggling back-and-forth" by both constables.

[31] Annette MacDonald was qualified by the court as an expert in relation to "the nature and significance of injury to the female genitalia in the context of sexual assaults", as well regarding the forensic examination of alleged sexual assault victims, and specifically to relate her examination and observations of JB.

[32] JB was at the hospital intermittently with SANE staff between about 8:45 a.m. and 11:30 a.m. on August 29, 2015. Ms. MacDonald's observations confirmed that JB was having her menstrual cycle.

[33] After preliminary screening for forensic foreign material using a fluorescent light, which revealed only two locations of interest: on JB's Labia and around the anal area. She swabbed those areas and treated the swabs thereafter according to forensic standards – they were turned over to police. Mr. Shamsuddin does not contest continuity of the exhibits once handed to the police.

[34] Marc Lett testified. He is an RCMP Forensic Specialist with Biology Services, Forensic Science and Identification Services, National Forensic Laboratory Services – Ottawa.[22]

[35] He was qualified by me to give opinion evidence.

[36] I accepted his qualifications as an expert, able to provide evidence on the interpretation and reporting of bodily fluids identification test results, and the interpretation and comparison of DNA typing profile results and forensic application of statistics, thereby able to form opinions regarding the chances that some other person than that identified in control samples, contributed DNA to the sample in question.

[37] The upshot of his evidence is that the swabs taken from JB's labia and anal areas contained the DNA of Mr. Shamsuddin, such that the chances of another random individual of any racial origin providing that DNA sample, is "very very

[22] He is what is referred to as a DNA "reporting scientist" – this kind of evidence was canvassed in *R. v. Keats*, 2016 NSCA 94.

rare, approaching a probability of zero". It is a virtual certainty that it is Mr. Shamsuddin's DNA. I also accept his opinion that, because while technical staff were doing the DNA extraction the amount of male DNA increased so substantially between the first and second fractions used to extract the DNA, it is likely that Mr. Shamsuddin's DNA found on the swab from JB came from semen, a component of which is spermatozoa.

[38] I am satisfied that Mr. Shamsuddin's ejaculate was present on the body of JB on August 29, 2015, when she presented herself at the hospital, which were sourced from swabs taken on the labia and around the anal area.

Assessing the testimony of JB and Mr. Shamsuddin

[39] I had the opportunity to observe JB and Mr. Shamsuddin testifying at length. I carefully followed the evidence of each witness and watched the manner in which they gave their evidence. I took note of whether they gave it after due consideration, or volunteered answers before questions were finished; their gestures; their seriousness (reflecting a recognition of the serious nature of the proceedings); their composure and reaction, particularly under cross-examination; and the tone, and inflection, of their answers.

[40] Assessing credibility requires a recognition that credibility is a mixture of a witness' reliability (for example, are they now accurately recalling matters they had a proper opportunity to observe and commit to memory in the past?) and impartiality or honesty (are they appropriately disinterested in the outcome of the case, without appearing to favour the interests of one party over another?).[23]

[41] Some of the aspects that I have considered include:

1. Did the witness seem honest? Is there any reason why the witness would not be telling the truth? (Special considerations apply to the accused; see Justice Oland's comments, at paras. 8 - 12 in *R. v. J.A.H.*, 2012 NSCA 121);
2. Did the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?;

[23] Strictly speaking, these are separate concepts – namely, "credibility" is associated with veracity/honesty and "reliability" is concerned with accuracy – *R. v. Perrone*, 2015 SCC 8, affirming 2017 MBCA 74, at paras. 25-27 and 48. However, for convenience when I speak of credibility, I am considering both a witness' honesty and reliability.

3. Did the witness seem able to make accurate and complete observations about the event? Did they have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine?;

4. Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which they testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions?;

5. Did the witness appear to be reporting to the Court what they had heard or seen themselves, or simply putting together an account based on information obtained from other sources rather than personal observation?;

6. Did the witness' testimony seem reasonable and consistent as they gave it? Is it similar to or different from what other witnesses said about the same events? Did the witness say or do something different on an earlier occasion? This involves a consideration of whether the witness' evidence is externally consistent - that is, whether their evidence is consistent with independent witnesses' testimony and exhibits which are accepted by me; and internally consistent - that is whether their evidence is consistent throughout their testimony, does it change while on the stand, or is it logically at odds?

7. Do any inconsistencies in the witness' evidence make the main points of their testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because they failed to mention something? Is there any explanation for it? Does the explanation makes sense?

