Case Name:

R. v. McKinnon

Between
Her Majesty the Queen, and
Ernest McKinnon, Accused

[2018] O.J. No. 6372

2018 ONSC 4781

Court File No.: 7723/17

Ontario Superior Court of Justice

E.E. Gareau J.

Heard: July 18-20, 23 and 24, 2018.
Judgment: October 5, 2018.

(96 paras.)

Counsel:

David Kirk/Marie-Eve Talbot, Counsel for the Crown.

Bruce Willson, Counsel for the Accused.

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REASONS FOR JUDGMENT

1 E.E. GAREAU J.:-- This matter proceeded to trial over five days in July 2018.

2 The accused entered pleas of not guilty to the five charges set out in an Indictment dated

February 7, 2017

3 The allegations involving the accused relate to one complainant, J.B., and events which occurred on one date, namely, February 4, 2016.

4 Count 1 in the Indictment alleges a sexual assault, contrary to s. 271 of the *Criminal Code of Canada.* Count 2 alleges unlawful confinement, contrary to s. 279(2) of the *Criminal Code of Canada.* Count 3 alleges the accused surreptitiously made visual recordings of J.B. in a circumstances that gave rise to a reasonable expectation of privacy, contrary to s. 162(1) of the *Criminal Code of Canada.* Count 4 alleges an assault on J.B., contrary to s. 266 of the *Criminal Code of Canada.* Count 5 alleges sexual assault with a weapon, being an unknown object, contrary to s. 272(2)(a) of the *Criminal Code of Canada.*

FACTUAL BACKGROUND

5 The pertinent facts which lead up to the eventing of February 4, 2016 are not complicated. The complainant, J.B., is 52 years of age. She worked as a mobile dog groomer. The accused is 61 years of age. He is a bricklayer by training who at the time of the alleged incidents was working sporadically on contract jobs that were available to him.

6 It was the evidence of the accused that he met J.B. in 2011. They dated and resided together sporadically, the complainant living in Sault Ste. Marie, Ontario, and the accused maintaining a residence in Wawa, Ontario. On August 1, 2015, the accused purchased a residence in Sault Ste. Marie, Ontario. From the time this home was purchased, the accused and the complainant resided together in a common-law relationship until the events on February 4, 2016 unfolded.

7 The home purchased by the accused required renovations primarily in the upstairs area. The accused was doing this renovation work himself and he and J.B. resided primarily in the basement of the home while this renovation work was ongoing. They slept in a bedroom in the basement area of the home. This was the situation from the time the home was purchased until the evening of February 4, 2016. The accused acknowledged in his evidence at the trial that the interior of the home is accurately depicted in the compilation of photographs entered as Exhibit 1 (the Cst. Cyr Exhibit).

8 On February 4, 2016, the complainant J.B. left the home in the morning to perform her mobile dog grooming business. She spent the day on appointments with clients. The accused remained in the residence doing renovation work on the home throughout the day. It was the evidence of the accused that the complainant returned to the residence between 6:00 p.m. and 6:10 p.m. on February 4, 2016. That is when the events of that evening began to unfold.

The Law on the Issue of Consent

9 This is a case about consent. The complainant testified that the evening of February 4, 2016

started out with consensual sexual relations which led to non-consensual sexual relations, and that she did not consent to some of the sexual acts performed on her by the accused. The accused gave completely polar evidence that the evening of February 4, 2016 started as a consensual sexual activity and remained that way until the sexual activity was over. The accused testified that the complainant was actively engaged in the sexual experience, that she consented throughout and that he honestly believed that she consented, raising the defence of mistaken belief in consent.

10 In *R. v. Ewanchuk*, 131 C.C.C. (3d) 481, the Supreme Court of Canada comments on the issue of consent in offences involving sexual assault. Major J.A., speaking for the majority of the court, states at paragraph 23 of the reasons:

> A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

11 The Supreme Court of Canada goes on at paragraph 25 of the decision to state that:

> The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent...

As is stated by the Supreme Court of Canada, although the sexual nature of the assault is determined objectively, the absence of consent is determined subjectively, "and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred".

12 As is sated in paragraph 30 in *Ewanchuk*:

> The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

13 In *R. v. M.L.M.*, 89 C.C.C. (3d) 96, the Supreme Court of Canada makes it clear that lack of resistance on the part of the complainant is not to be equated with consent.

14 As to when mistaken belief in consent can arise in law, in the case of *R. v. Osolin*, 86 C.C.C. (3d) 481, the Supreme Court of Canada provides useful instruction. Paragraph 201 of that decision

raises the question as to when it is appropriate to consider a defence of mistaken belief in consent. As set out in that paragraph:

> [201] In what circumstances will it be appropriate to consider a defence of mistaken belief in consent? It is the position of the intervener, the Attorney General for Ontario, that the defence cannot arise in situations where the evidence of the complainant and the accused are diametrically opposed. For example, if the accused states that there was willing consent and the complainant denies any consent then the defence simply cannot arise. In such circumstances for a jury to accept the defence of mistaken belief in consent it would have to reject all the evidence given at the trial including that tendered by both the complainant (no consent) and that of the accused (willing consent). Indeed in order to give effect to the defence a jury would have to speculate upon and give effect to a third version of events which was not in evidence.

15 The court answers this question raised in paragraph 204 and 205 of its decision in *Osolin* as follows:

> [204] I agree with this position. The defence of mistake may arise when the accused and the complainant tell essentially the same story and then argue that they interpreted it differently. Realistically it can only arise when the facts described by the complainant and the accused generally correspond but the interpretation of those facts leads to a different state of mind for each of the parties. In a situation where the evidence given is directly opposed as to whether there was consent, the defence of mistake as to consent simply cannot exist. However, even in the absence of that defence, the jury will nonetheless be bound to acquit if it has a reasonable doubt as to whether there was consent in light of the conflicting evidence on the issue. Lack of consent is an integral element of the offence. In cases where there is conflicting evidence on the issue the trial judge will always direct the jury that they must be satisfied beyond a reasonable doubt that consent was lacking.

> [205] It should be emphasized once again that the defence of mistaken belief in consent will be invoked rarely. In the vast majority of cases a sexual assault does not occur as a result of accident or mistake. It is simply not a crime that lends itself to commission by mistake or by accident. As Dickson J. dissenting in *Pappajohn, supra*, stated, at p. 155, it is not a crime that is committed *per incuriam*. Indeed it may well be appropriate for a trial judge to charge a jury that in the usual course of events this is not a crime that can be committed accidentally.