8. What was the witness' manner when they testified? How did they appear? I remind myself not to jump to conclusions, however, based entirely on how (attitude and demeanor) the witnesses testified because looks can be deceiving and giving evidence in a trial is not a common experience for most witnesses. I recognize people react and appear differently. They come from different backgrounds. They have different abilities, values and life experiences. I appreciate there

are simply too many variables to make the manner in which a witness testifies the only or most important factor in my assessment of their credibility;

9. I also concern myself with the sense of the evidence. Does common sense, life experience and logic, when applied to the testimony of the witness, suggest that the evidence is impossible, improbable or unlikely? And, what other results are there when I apply my common sense to the evidence?; and

10. I will consider the exhibits that are filed, and similarly the evidence of the peripheral witnesses, such as Constables Oostveen and Comer, Brian Arbuckle, Annette MacDonald, and Sgt. Tucker. With these in mind, I now turn to the assessment of the credibility of the main witnesses in the trial.

[42] I may accept none, some, or all, of the evidence of any witness.

The evidence that was not materially in dispute

[43] Much of the evidence of JB and Mr. Shamsuddin is generally consistent. They both agree that:

1. JB arrived at approximately 12:00 – 1:00 a.m.;
2. She requested to stay the night and Mr. Shamsuddin agreed – there was only one bed - a single bed - available;
3. JB was intoxicated when she arrived, and had with her eight cans of (cold shots) beers, a full pint of rum, and some "weed";
4. Mr. Shamsuddin and IG had to that point been smoking some "weed", but had not been consuming alcohol;
5. JB was near the end of her menstrual cycle, but still had a tampon inserted in her vagina;
6. For the next 3 to 4 hours they were drinking, smoking "weed", listening to music, dancing and relaxing. On two occasions, security had to come to insist they turn down the volume of the music (notably, the security desk is on the same floor and in close proximity to Mr. Shamsuddin's apartment);
7. JB had a further three (cold shots) beers, at least one glass with rum and pop in it, and shared in the smoking of 1 to 3 joints of "weed";

8. Mr. Shamsuddin had also shared in the smoking of 1 to 3 joints of "weed", and drank three (cold shots) beer cans;
9. It was dark when all three of them decided to go to sleep;
10. IG laid down on a rug with a blanket to cover him and pillow within 5 feet of the only bed, which was placed in the living room at the time;
11. JB laid down on the bed, wearing her blouse and spandex capri pants, and did not leave the bed before she fell asleep; and
12. Mr. Shamsuddin was the last to lay down. He got in the bed behind JB.

[44] As indicated above, there is no dispute that there was sexual intercourse, and that Mr. Shamsuddin ejaculated. I am satisfied beyond a reasonable doubt that his ejaculate was found on the labia of JB's vagina and around the anal area. I am further satisfied beyond a reasonable doubt that Mr. Shamsuddin used his penis to penetrate JB's vagina, while he was behind her. This caused the "rocking" motion which JB described.

The evidence of JB

[45] She testified that she started drinking beer at her friend's apartment in the daytime on August 28, 2015. She described herself as "intoxicated" by the time, when she later left to go to a nearby bar, where she had 3 to 4 beer over approximately one hour. She then went back to her friend's place to get her remaining liquor: an eight pack of (cold shots) of beer and a pint of rum. She was so intoxicated that she did not wish to take a chance on leaving the building, therefore she went directly to Mr. Shamsuddin's apartment, where she had stayed overnight before. I conclude it more likely than not that this was between 12:00 a.m. and 1:00 a.m. on August 29, 2015.

[46] She testified that after their brief discussion upon her arrival, she felt sure there was an agreement about sleeping arrangements, which was that only she would sleep in the only bed in the apartment. However, she did admit she did not specifically ask Mr. Shamsuddin where he would sleep. I infer that at the time, she believed that only she would sleep in the available bed. I am not satisfied that there was an agreement to that effect by Mr. Shamsuddin.

[47] Four hours later, when JB laid down on the bed, she would have been significantly intoxicated and very tired. Her admitted intoxication level existing at

the time she arrived at Mr. Shamsuddin's apartment was increased by the alcohol and "weed" she consumed there.

[48] I accept the evidence of Mr. Shamsuddin that it is more likely than not that JB consumed two of the (cold shots) beers and a significant portion of the pint of rum before she laid down on the bed.[24]

[49] There was no suggestion that IG had consumed any of the rum. JB herself testified that Mr. Shamsuddin, "wasn't drunk, intoxicated like that, no", at the end of the evening.[25]

[50] She testified that Mr. Shamsuddin put a blanket over her before she fell asleep,[26] and that it was dark then. She had no idea how long she had been asleep, before she noticed the feeling of her body "rocking."[27]

[51] Generally, I found she gave her evidence in a forthright manner. She readily conceded matters, including those that would place her in a less favourable light,[28] and did not attempt to embellish so as to place Mr. Shamsuddin in a less favourable light. Her evidence was consistent, in relation to the core facts, and is plausible when combined with all the other evidence I accept. Her powers of observation and recall were no doubt affected by her level of intoxication, and the passage of time. Although she testified honestly to matters as she believed them to be, the reliability of her evidence suffered particularly as her intoxication and tiredness mounted nearer to the time she went to bed.

[52] While she appeared frustrated and argumentative at times during the trial, I attribute this to the fact that she was unable to find an alternate caregiver for her very young son, who was present at trial, and needed extra attention because he was recuperating from surgery. In relation to inconsistencies between her trial testimony and earlier statements at the preliminary inquiry, generally I find these were not in relation to material matters, and could also be attributed to the stress associated with testimony regarding such highly intimate allegations, and because she had not testified before.

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[24] See pages 361(13), 362(12), 366(18) 373(12) and 383(17), Transcript.
[25] Page 69, Transcript.
[26] Page 27 (5); in his testimony he agreed that when he went to the bed the blanket was already on top of her- p. 259(4); and JB agreed: p. 94(9) and 97(1), Transcript.
[27] Page 25(5), Transcript.
[28] On cross-examination she was shown to be inconsistent at trial, with her preliminary inquiry testimony; e.g. where she said she did not have any of the rum to drink, but had testified at trial to the fact that she had been drinking from the rum bottle – p. 93(13). Further cogent examples were cited by defence counsel in closing submissions.

[53] In summary, on the core facts, I accept her evidence, as more likely than not, that:

1. She went to bed believing only she would sleep there;
2. She was in the process of falling asleep as Mr. Shamsuddin got into the bed; and
3. She did not consent (*re actus reus*) to any sexual activity with Mr. Shamsuddin thereafter.

The evidence of Mr. Shamsuddin

[54] Generally, I found he gave his evidence in a forthright manner. He readily conceded matters that would place him in a less favourable light, and he did not attempt to embellish so as to place JB in a less favourable light. His powers of observation and recall were generally better than that of JB. He was able to give with more precision, specific times when events happened, and greater detail surrounding the circumstances between 12:00 a.m. and 6:00 a.m. on August 29, 2015. This is particularly so in the interval just before the sexual activity took place. During very extensive cross-examination, he was asked many questions. Not once did he say that he did not remember. He answered the questions asked of him directly. In cross-examination, it was suggested to him that JB's pants had a button and zipper, and he conceded that he was unsure about this.[29]

[55] During closing submissions Crown counsel suggested that the defendant's counsel did not put the following evidence, referred to by Mr. Shamsuddin when he testified, to JB:[30] that after he ejaculated, JB straddled him and was angry for him not ejaculating inside her vagina; and that JB had earlier dramatically and purposefully dropped to the floor while they were dancing after she asked him whether he loved her, and he did not initially say that he did. Defendant's counsel responded that JB had a fair opportunity to address the core facts that she was alleging. I do not find these were sufficiently serious omissions by the defendant's counsel to warrant placing materially less weight on Mr. Shamsuddin's testimony to that effect, as may be required in appropriate cases by the rule in *Browne v. Dunn*, (1893), 6R. 67 (U.K.H.L.).[31]

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[29] Page 417(21)-418, Transcript.
[30] At pages 260 and 377 of the transcript respectively
[31] See *R. v. Mauger*, 2018 NSCA 41 at paras. 46-7 per Beveridge JA; *R. v. Voboriv*, 2018 ONCA 448, at paras. 42 – 43; and *R. v. Quansah*, 2015 ONCA 237, at paras. 75 – 86, per Watt J.A. I note that Mr. Shamsuddin had stated to

[56] His testimony was to the effect that he believed JB was interested in sexual activity with him based on a number of observations between 12:00 a.m. and 5:00 a.m.:

1. When she arrived, their discussion of where she would sleep, left open the possibility that he would sleep in the bed with her;[32]
2. That she asked him if he was single, and he asked her if she was single, and both responded "yes";[33]
3. She was dancing in a sexual manner with him (JB herself admitted that she was grinding her backside against his crotch area during these dances).[34]

[57] From his evidence, I accept that within five minutes of JB getting into bed, he got into the bed behind JB, took off (or at least partially down) his own jeans,[35] and not long thereafter, he pulled her pants sufficiently down to a point that he could penetrate her vagina with his penis, and that he did so until he was ready to ejaculate. He tried to ensure that he did not ejaculate inside her vagina.