16 The Supreme Court of Canada makes similar comments as those made in *Osolin* as to the availability of the defence of mistaken belief in consent in *R. v. Park*, 99 C.C.C. (3d) 1. In the case at bar, there are two diametrically different version of events given by the complaint, J.B., and the accused. The court in *Park* gave the following direction with respect to cases where these diametrically opposed versions exist in the evidence at paragraphs 22 to 26 of its reasons as follows:

> [22] It is true that in cases where the defence of honest but mistaken belief is not put to the jury, there is often a considerable divergence between the evidence of the accused and that of the complainant (*Pappajohn*, *supra*; *R. v. Guthrie* (1985), 20 C.C.C. (3d) 73 (Ont. C.A.); *R. v. White* (1986), 1986 CanLII 1145 (BC CA), 24 C.C.C. (3d) 1 (B.C.C.A.); *R. v. Osolin*, *supra*; and *R. v. Livermore* (1994), 1994 CanLII 693 (ON CA), 18 O.R. (3d) 221 (C.A.)). The significance of diametrically opposing stories is often misunderstood in two respects, however.
>
> [23] First, it is important to recall that the two individuals' stories are only relevant to guilt or innocence of sexual assault in so far as they relate in some way to the circumstances affecting the parties <u>at the time of the alleged assault</u>. Beyond evidence such as the location and time of the alleged assault and the conduct of the two parties at that time, this includes relevant and admissible background facts which explain how the accused could have honestly interpreted the complainant's conduct at the time of the alleged assault to mean that she was consenting. For instance, this Court has recognized that passivity may express lack of consent (*R. v. M. (M.L.)*, 1994 CanLII 77 (SCC), [1994] 2 S.C.R. 3). Taken together with passive behaviour by the complainant, earlier acts, gestures or incidents may in certain cases colour the accused's perception of the complainant's behaviour, and serve as relevant evidence in assessing the existence or air of reality of an honest but mistaken belief in actual consent. Those acts and gestures may form part of a broader context or continuum which is necessary to understand the accused's honest perception of the complainant's behaviour at the time of the alleged assault.
>
> [24] At the same time, it must always be remembered that consent, even if given at one point, may be withdrawn at any time. Consequently, it can be dangerous to assume that evidence capable of founding an honest belief on the part of the accused that the complainant <u>would</u> consent to sexual activity is informative of the real question at issue, which is whether the accused believed that the complainant <u>in fact</u> consented to that activity. An honest belief that the complainant <u>would</u> consent is not a defence to sexual assault where the accused is aware of, or wilfully blind or reckless as to, lack of consent at the time of the sexual activity. Only where an accused entertains an honest belief that the

complainant actually does consent does this mistake render the sexual assault non-culpable. Absent some realistic showing of how earlier events could have influenced the accused's honest perceptions of the complainant's behaviour at the time of the actual assault, such evidence will not be capable of supporting, by itself, the defence of honest but mistaken belief in consent.

[25] Secondly, the fact that stories are diametrically opposed, as well as the degree to which they are opposed, is but one factor in the air of reality determination. Instances in which stories are diametrically opposed and where there is no air of reality are, in fact, specific applications of the air of reality threshold. They are not intrinsic to the test, itself. The question is not whether two stories are so diametrically opposed that there can be no air of reality to the defence of mistaken belief in consent. This approach ignores the presence of other factors, such as corroborative evidence, which may nonetheless justify putting the defence of honest mistake to the jury (see *Bulmer*, *supra*). Rather, we must bear in mind that neither the version of the facts given by the complainant nor that given by the accused is necessarily a full and complete account of what actually took place and, as such, a jury may decide not to believe certain parts of each person's testimony. Thus, the question is whether, in the absence of other evidence lending an air of reality to the defence of honest mistake, a reasonable jury could cobble together some of the complainant's evidence and some of the accused's evidence to produce a sufficient basis for such a defence. Would the acceptance of one version necessarily involve the rejection of the other? Put another way, is it realistically possible for a properly instructed jury, acting judiciously, to splice some of each person's evidence with respect to the encounter, and settle upon a reasonably coherent set of facts, supported by the evidence, that is capable of sustaining the defence of mistaken belief in consent? If the stories cannot realistically be spliced in such a manner, then the issue really is purely one of credibility -- of consent or no consent -- and the defence of mistaken belief in consent should not be put to the jury.

[26] To summarize, when the complainant and the accused give similar versions of the facts, and the only material contradiction is in their interpretation of what happened, then the defence of honest but mistaken belief in consent should generally be put to the jury, except in cases where the accused's conduct demonstrates recklessness or wilful blindness to the absence of consent. On the other hand, courts have generally refused to put the defence of honest but mistaken belief in consent to the jury when the accused clearly bases his defence on voluntary consent, and he also testifies that the complainant was an active, eager or willing partner, whereas the complainant testifies that she vigorously

> resisted. In such cases, the question is generally simply one of credibility, of consent or no consent. [Emphasis in original]

17 As to the air of reality test, as stated in paragraph 20 in the case of *R. v. Chan*, 195 C.C.C. (3d) 301, a decision of the Nova Scotia Court of Appeal,

> The air of reality is concerned only with whether or not a putative defence should be put into play, in other words, left with the jury for its consideration.

18 The air of reality test was considered by the Supreme Court of Canada in *R. v. Cinous* (2002), 162 C.C.C. (3d) 129. As the court held in that case,

> The issue is whether a defence rests upon an evidential foundation warranting that it be put to a jury. (Para. 60)

19 In the case before me it is impossible to take the evidence of the complainant and the evidence of the accused and cobble together aspects of both versions of events to support a defence of honest mistaken belief in consent. This defence has no air of reality and would not be put to jury if this was a trial with a jury as the trier of fact. Rather, in my view, the case at bar reduces itself to whether there was consent or there wasn't consent resting on the credibility of the evidence of the complainant, J.B., and the accused.

The Evidence

20 The Crown called as witnesses three officers with the Sault Ste. Marie Police Services who were involved with various aspects of the investigation into this matter. Staff Sergeant Tom Armstrong testified that on February 4, 2016 at 2150 hours he received a call concerning a female person who was at a home in Sault Ste. Marie, Ontario. He identified a Karen Hall as being the owner of the home. He testified that he saw J.B. talking to other officers and that he observed J.B. to be "upset and distraught". Sergeant Armstrong testified that he attended at the residence of the accused which was close to the residence of Karen Hall. He entered the home of the accused through the rear door. Staff Sergeant Armstrong testified that the purpose of entering the home was to secure the property for the purpose of gathering evidence for the investigation. There was nothing seized at that time as a search warrant was being obtained. The premises were secured until the search warrant was obtained and could be executed at the home. Staff Sergeant Armstrong indicated that he saw the accused outside in the driveway area of the home and that the accused was arrested.