[58] He does not claim that they had any discussion about this;[36] rather he claims that JB progressively communicated her consent to this sexual activity through her conduct over the ensuing less than 10-minute interval:

1. He hugged her from behind and touched her shoulder;
2. She helped him with her hand, to move her body so he could touch her breasts;
3. Once he began touching her breasts, she started pushing her backside more into his crotch area;
4. Next, he began to touch the area of her vagina, outside her pants; he sensed she was enjoying this more and more;

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police, which statement was admitted at the behest of the Crown, that "[JB] wasn't happy because I did not finish inside her." The Crown thus was aware before JB testified that this was Mr. Shamsuddin's evidence, even if he did not testify – JB could have been asked about that by the Crown.

[32] Page 294(10); and he told IG that he would be sleeping in the bed with her: Page 297(17), Transcript.

[33] Page 308-310, Transcript. I accept his evidence on this point.

[34] For example at pp.88-89; 375(20) -382(4), Transcript.

[35] Page 392 and 422(14) – Transcript.

[36] Pages 394-400, Transcript.

5. Then he attempted to pull down her spandex capri pants, and she assisted him by helping pull down one side of them with her hand;[37]
6. To make it relatively quick and quiet sex, particularly due to IG's close proximity to the bed, he deliberately had "quiet" sexual contact and intercourse with her;[38] and
7. He says that neither of them made any noises that might otherwise have been associated with the expected pleasurable aspects of the sexual activity.[39]

Why I find Mr. Shamsuddin "Not Guilty"

[59] It must be remembered that the question at the *actus reus* stage is whether there was "consent" in the mind of JB.

[60] I am satisfied beyond a reasonable doubt that Mr. Shamsuddin, with his fingers, touched JB on her breasts and vagina area, and had sexual intercourse with her, ejaculating as a result. I am satisfied it is more likely than not that JB did not consent to any of the sexual touching by Mr. Shamsuddin. However, I am left with a reasonable doubt as to whether, at the relevant times, JB did not consent.

[61] JB did not likely verbally communicate her consent to engage in any of this sexual activity. There is no direct evidence, *inter alia*, that: she verbally agreed to, (or was even simultaneously aware of), the removal of her tampon; or to unprotected sexual intercourse.

[62] The extent of what I will call, JB's "consensual conduct" according to Mr. Shamsuddin, was that: she lifted her body in order to allow him to reach under her so he could touch her breasts; shortly thereafter, she was pushing her backside towards him and enjoyed his touching her vagina area outside her pants; that she used one of her hands to help him pull her spandex pants down. I do not believe Mr. Shamsuddin's evidence more likely than not, when he suggests that JB *consciously and deliberately*, by her conduct, assisted him in the sexual activity he has described. However, I am not sure, beyond a reasonable doubt, that JB did not

[37] Notably, at this point he discovered she was wearing a tampon – he removed it and threw it. It landed near the bed where JB found it after she confronted him. She testified that initially he denied knowing where it was, but then he did tell her, and she was the one who picked it up.
[38] JB testified that when she realized her body was "rocking" back and forth, IG was still asleep on the floor near the bed.
[39] Page 421(1-7), Transcript.

move her body consciously and deliberately as Mr. Shamsuddin described, to facilitate his sexual touching of her.

[63] I conclude this recognizing that neither JB, nor Mr. Shamsuddin, said a word during the less than 10-minutes that the sexual activity continued, and that JB's body was largely passive during this interval.

[64] Having determined that there is a reasonable doubt about whether JB, in her mind, did not consent to this sexual activity, I go on to consider whether the Crown has proved that JB was *incapable of consenting* to that sexual activity because she was compelled to sleep by virtue of tiredness and intoxication, shortly after getting into the bed. The sexual activity happened almost immediately upon Mr. Shamsuddin's entry into bed. At the time of the sexual activity, from JB's evidence standing alone, I am satisfied that JB was "asleep",[40] and therefore incapable of consenting to the sexual activity more likely than not, however, largely due to Mr. Shamsuddin's evidence, I am left with a reasonable doubt about that.