21 Constable Spencer Guild was working with Constable Johns on the evening of February 4, 2016. He testified that he was dispatched related to a "domestic complaint" and arrived at the home of Karen Hall at 2158 hours. Constable Guild met the homeowner Karen Hall and was told that J.B. had come into her yard. Constable Guild did not speak to J.B. From Ms. Hall's residence, Constable Guild went to the accused's residence to basically secure the home so that any evidence at that home could be preserved. Constable Guild indicated that he arrived at this residence at 2215 hours and

that no one was around but there were dogs in the residence. Constable Guild testified that he entered the residence through an unlocked rear door and did so to look for the accused and to protect evidence that may be inside the residence. At some point, Constable Guild looked outside through a window in the home and saw a person walking toward the driveway. That person was the accused, who was arrested by Constable Johns at 2225 hours or 10:25 p.m. Constable Guild indicated in cross-examination that there was a marked police cruiser in the driveway at 39 Celine Court, and that it would have been plain to anyone that the police were at that residence.

22 Constable Michael Rogers is part of the Technological Crime Unit at the Sault Ste. Marie Police Services. Constable Rogers extracted data seized from the Acer laptop and Samsung Galaxy S4 mini cellphone seized from the residence of the accused. There is no dispute that these items were found in the residence of the accused and that they belong to the accused. The findings of Constable Rogers from this forensic extraction are contained in his report which was entered as Exhibit 2 in the trial. Nothing of evidentiary value was found on the Acer laptop. Constable Rogers indicated that he used a universal forensic extraction device to retrieve photo images from the cellphone belonging to the accused. These cellphone images are reproduced in Exhibit 2 and contain images of the complainant in various sexual positions and some images of the accused engaged in sexual activity with the complainant. The accused admits that he took these pictures and that he is in some of them. There is no issue that the complainant is the person in the photos on the cellphone. The images in the pictures were very graphic.

23 With respect to the time the pictures on the cellphone were taken, it was the evidence of Constable Rogers that the pictures start at 8:18 p.m. and concluded at 8:57:58, meaning that there is 39 minutes of activity with respect to picture taking by the accused. Some images have sequential numbers, such as photos 417, 418, 419, 420, 421, as shown in Exhibit 2, Tab 2. It was the evidence of Constable Rogers that these images were possibly taken in sequence with the number created by the phone as the images are saved on the phone to the data base.

24 As is indicated in Exhibit 2, Tab 1, and testified to by Constable Rogers in his evidence, two images, numbered 17 and 18, were deleted on the cellphone. Image 17 was a blurry picture and image 18 showed the face of the accused near the vagina of the complainant.

25 The photographs of the interior of the residence of the accused and where various items seized within that home were located within that residence were entered as Exhibit 1, referred to as the Constable Cyr Exhibit. These photographs were taken by Constable Cyr. He did not testify at the trial but on consent portions of his "will say" statement were read into the court record. Details of this are as follows:

> On February 5, 2016 at 4:20 p.m. he attended at 39 Celine Court, Sault Ste. Marie, Ontario with a search warrant. He seized items located in the basement of the home. The items seized and tagged included the following:

> Acer mini laptop; black marker; blue hair elastic in box on nightstand; purple vibrator in box on nightstand; pen cap; lubricant; Samsung smart phone found close to the lubricant; vibrator attachment in bed under the sheet; white box with elastics on a nightstand.

Photographs of these items were taken, which form part of Exhibit 1.

The Evidence of the Accused, E.M.

26 The accused testified at the trial. This brings the principles of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, into play. The court must consider these principles when considering the evidence of the accused and whether the evidence convinces the court beyond a reasonable doubt of the guilt of the accused. In *W.(D.)*, the Supreme Court of Canada stated at paragraph 28:

> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury or the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused, but you are left in a reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

27 This formula of the court reinforces the principle that the Crown must prove the guilt of the accused beyond a reasonable doubt, which is a cornerstone in the criminal justice system in Canada.

28 The accused testified that when the complainant arrived home she told him that she was going to relax for one hour and "then I am taking a shower and we can have sex". The accused agreed. They did in fact have a shower together after which they proceeded to the downstairs bedroom and began to have intimate sexual relations. It was the evidence of the accused that this involved caressing and kissing at first, and then oral sex performed on each other. He then reached for the side table to a white box that "had sex toys in it". From that box the accused retrieved a finger vibrator which he used on the complainant's vagina. The accused testified that he and the complainant then had vaginal intercourse and he pulled out straps and put one of the complainant's

hands in it and then her second hand. It was the evidence of the accused that these straps were loose and that the complainant held onto the straps and could freely move her hands in and out of the straps. The accused testified that he never tightened the straps around the complainant's wrists and that she never did anything other than grasp onto the straps.

29 The accused testified that at this point in time while they were having vaginal intercourse that the complainant's eyes were opening and closing. The accused testified that at this point in time he grabbed lubricant which he described was in a "toothpaste tube" type of container and he applied the lubricant to the vaginal and anal areas on the complainant's body. They had vaginal sex and then the accused had anal sex with the complainant. With respect to the anal sex, it was the evidence that the complainant was not screaming in pain but rather moaning in pleasure, "making sexual noises", as he put it, and moving her hips with pleasure. It was the evidence of the accused that he made no comments to the complainant abut "being raped" or "being sodomized", and that the complainant fully consented to the sexual activity, including the act of anal intercourse.

30 It was the evidence of the accused that on one occasion when he went to the bathroom he grabbed his cellphone which was on a nearby shelving unit. In doing so the accused intended to take pictures of the complainant, and pictures of himself and the complainant engaged in sexual activity. As the accused put it in his evidence, "I thought maybe it would be nice to take some pictures of us having sex".

31 In Exhibit 2, Tab 2, photo numbered 431 depicts the complainant with a pillow under her buttocks, her buttocks and vaginal area exposed and her ankles tied to the headboard of the bed. It was the evidence of the accused that the complainant helped position herself to get her hips up so the pillow could go underneath her buttocks and to get her legs up toward the headboard so that they could be secured. It was the evidence of the accused that the complainant was not restrained in that she could slip her feet and get out of the ankle straps secured to the headboard of the bed.

32 The accused testified that with the complainant in this position, namely, with her buttocks up and her ankles secured to the bed, that he had vaginal intercourse with the complainant and then anal intercourse. The accused testified that he took pictures of the complainant and the complainant and himself involved in sexual activity with his cellphone, and that during this picture taking the complainant's eyes were opening and closing.