[65] I have not lost sight of the jurisprudence, which confirms that I am entitled to consider JB's post-event emotional state. As Justice MacPherson stated for the court in *R. v. J.A.*, (2010) 261 CCC (3d) 125 (Ont. CA):[41]

> (1) The complainant's post-event demeanour
>
> 16 The appellant submits that the trial judge erred in law in his assessment of credibility by placing extensive emphasis on the demeanour of the complainant

[40] I accept that Mr. Shamsuddin spontaneously stated to police at 7:33 a.m. while in their custody: "she wasn't happy because I did not finish inside of her – it was semen on the sheets"; which is consistent with his testimony that JB, upon Mr. Shamsuddin's ejaculation, jumped on top of him and asked whether he had ejaculated inside her vagina, and she then became angry upon Mr. Shamsuddin telling her he had not, in order to avoid a pregnancy. His evidence is that this was the motivation for her expressed anger thereafter, which anger was still evident when the security guards and police arrived. I note that in her testimony, JB never complained about that fact to others. She complained that she had been "raped". Nevertheless, his evidence about her being awake, as well as the claimed consensual conduct, being so close in time to her getting into bed, and her immediate reaction, including her references to having him charged with "rape", *inter alia*, cause me to have a reasonable doubt: that there was no consent by JB to any of the sexual activity; that she was incapable of consenting; and that she did not communicate her consent by her conduct.

[41] Although this was reversed on appeal, [2011] 1 S.C.R. 628, this issue was not under appeal; see also the law referenced in *R. v. AHM*, 2018 ONCA 503, regarding victim's post-event flight (while naked) from the scene. I do not find that JB's statements and demeanour according to her, at the time, though they could in other circumstances, rise to the level of *res gestae* (see *R. v.* Shea, 2011 NSCA 107, at paras. 58-64, per Farrar J.A., leave to appeal denied [2012] SCCA No. 298) or a sufficiently reliable confirmation of the alleged offence (as an exception to the rule against prior consistent statements, see *R. v. Khan*, 2017 ONCA 114, at paras. 15-35 and 49, leave to appeal denied [2017] S.C.C.A.) respectively to allow me to conclude the offence has been proved beyond a reasonable doubt.

following the alleged assault. In particular, the appellant challenges this passage in the trial judge's reasons:

> I found the evidence of the complainant compelling, straightforward, credible, and supported by her demeanour after she left the house, in her contact with her neighbour, and shortly after when her husband attended to retrieve his clothing; and as well at the hospital and the Mountain Station when giving her initial statements.

17 I do not accept this submission. The use of evidence relating to the post-event demeanour (perhaps better described as post-event emotional state) of a complainant was described by this court in *R. v. Varcoe* (2007), 219 C.C.C. (3d) 397, at para. 33:

> K.F.'s emotional upset was manifest the day following the assault; it was apparent to and noted by her family. Such evidence is admissible and may be used to support a complainant's evidence of a sexual assault. See *R. v. Boss* (1988), 46 C.C.C. (3d) 523 (Ont. C.A.). The weight to be given this properly admissible evidence was exclusively a matter for the trial judge's discretion.

18 In light of *Varcoe* and *Boss* (both of which were cited by the trial judge in his reasons for judgment), it was clearly permissible for the trial judge to admit the evidence relating to the complainant's post-event emotional state soon after the incident. Nor, can there be any suggestion, in my view, that he gave this evidence too much weight. The key factor in the trial judge's reasons was his belief in the complainant's testimony on the witness stand; he called it "compelling, straightforward, credible." In support - but only in support - of this testimony, the trial judge relied on several other factors, including her post-event emotional state in several settings. This is a question of weight which, as *Varcoe* prescribes, is "a matter for the trial judge's discretion."

[66] However, as Winkler CJ.O. stated in dissent, such evidence must be approached with caution:

> 97 Another area where the trial judge fell into reversible error was in his treatment of the demeanour evidence. In this case there were three separate segments of evidence relating to the post-incident demeanour of the complainant: (1) immediately after the incident at her friend's house; (2) later that day when giving a statement to the police, which began at the hospital and continued at the police station; and (3) two days later at her house when the appellant was escorted to the house by the police to obtain some of his personal belongings. I note that the trial counsel objected to the third segment of this evidence, prior to its introduction.
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> 98 With respect to demeanour evidence, the trial judge made reference to *R. v. Varcoe* (2007), 219 C.C.C. (3d) 397 (Ont. C.A.). *Varcoe* followed *R. v. Boss* (1988), 46 C.C.C. (3d) 523 (Ont. C.A.), which, in turn, followed *R.*

v. Murphy, [1977] 2 S.C.R. 603. The trial judge relied on this line of cases in support of the proposition that evidence of the complainant's demeanour is admissible in sexual assault cases. In *R. v. Lindsay*, 2005 CanLII 24240 (Ont. S.C.), at para. 159, Fuerst J. summarized the relevant considerations underlying this proposition:

> I agree that it can be dangerous to place weight on a witness's demeanour when he or she testifies. It is well-established, however, that evidence of a complainant's emotional state after an alleged offence may constitute circumstantial evidence confirming that the offence occurred, depending on the circumstances of the case, including the temporal nexus to the alleged offence and the existence of alternative explanations for the emotional state. [Citations omitted.]

99 I am not satisfied by the trial judge's reasons that he adequately directed himself on this issue, in particular relating to the existence of alternative explanations for the emotional state of the complainant. Where there are alternative explanations, some inculpatory and some not, and the precise explanation is not identified, the demeanour evidence is ambiguous. Such evidence is not relevant and should not be admitted without a proper foundation being established for its admissibility. Ambiguous demeanour evidence can be highly prejudicial and is of no probative value.

100 In my view, there are a multitude of possible reasons for the emotional state of S.A. arising out of the circumstances of the family dispute which are consistent with her behaviour on other occasions. In *R. v. Morelli* (2010), 316 D.L.R. (4th) 1 (S.C.C.), Fish J., writing for the majority of the Supreme Court of Canada, referred, at para. 91, to drawing an inference in such circumstances as "to speculate impermissibly." The reasoning of the trial judge that the demeanour of the complainant supported her credibility, to the ultimate effect that the evidence of the appellant was rejected, failed to take these considerations into account. The effect of this was that he improperly admitted this circumstantial evidence which was not relevant, thus committing an error of law.

101 The third element of demeanour evidence, to which defence counsel raised an objection at trial, highlights the point. Both police officers testified that they were with the complainant when the appellant was being escorted to the family home to retrieve his belongings. When this line of questioning was put to the first officer called to testify, defence counsel objected that this evidence had not previously been led through the complainant in her examination-in-chief. The trial judge overruled the objection.

102 The substance of the evidence given by the police officers was that the complainant became very distressed and upset when she saw the appellant being escorted into their home. However, neither officer apparently asked the complainant about the reasons why she had become upset. The trial judge inferred, improperly in my view, that the emotional state was caused by the alleged sexual assault, without considering any other possible reason. His reliance

> on this demeanour evidence to support his credibility finding represents "circular reasoning". As Doherty J.A. stated in *R. v. Portillo* (2003), 176 C.C.C. (3d) 467 (Ont. C.A.), at para. 37, in commenting on such circular reasoning, "on close analysis, that reasoning goes beyond inference to assumption and speculation." The only way such an inference can be drawn, to the exclusion of other possibilities, is if it is assumed *a priori* that the offence has taken place. In the absence of the offence, there would be no foundation for the inference.

[67] JB's post-event demeanour[42] is not determinative of the verdict, nor is it inconsistent with a "not guilty" verdict in the circumstances as I find them in this case. Even considering this demeanour evidence, does not change my assessment that Mr. Shamsuddin is not guilty.

[68] I have found it more likely than not, but not so beyond a reasonable doubt, that JB was asleep at the material times. Having found a reasonable doubt about JB's lack of consent and incapacity to consent, I could simply end my analysis and find Mr. Shamsuddin "not guilty". Nevertheless, I will go on to consider, presuming for the moment that Mr. Shamsuddin's testimony is truthful, whether there is an air of reality to his suggestion that he honestly, but mistakenly, *believed* that, by her conduct, JB was communicating her consent to the sexual activity, and that she was capable of consenting.

[69] Is there evidence on the record upon which a properly instructed trier of fact reasonably could find Mr. Shamsuddin had the required honest, but mistaken, belief?

[70] His testimony, if believed,[43] suggests that in response to his sexual touching and sexual intercourse, JB's body reacted as if she was communicating thereby that she was in agreement.