33 The accused indicated in examination in-chief that after the anal intercourse he went to the bathroom to wash his penis and on his way back to the bedroom he picked up a pen. The accused's intention in doing so was to mark his initials on the complainant's body. As the accused put it in his evidence, "we were into a lot of sex play -- I was thinking of putting my initials on her as part of the sex". The accused testified that when he returned to the bedroom he performed oral sex on J.B. The accused testified that the complainant was "moaning" and that it "seemed pleasurable to her". At this point the accused took the pen and marked his initials -- "E.M." on the thigh of the complainant. The accused described this as "playful sex" and indicated in his evidence that J.B. said nothing

when this was being done to her and that "she was still playing along in the game", as the accused put it.

34 When Exhibit 10, a black marker, was shown to the accused he indicated that it was not what he used to put his initials on the complainant. The accused testified that this was done with a "ballpoint pen" and not a black marker.

35 In his evidence the accused indicated that no foreign objects were inserted into either the complainant's vagina or anus. It was the evidence of the accused if anything was inserted it would have been his fingers. The accused agreed with the suggestion that pictures that he took would have been from approximately 8:18 p.m. to 8:58 p.m. and that in the last two pictures taken of the complainant lying unclothed on the bed that she was "dormant" and appeared to be sleeping.

36 It was the evidence of the accused that throughout all types of sexual activity that the complainant consented, was actively participating, and there was nothing which would indicate to him that the complainant objected to what was being done to her, including the tying of her wrists and ankles, the anal sex, the picture taking, and having his initials put on her thigh.

37 The accused, E.M., was subjected to a vigorous cross-examination by Crown counsel and, in my view, an effective cross-examination which exposed problems in his evidence and the incredulity of the tale that he was trying to spin to the court.

38 In his evidence the accused took every opportunity to indicate that the complainant consented to the sexual activity or that he believed that she consented. It did not matter that this response was relevant to the question asked of the accused or not. The accused testified when the complainant first came home from work on the evening of February 4, 2016 that she invited the accused to have sex. His evidence is that J.B. came home and said she was going to relax for an hour and then was going to have a shower and then they could have sex. It was the evidence of the complainant that when she came home from work she said she wanted to relax for an hour. Later on when she was about to have a shower, she invited the accused to join her and from the shower they moved into the bedroom and this progressed to sexual relations. It is hard to believe that the complainant would come home from working all day and the first thing she would pronounce is that she wanted to have sex. The complainant's version on how the evening of February 4, 2016 initially unfolded paints a far more usual scenario and is believable. In my view, the accused's version is an attempt to bolster his evidence on the issue of consent, and is farfetched and not at all believable.

39 Also difficult to accept is the accused's attempt in his evidence to distance himself from the physical evidence seized by the police from his home. Exhibit 1, photo 3476, depicts hairclips and hairbands which were in the white box beside the nightstand. The accused testified that the first time he saw these hairclips and hairbands was in the pictures and that the bands in the box were not the ones which secured the complainant to the bed. The accused testified that he never saw the complainant use hairclips or hairbands. The accused agreed that the hairbands and straps in the white box are "very similar" in colour and thickness to the ones photographed by the police on the

bed in the bedroom, but his evidence was they were not the bands used to restrain the wrists or ankles of the complainant. Exhibit 7 is hair elastics which were shown to the accused, but he disagreed that these were used to tie J.B.'s wrists. He acknowledged that "I would say that they were very similar" but he denied that they were used to secure the wrists and ankles. It is difficult to accept the evidence that the bands found in the white box or on the bed by the police after the incident and photographed by them were not the bands used to secure the complainant. The home of the accused was secured by the police after the alleged incident and undoubtedly the items found in the home and photographed by the police were the items used in the sexual activity of the complainant and the accused. To suggest otherwise defies logic.

40 The photographs entered as Exhibit 2 retrieved from the cellphone of the accused belie the evidence of the accused that the complainant was an active participant in the sexual activity. The photographs depict the complainant lying limp. This does not change throughout the entirety of photographs. In cross-examination the accused agreed that the pictures show the complainant's head and arm in the same position at 8:34:24 as it is at 8:18:43. The accused described this as a "coincidence" and denied the suggestion that it was because she was not actively engaged. The pictures themselves support the complainant's version that she was "playing possum" and zoning in and out as the sexual activity was going on. The photographs do not support the accused's version that the complainant was an active participant in the sexual activity or that "she was engaged in all the photos".

41 As to putting his initials on the thigh of the complainant, the accused described this as going on quickly and smoothly. Again, the photographs of the complainant from the Sault Area Hospital (Exhibit 3) depict a different story. The initials appear to be dug into the skin. These photographs are consistent with the evidence of the neighbour, Karen Hall, who saw the complainant immediately after the events of February 4, 2016, who ascribed the initials as an "angry, harsh mark". I would agree with the description given by Ms. Hall. These photographs do not depict a mark that went "smoothly" on the skin as suggested by the accused in his evidence.

42 As to when the initials were put on the complainant's thigh, it was the evidence of the accused that he put the initials on J.B. near "the end of the sex game". Later in his evidence the accused stated that "I can't remember at which point the initials were put on but I am sure it was at the end". The accused denied the suggestion put to him by the Crown that the initials were placed on the complainant earlier in their sexual activity and not at the end. Photographs retrieved from the accused's cellphone (Exhibit 2 -- Tab 1) indicate that there are no initials on the complainant at 18:18:43. That indicates that the initials are on the complainant 16 minutes into the photographs which were taken over a 39-minute period, to 18:58. Again, the physical evidence (the photographs) indicate that the evidence of the accused cannot be relied upon when it comes to when he placed his initials on the thigh of the complainant.

43 Then there is the matter of the magic marker. Exhibit 2, Tab 1, photo 204143 depicts a black magic marker cap on the bed. The accused testified that he has no idea how that magic marker cap

got on the bed. He simply has no explanation for that. The complainant testified that something that felt like a pen, a cold, hard object was inserted into her vagina. The accused denied the suggestion that it was a magic marker. The accused denied that a magic marker was used or that a magic marker was ever on the bed. In Exhibit 2, Tab 2, photograph 203505 depicts the finger of the accused spreading the vagina of the complainant. This is also depicted in photographs 419 and 420. Photograph 203505 was enlarged on a screen at the trial so the mark on the accused's finger could be clearly seen. The accused testified that this mark on his finger was a cut that was healing. The accused denied the suggestion put to him by the Crown that the mark on his finger was from black magic marker that he got when he inserted the black magic marker into the vagina of the complainant. The accused was firm in his evidence that the mark on his finger was a cut and not the mark from a black magic marker. The photographs in Exhibit 2, especially the photograph as enlarged at the trial, provide a different answer. There is absolutely no doubt that the mark on the finger of the accused as depicted in the photographs is a black magic marker mark. This is the mark a person would get when a black magic marker ran against the finger. The accused clearly lied under oath to the court about this point. This is not an insignificant point but goes to essential evidence as it relates to Count 5 in the Indictment.

44 The blatant lie to the court by the accused about the magic marker mark on his finger and the serious difficulties with respect to the other aspects of his evidence casts real doubt on the believability and reliability of the evidence that the accused has given to the court. The court was left with the impression that the accused was trying to spin a narrative to justify his actions and conduct on the evidence of February 4, 2016, particularly on the issue of consent. At times the evidence of E.M. was incredulous, difficult to accept, and lacked the ring of truth.

45 In applying *W.(D.)*, I do not believe the evidence of the accused nor does his evidence raise a reasonable doubt. It is therefore the third prong of the *W.(D.)* test that is applicable to the case at bar and must be considered by the court. Even if I am not left in a doubt by the evidence of the accused, I must go on to consider the evidence as a whole and must ask myself whether on the basis of the evidence I do accept if I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused. I must consider whether the Crown has proven the guilt of the accused beyond a reasonable doubt.

Evidence of the Complainant, J.B.

46 I will now deal with the evidence of the complainant. J.B. testified that she arrived home from work on February 4, 2016 at approximately 6:00 p.m. Her evidence was that E.M. asked her if she wanted to go out and that she said she wanted to relax for an hour and maybe then they could go to the casino. She relaxed by playing on her computer. After she did this she indicated to the accused that she was going to take a shower and asked him to join her. The accused did. From the shower they moved to the downstairs bedroom. The complainant testified that they began to kiss in the bedroom, that his led to the accused kissing her genitals gradually progressing to vaginal intercourse. The complainant indicated "everything was normal and nothing was out of the

ordinary".

47 The complainant testified that at this point the accused reached over to the side of the bed into what she described as "a white bag" and which she later described as a white box. She indicated that E.M. took her left wrist and tied it with an elastic object to the headboard of the bed. He did this also to her right wrist. At this point the complainant thought nothing of it. As she put it in her evidence, "I thought he was being silly. I thought he was playing." At this point in time her wrists were tied loosely and she could have pulled her hands out at any time. With her wrists tied in this manner, the accused continued to have vaginal intercourse with the complainant. At one point the complainant's left hand slipped out of the restraint and she put her hand back in and held it. The complainant thought nothing of this and as she indicated in her evidence, "I thought we were still playing".

48 Undoubtedly, on the totality of the evidence, the sexual activity between the accused and the complainant was consensual at this point of time. It is the evidence of the complainant that this changed when the accused took her left hand and wrapped it around the restraint "very tight". The complainant testified that she told the accused that it hurt and that she asked him what he was doing. The complainant testified that the accused tightened her right wrist in a similar manner and that "now I was being restrained". It was the evidence of the complainant that the restrains were now tight and that she was "feeling upset and trapped". The complainant testified that she was struggling on the bed and moving back and forth on the bed. She indicated in her evidence that she told the accused to "stop what you are doing that's tight", but the accused did not and said nothing. It was the evidence of the complainant that the tightening of the straps to restrain her was not consensual and that she did not consent to it.

49 According to the evidence of the complainant, the accused reached over to the side of the bed into the white bag and took out a lubricant which he applied to her vagina and her anal area. The accused then penetrated her vagina. The complainant said nothing. The accused then penetrated her anus which the complainant described as "very hard and very forcefully". The complainant testified that she told the accused that it hurt and that she asked him to stop what he was doing. The accused did not stop, but according to the complainant said to her "have you ever been raped before honey. Tell me a time you have been sodomized". The complainant testified that the voice did not even sound like E.M., and that she was in pain and struggling. It was the evidence of the complainant that the anal intercourse was not consensual and that she asked E.M. to stop.

50 The complainant testified that when the anal intercourse began that her mind "went to another place" in order to handle the situation and escape the pain. As she put it in her evidence, "At that point I was frightened and in so much pain my mind went somewhere else".

51 What occurred next, according to the complainant, was that her foot and ankle were raised to the point where they were secured to the headboard. She testified that she stayed limp and was passive. The testified that E.M. left the bedroom and when he returned he "started sticking

something inside of me", which she describe as "hard and cold". The complainant testified that this object was put into her vagina and into her anus. The complainant testified that at some point she felt a vibrator being stuck into her vagina. The complainant testified that she knew it was a vibrator because "it was vibrating".

52 The complainant testified that after this occurred, E.M. left the bedroom and that when he returned he started taking pictures and that she could "hear the sound of his phone clicking". She could feel the heat of a lamp which she believed was pointed toward her genitals and could feel E.M. spreading her legs open. She could feel the accused's fingers going into her vagina and anus. The complainant described "different sessions" of events where the accused would leave the bedroom, return, and something else would start up again. The complainant testified that at one point she felt "a sharp pain on the back of my thigh". She believed that she was being cut, but then realized that she was being marked with a pen. As the complainant testified, "I felt a needle penetrating my skin over and over again". Later on, the complainant realized that the accused had tattooed his initials -- E.M. -- into her, "like one of his tools or anything he owns", as the complainant put it in her evidence.

53 It was the complainant's evidence that at some point the sexual activity ended and her feet were untied and they "plopped to the bed". The complainant's hands were untied and her evidence was that until the accused left the room she lied still on the bed "wondering what would happen next". J.B. described herself as being in shock and shaking so badly that "my teeth rattled and the bed shook". The complainant testified that "I wanted to get out of there before anything else happened to me and that is what I did". The complainant testified that she put on jogging pants and a sweater, boots, grabbed her purse and ran outside, eventually ending up at the nearby home of Karen Hall. Ms. Hall was known to the complainant as she groomed her dog. The complainant testified that she went to the back porch of Ms. Hall's home, told her what happened and had Ms. Hall look at her thigh because it was burning. The Sault Ste. Marie Police were called to the home of Karen Hall and the complainant was transported by ambulance to the Sault Area Hospital where she was examined and photographs were taken of her, which were entered as Exhibit 3.

54 There is some corroboration of the evidence given by the complainant by the evidence of Karen Hall. Ms. Hall testified that she resides close to where the complainant lived and that J.B. is known to her as she grooms her dog. Ms. Hall testified that she was in her basement watching television late on "a wintery night" when she received a call on her cellphone from J.B. Ms. Hall described J.B. as "sounding strange" and being "hard to understand". J.B. told Hall that she was outside and Hall found her at the back of her home standing in the covered patio.