[71] At this stage, I must be satisfied only that there is *some* evidence that JB communicated her consent to engage in the sexual activity in question, was capable of giving her consent *and* that Mr. Shamsuddin believed she had the capacity to do

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[42] i.e. her persistently repeated angry accusations against Mr. Shamsuddin between 5:00 a.m. and 6:30 a.m., and her willingness to undergo the invasive, and embarrassing SANE process, including taking medication with its unpleasant side effects – see a discussion of the relevance of such evidence in *R. v. Mugabo*, 2017 ONCA 323. Defence counsel suggested JB may have undergone the SANE process to ensure that she would not become pregnant or to counter any STI she may have been exposed to, after "unwisely" engaging in unprotected sex. I find that unlikely to be the case.

[43] See *R. v. Howe*, 2015 NSCA 84; *R. v. Barton*, 2017 ABCA 216, leave to appeal granted [2017] SCCA 387; *R. v. Noftal*, 2018 ONCA 538, at para. 8; I bear in mind that as the court in *Barton* stated at para. 250: "… there will be no air of reality if one of the statutory bars in s. 273.2 is present."

so, and communicated that consent, based on the circumstances surrounding the events and behaviour of the involved parties.

[72] In my opinion, Mr. Shamsuddin's testimony does present, at least to a level of giving it an air of reality, a sufficient basis to require me to examine whether Mr. Shamsuddin had an honest, but mistaken, belief that JB had communicated her consent and was capable of giving consent.

[73] Mr. Shamsuddin is not saying that he believed JB consented because: she was silent, did not resist or otherwise object to what he was doing. He is saying that he believed that she actively, by her conduct, communicated her voluntary agreement to the sexual activity in question.

[74] Let me then turn back to a consideration of whether the Crown has proved beyond a reasonable doubt that that Mr. Shamsuddin did not have an honest, but mistaken, belief.

[75] Mr. Shamsuddin's honest, but mistaken, belief that JB was consenting and capable of consenting, cannot arise from his self-induced intoxication, recklessness or wilful blindness; or from him not taking reasonable steps, in the circumstances known to him at the time, to ascertain that JB was communicating her consent.

[76] I conclude his level of intoxication did not play a material part in his claimed honest, but mistaken, belief.

[77] Regarding the *honesty* of Mr. Shamsuddin's belief, I am satisfied that at least a reasonable doubt exists regarding whether Mr. Shamsuddin knew, was reckless;[44] or wilfully blind,[45] that JB was, not communicating her voluntary agreement to the sexual activity, and incapable of consenting.

[78] Did Mr. Shamsuddin take *reasonable* steps, in the circumstances known to him at the time, to ascertain whether JB 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.

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[44] i.e. that he saw a risk that JB would not voluntarily agree to participate in the sexual activity, but went ahead anyway in spite of that risk.

[45] i.e. that he was aware that he needed to find out whether JB would agree to participate in the activity, but did nothing about it because he didn't want to know the truth.

[79] The circumstances here are not like those in *R. v. Dippel*, 2011 ABCA 129.[46] In *Dippel*, the accused and complainant were virtual strangers coincidentally present in the same location, however the court made some comments which are helpful in the present case:

> 22 Further, and even more basic, aside from an accused's subjective belief is the objective requirement that an accused take "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting": s. 273.2(b). As observed by Justice Wood of the British Columbia Court of Appeal in *R. v. G.(R.)* (1994), 53 B.C.A.C. 254, 38 C.R. (4th) 123 at para. 29:
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> > ... s. 273.2(b) clearly creates a proportionate relationship between what will be required in the way of reasonable steps by an accused to ascertain that the complainant was consenting and "the circumstances known to him" at the time. Those circumstances will be as many and as varied as the cases in which the issue can arise, and it seems to me that the section clearly contemplates that there may be cases in which ... nothing short of an unequivocal indication of consent from the complainant, at the time of the alleged offence, will suffice to meet the threshold test which it establishes as a prerequisite to a defence of honest but mistaken belief. [emphasis added]
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> 23 The respondent, by his evidence and his submissions at trial, seemed to suggest that it was entirely reasonable for him to rely on the complainant's failure to resist one level of sexual assault as a means of determining whether she was consenting to a higher level of assault. That is neither a reasonable step nor a tenable position. Doing nothing to ascertain that a person is consenting to sexual activity does not constitute a reasonable step. And committing a less serious sexual assault as a test of whether the person affected "consents" to more serious sexual activity is not a reasonable step either.
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> 24 Further, this is one of those situations that required an unequivocal communication of consent. The fact that the individuals were complete strangers and she was asleep at the time, would require a reasonable person in the respondent's position to clearly ascertain that the complainant was consenting to engage in sexual contact with *him*: *R. v. Crangle*, 2010 ONCA 451, 266 O.A.C. 299, leave to appeal to SCC refused: 33768 (December 23, 2010), [2010] S.C.C.A. No. 300. The observations of Abella J.A. (as she then was), in *R. v. Osvath* (1996), 46 C.R. (4th) 124 at para. 29, 87 O.A.C. 274 (C.A.), a case factually very similar to the case at bar, are also apposite:

[46] Referred to with approval in *Barton*, at para. 250; and *R. v. IEB*, 2013 NSCA 98. See also *R. v. Cornejo*, (2003) 181 CCC(3d) 206(Ont. CA), at paras. 20-23, per Abella J.A. (as she then was); leave to appeal denied [2004] SCCA No. 32, and Justice Kenneth L. Campbell's decision in *R. v. Mirzadegan*, 2018 ONSC 3449, at paras. 113-114.

> Anyone seeking sexual activity in these circumstances could hardly fail to know that he was obliged, at a minimum, to let the person from whom permission for such activity was sought, know who was seeking the consent. Consent is not given or refused in a vacuum - it is given or refused to a particular activity with a particular individual. [emphasis added]

[80] What is significant are the court's comments that an examination of the reasonableness of the steps taken by Mr. Shamsuddin necessarily involves a consideration of the proportionality between what should be required of Mr. Shamsuddin insofar as taking reasonable steps to ascertain JB was capable of, and did communicate her consent, and "the circumstances known to him" at the time.

[81] Here, Mr. Shamsuddin testified, and JB basically agreed, that at no time before JB laid down in the bed, had they expressly agreed upon who would be sleeping in the single bed available in the apartment. JB believed only she would be; Mr. Shamsuddin believed early on after JB's arrival, that there was a 50/50 chance, but later believed it was a virtual certainty, that they would sleep together in the bed when festivities in the apartment ended at approximately 4:00 a.m. I accept that Mr. Shamsuddin told JB that he was "single" and that JB told him she was also "single". The two were not strangers. Their shared history likely informed their respective perspectives and decision-making that day. When asked in cross-examination whether they had kissed while in the bed together, he answered that JB knew that he did not like to be kissed. He honestly believed that JB was interested in sexual activity with him. JB agreed that consensual sexual activity had already taken place while they were dancing in his apartment.

[82] Generally, I found Mr. Shamsuddin's testimony more reliable largely due to his lesser state of intoxication. I accept his testimony that it was during the later portion of the early morning, and as recent as just before JB went to bed that they were, as Mr. Shamsuddin characterized it, "sexy dancing".

[83] While I fully recognize that JB's conduct prior to the sexual activity is not relevant to whether she consented in her mind to any sexual activity or not, however, an assessment of Mr. Shamsuddin's claimed honest, but mistaken, belief in her communication of consent and capacity to consent necessarily requires an examination of the circumstances, including her conduct leading to the sexual activity, to assess whether that conduct could have a bearing on my factual assessment of the honesty of Mr. Shamsuddin's belief. From Mr. Shamsuddin's testimony, it is clear that he considered the "sexy dancing" and JB's move to the

bed as one continuum, during which JB had signalled her interest in a sexual activity with him.

[84] Mr. Shamsuddin says that JB was awake when he came to the bed. He slipped in behind her. He honestly believed that, in the circumstances, she would prefer that their sexual intimacy be as quiet as possible.

[85] It is not fanciful or speculative to conclude that, JB's body reflexively reacted to the intimate touchings by Mr. Shamsuddin, in a manner that was sufficiently suggestive as an expression of her agreement to the sexual activity in question, to cause Mr. Shamsuddin to honestly, but mistakenly, believe that JB was capable of, and was in fact communicating her consent to the sexual activity.[47] In these particular circumstances, I am left with a reasonable doubt regarding whether Mr. Shamsuddin did not take reasonable steps to ascertain that JB was communicating her consent to the sexual activity, and was capable of consenting.

Conclusion

[86] I have a reasonable doubt about whether JB did not consent to, and she was incapable of consenting to, the sexual activity. While I have serious concerns regarding some of the events as described by Mr. Shamsuddin, I still have a reasonable doubt about whether he had the necessary *mens rea* to commit the offence.

[87] Therefore, I must find him not guilty.

Rosinski, J.

[47] While in a different factual context, such reflexive actions were discussed in *R. v. Fontaine*, 2017 SKCA 72.