55 Karen Hall said that when she came upon J.B. that "she wasn't the J. I knew". Hall described her as crying, disheveled, and "completely distraught". Ms. Hall described J.B. as not being "dressed appropriately for winter". Emergency services were called as was the sister of J.B. Karen Hall described the complainant as "shaking and hunched over". Hall testified that she was worried about J.B.'s overall wellbeing and that "the person that came to my door that night was not the J. I

knew". Ms. Hall testified that it was a cold wintery night outside, and that J.B. was not dressed appropriately for the weather outside.

56 Karen Hall indicated in her evidence that the complainant was focused on a cut that she received, repeating that "he cut me, he cut me". Ms. Hall testified that she looked at the complainant's thigh and was able to see initials written into the complainant's thigh. Ms. Hall described the site where the initials were as "fresh and raw" and indicated that it looked like "it was forced into her flesh". Ms. Hall described what she saw on the complainant's thigh as "really raw and really nasty".

57 In my view, a piece of the evidence to be considered by the court is how the complainant presented after the alleged event. As indicated in the jurisprudence, this can be considered by the court and it is not an error to do so. As noted at paragraph 14 in *R. v. Haggart*, [2010] O.J. No. 268, the Ontario Court of Appeal observed that,

> The trial judge properly relied on the evidence of the complainant's emotional condition, her dirty clothing, the abrasions and scratches on her shoulder and buttock, the grains of dirt found on the vaginal swab, all of which he observed as confirmatory of her testimony. The trial judge made no error in doing so.

58 Roccamo J., in the decision of *R. v. A.A.R.*, [2017] O.J. No. 4763, made the following comments at paragraph 17,

> Like G.A., upon her arrival at the hotel and after gaining entry to the room of A.R., found N.S. to be very shaken up, with eyes wide open and teary. I accepted the description both she and G.A. offered of N.S.'s emotional condition as circumstantial evidence corroborative of N.S.'s own description of her state of mind when attempting to extricate herself from danger after being sexually assaulted by A.R. This demeanor evidence was not seriously challenged and, in my opinion, was capable of corroborating the truth of N.S.'s account as it did that of the complainant in *R. v. N.(R.)*, 2016 ONSC 2009, 129 W.C.B. (2d) 295, at paras. 19 and 20.

59 As noted by Hill J. in *R. v. N.R.*, [2016] O.J. No. 1561, at paragraph 19,

> A complainant's emotional condition is circumstantial evidence capable of being corroborative of the truth of the witness's account: *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 161 (S.C.C.) at pp 164, 167-8; *R. v. Haggart*, [2010] O.J. No. 268 (C.A.) at para. 14; *R. v. Folland* (1999), 132 C.C.C. (3d) 14 (Ont. C.A.) at paras. 24-25.

60 The evidence of Staff Sergeant Armstrong, who attended at the home of Karen Hall, was that he found J.B. to be "upset and distraught". Karen Hall describes the clothing worn by J.B. as inappropriate for the winter conditions, which suggests that the complainant left the home in a hurry

after the incident, which is consistent with her version of events. Karen Hall described the complainant as disheveled, crying and completely distraught. In the complainant, Karen Hall encountered a different person than she knew. The way that the complainant presented at the home of Karen Hall after the alleged incidents indicates an emotional condition, appearance and demeanor that is consistent with the complainant's evidence that the accused had sexual relations with her against her will.

61 In assessing the totality of the evidence of the complainant, I found her evidence compelling and believable. The complainant was vigorously cross-examined and her version of events were not seriously shaken. It is true that at times the complainant had difficulty recalling the sequence that events happened during the evening of February 4, 2016 but she was consistent in her recollection and retelling of the events that occurred during the evening of February 4, 2016. The complainant's evidence was not fraught with inconsistencies and any inconsistencies put to her from the evidence she gave at the preliminary hearing were on peripheral and not central issues and were adequately explained by the complainant. The evidence of the complainant had the ring of truth to it that was absent in the evidence of the accused as to what occurred during the evening of February 4, 2016. Where the evidence of the complainant conflicts with the evidence of the accused, I prefer and accept the evidence of the complainant.

Post-offence Conduct

62 An issue arose during the trial as to whether the court would hear evidence of post-offence conduct of the accused, which dealt primarily with the encounters between the accused and the complainant during the month of October 2017. I ruled that the evidence was relevant and that its probative value was not substantially outweighed by its prejudicial effect. In making that ruling, I cautioned that evidence of post-offence conduct is just one piece of evidence not analyzed in isolation, but rather weighed with all the evidence received at the trial. At the end of the day, post-offence conduct must be considered with care and caution and I have treated this evidence accordingly. Overall, in arriving at my decision in the case at bar, I put no weight on the post-offence conduct evidence that I heard in this trial. The post-offence conduct consists of a series of meetings between the complainant and the accused, which appear to be initiated by the accused, in which certain comments are alleged to be made by the accused, such as urging the complainant to drop the charges against him and comments that he was remorseful for what occurred. In addition to the face-to-face meetings, there was a series of text messages exchanged between the parties, which were entered as Exhibit 4.

63 There are problems with the evidence of the complainant and the accused with respect to what actually occurred and what was said during these face-to-face encounters in October 2017. In examining the evidence, what is clear is that the accused was anxious to reconcile with the complainant, and the complainant still had feelings for the accused and was confused and conflicted when it came to a relationship with the accused. All of this is not difficult to understand. Although the complainant indicated in her evidence that she did not want the accused to show up where she

was residing, the text messages (Exhibit 4) perhaps suggest something different and indicate that J.B. is openly communicating with the accused and interested in meeting up with him.

64 It is impossible to sort out what really occurred at the face-to-face meetings in October 2017 to place any weight on this piece of evidence, and consequently no weight is placed by the court in the post-offence conduct in arriving at an ultimate decision.

***Browne v. Dunn* Issue**

65 At the conclusion of the evidence of the accused, the Crown raised the issue of *Browne v. Dunn* (1893), 6 R. 67, indicating that there were matters of substance raised by the accused in evidence which were not put to the complainant in cross-examination. Put simply, if there is a challenge to the credibility of another witness by calling other witnesses to give contradictory evidence, the rule in *Browne v. Dunn* requires the cross-examiner to put that evidence to the witness so they have a chance to respond to it. The rule is based on fairness to the trial process.

66 The Crown suggested the following areas where the complainant was not asked in cross-examination about matters testified to by the accused:

(1) the evidence that she intended to relax for one hour and then wanted sex;

(2) the evidence that the complainant performed oral sex on the accused

(3) the evidence that when sexual acts were occurring the complainant was moving her hips and moaning with pleasure.

67 If the court finds that there has been a breach of the rule in *Browne v. Dunn*, there are two possible remedies, namely, recalling the witness and having these questions put to her, or, take into account that these matters were not covered in the evidence of the complainant in any overall assessment of the credibility and reliability of the evidence of the accused.

68 Sensibly, the Crown took the position that the court do the latter given the difficulties in recalling a complainant in a sexual assault trial to have her relive events all over again.

69 The defence suggested to the court that there was no breach of the rule in *Browne v. Dunn* in that evidence was not material or significant to the facts in issue in the trial. As is noted in the jurisprudence, not every detail or piece of evidence must be put to a witness, but rather only the evidence that is significant or material.

70 In my view, the issues raised by the Crown are of a minor nature in that they do not offend the rule in *Browne v. Dunn*. I have not considered this in my overall assessment of the credibility and reliability of the evidence given by the accused.

The Charges in the Indictment

71 Count 1 in the Indictment is a charge of sexual assault, contrary to s. 271 of the *Criminal Code of Canada*. In order to find the accused guilty of sexual assault, the Crown must prove beyond a reasonable doubt all of the following essential elements of the offence:

(1) That the accused intentionally applied force to the complainant;

(2) That the complainant did not consent to the force;

(3) That the accused knew that the complainant did not consent to the force;

(4) That the force applied took place in circumstances of a sexual nature.

72 I accept the complainant's evidence that she did not consent to anal intercourse. I accept the complainant's evidence that she told the accused to stop but that the accused did not stop. The act of anal intercourse was clearly an intentional application of force by the accused to the complainant and clearly in circumstances of a sexual nature. I find on the totality of the evidence that the Crown has proven all the essential elements of sexual assault beyond a reasonable doubt, and accordingly there is a finding of guilt and a registration of a conviction in Count 1 in the Indictment.

73 Count 2 in the Indictment is a charge of unlawful confinement, contrary to s. 279(2) of the *Criminal Code of Canada*. In order to find the accused guilty of unlawful confinement, the Crown must prove beyond a reasonable doubt all of the following essential elements of the offence:

(1) That the accused intentionally confined the complainant; and

(2) That the confinement was without lawful authority.

74 The accused did not have a right in law to confine the complainant. In other words, he did not have lawful authority to confine the complainant. I accept the evidence of the complainant that although the restraints to her wrists to the headboard were loose and non-confining, that the accused subsequently tightened the restraints to her wrists to the point where they were tight and she could not free her hands. I accept the evidence of the complainant that at some point in the evening of February 4, 2016 the accused restrained her ankles as well, securing them to the headboard. I accept the evidence of the complainant that she felt restrained and unable to extricate herself. On the evidence, the complainant was deprived of her liberty to move freely and was restrained and confined. On the evidence before the court it is apparent that this restraint lasted for a significant period of time. Accordingly, the court finds that the Crown has proven all the essential elements of

unlawful confinement beyond a reasonable doubt and accordingly there is a finding of guilt and a registration of a conviction on Count 2 in the Indictment.

75 Count 3 in the Indictment is the charge of voyeurism. This is set out in s. 162(1) of the *Criminal Code of Canada*. Section 162(1) of the *Criminal Code* reads as follows:

> Every one commits an offence who, surreptitiously, observes -- including by mechanical or electronic means -- or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
>
> (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
>
> (b) the person is nude is, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
>
> (c) the observation or recording is done for a sexual purpose.

76 Section 162(2) of the *Criminal Code* defines the term "visual recording" to include photographic. Regrettably, there is no definition of what is intended by the phrase "surreptitiously" in the *Criminal Code*. The dictionary's definition of surreptitious is "covert or clandestine", or, in other words, something that is done secretly. In the case at bar, the photographs taken by the accused on his cellphone were not done secretly. The complainant testified that although her eyes were closed, she could hear the clicking of the cellphone and was aware that the accused was taking pictures of her. It is also a fact on the evidence that at the time these pictures were taken, the complainant was being restrained and therefore could not remove herself from the situation.

77 In *R. v. Jarvis*, [2017] O.J. No. 5261, the Ontario Court of appeal dealt with the offence of voyeurism. In paragraphs 28-30 of that decision, Feldman J.A., speaking for the court, makes the following observations:

> [28] To come within the voyeurism offence, the observation or recording must be done surreptitiously. Also the person who is observed or recorded must be in circumstances that give rise to a reasonable expectation of privacy. There are then three alternative elements that further delimit or define the offence. All three indicate that it is the sexual integrity of the victim that is intended to be protected.

> [29] The first focuses on the location of the victim: the offence occurs when the victim is in a place where a person can reasonably be expected to be nude, to expose their genitals, breasts or anal region, or be engaging in sexual activity. The second focuses on what the victim is doing: the offence occurs if the victim is nude or is engaging in sexual activity and the purpose of the perpetrator is to observe or record the nudity or the sexual activity.
>
> [30] The third element is not circumscribed by the victim's location, his or her state of undress, or sexual activity. The offence is committed if the observation or recording is done for a sexual purpose. Of course, all elements are governed by the overall requirement that the person observed or recorded must be in circumstances that give rise to a reasonable expectation of privacy.

78 Apart from the requirement that the recording must be done "surreptitiously", all the essential elements of the offence as set out in *Jarvis* have been established beyond a reasonable doubt in the case at bar.

79 As noted in paragraph 87 in *Jarvis*,

> Every person is entitled to expect to be able to protect their personal sexual integrity and dignity from non-consensual visual intrusion by other people. While the offence of voyeurism in s. 162 is intended to provide that protection, Parliament has imposed a number of limitations in its application.

80 One such limitation is that the act must be done "surreptitiously". As stated in paragraph 88 of *Jarvis*,

> First, the observation or videoing of another person is only an offence if it is done surreptitiously. It is not an offence to openly stare at another person or video them in one of the three prohibited situations. Arguably, this limitation recognizes and acknowledges that a person can consent to or acquiesce in being stared at or videoed, if the person is aware that it is happening. Similarly, when a person is aware that they are being observed or recorded, they can object, say no, turn away, leave, or take other steps to protect themselves from such an intrusion if it is unwanted.

81 Paragraph 88 of *Jarvis* suggests that a person can consent or withdraw their consent if they know they are being recorded. As indicated by the court, a person can object, turn away or leave if they are aware they are being recorded in order to protect their integrity. The complainant, J.B., had no such option available to her; both her wrists and both her ankles were tied to a bed. She could not

turn away, she could not leave. She had no way of protecting her privacy or dignity in preventing the images of her from being taken by the accused. This is tantamount to the images being taken secretively or in a clandestine manner. If the images are taken in a clandestine manner the person being recorded does not have an opportunity to flee, leave or take steps to protect themselves. The complainant, J.B., also did not have this opportunity on the facts of this case. If s. 162(1) of the *Criminal Code* does not apply to the facts of the case at bar where the complainant was rendered unable to prevent the pictures from being taken or to take steps to protect her personal dignity, then what was intended by Parliament in enacting that section, namely, the ability of a person to protect their sexual integrity and dignity from non-consensual visual intrusion by other people, is rendered meaningless.

82 On the evidence before me, I am satisfied that the Crown has proven the essential elements of the offence as set out in s. 162(1) of the *Criminal Code* and amplified in *R. v. Jarvis* and in *R. v. J.R.P.*, 201 ONSC 10701, at paragraph 5 as follows:

> The first step of analysis requires the court to identify the essential elements of the recently enacted offence of voyeurism (S.C. 2005, c. 32, s. 6). They are as follows:
>
> 1. the identity of the person who made the visual recording;
>
> 2. the person surreptitiously makes a visual recording of a person;
>
> 3. in circumstances that give rise to a reasonable expectation of privacy; and
>
> 4. the visual recording was done for a sexual purpose.

83 In particular, I am satisfied beyond a reasonable doubt that the photographs taken by the accused of the complainant were taken "surreptitiously" as contemplated in s. 162(1) of the *Criminal Code* and in keeping with the intention of Parliament in enacting that section. By his own evidence, the accused acknowledged that he believed the complainant was sleeping during the last two pictures taken, meaning that she was unable to consent and was unaware that those pictures were being taken.

84 Accordingly, there is a finding of guilt and a registration of a conviction with respect to Count 3 in the Indictment.

85 Count 4 in the Indictment is a charge of assault, contrary to s. 266 of the *Criminal Code*. In

order to find the accused guilty of assault, the Crown must prove all of the following essential elements beyond a reasonable doubt:

(1) that the accused intentionally applied force to the complainant;

(2) that the complainant did not consent to the force intentionally applied; and

(3) that the accused knew that the complainant did not consent to the force intentionally applied.

86 On the facts of this case, this count involves the application of the accused's initials on the thigh of the complainant. On the evidence before me, all of the aforementioned essential elements to make out a charge of assault have been proven by the Crown beyond a reasonable doubt. The placing of the initials on the complainant was an intentional application of force. On the evidence, I find that this was done without the consent of the complainant and the accused was aware that the complainant did not consent, or at the very least, took no steps to determine whether or not the complainant was consenting to this unusual activity. The charge of assault simpliciter is established on the evidence before me.

87 Having said that, the court cannot ignore the evidence of the accused with respect to the placing of his initials on the high of the complainant. The accused testified that he and the complainant "were into a lot of sex play" and his thought was that putting his initials on J.B. was "part of the sex", as he described it. This evidence was repeated by the accused in cross-examination in that he described it as "part of the sexual acts", acknowledging in his evidence that he never asked the complainant if he could put his initials on her before doing so.

88 There is no evidence to contradict the evidence of the accused that placing the initials on the complainant was part of the sex play between them. This being the case, the act that attracts the charge in Count 4 becomes a sexual assault in that all of the essential elements for a sexual assault are established beyond a reasonable doubt, including the element that the force applied took place in circumstances of a sexual nature. The charge of sexual assault is not an included offence to the charge of assault simpliciter. On the evidence before me, it is the charge of sexual assault that should have been laid with respect to Count 4. The Crown has not asked me for an amendment. This being the case, it would be unjust to register a conviction on Count 4, and that count is stayed.

89 Count 5 in the Indictment is a charge of sexual assault with a weapon (an unknown object), contrary to s. 272(1)(a) of the *Criminal Code*. In order to find the accused guilty of sexual assault with a weapon, the Crown must prove the following essential elements beyond a reasonable doubt:

(1) that the accused intentionally applied force to the complainant;

(2) that the complainant did not consent to the force applied;

(3) that the accused knew that the complainant did not consent to the force applied;

(4) that a weapon was involved; and

(5) that the force applied took place in circumstances of a sexual nature.

90 On the evidence before me, I am satisfied beyond a reasonable doubt that the accused penetrated the vagina and anus of the complainant with a black marker. This activity is consistent with the accused having a black magic marker mark on his index finger. This activity is consistent with the evidence of the complainant who described being penetrated by a "cold, hard" object. The evidence satisfies me that the essential elements of intentional force applied without the consent of the complainant, the accused knowing there was no consent, and the force being applied in a sexual nature have been established beyond a reasonable doubt by the Crown.

91 What concerns me is whether the black magic marker meets the definition of a "weapon" as contemplated in s. 272(1)(a) of the *Criminal Code*. Section 2 of the *Criminal Code* defines "weapon" as anything used, designed to be used or intended for use in causing death or injury to a person, or for the purpose of threatening or intimidating a person. In the case of *R. v. Lamy*, 2002 S.C.C. 25, the Supreme Court of Canada considered whether a decorated bamboo dildo constituted a weapon. The court held that where an accused uses an object such as a bamboo dildo in sexually assaulting the complainant and the object contributes to an injury caused by the sexual assault, the object constitutes a weapon even though the accused did not intend to use it as a weapon. As stated in para. 17 of the decision,

> When an accused knowingly or recklessly applies force and sexually assaults a complainant, if he uses an object in doing so, and if the object contributes to the harm caused to the victim by the assault, the accused cannot escape a conviction for sexual assault with a weapon by claiming that his intention was to sexually stimulate the person that he was otherwise assaulting.

92 The Supreme Court of Canada in *Lamy* would not go so far as to say that all cases of sexual assault cause injury and therefore if an object is used the offence of sexual assault with a weapon is established. As the court noted at paragraph 13 of its decision,

> One cannot go as far as the appellant argues, and conclude that because all cases of sexual assault cause injury (physical or psychological) and therefore if an object is used in the course of any sexual assault, the charge of sexual assault

with a weapon is automatically made out.

93 With respect to the case at bar, there is no evidence that the object used (the black marker) was used or intended to be used in causing injury to the complainant or to threaten or intimidate her. There is also no evidence that the complainant suffered any injury by having the black marker inserted into her vagina or anus. The complainant did give evidence of physical difficulties she is experiencing as a result of the events of February 4, 2016, but these injuries are not specifically tied into the incident involving the black marker. Additionally, there are no medical reports or medical evidence that support a conclusion that the inserting of the black marker into the vagina or anus of the complainant caused any injury to her.

94 On the basis of the definition of the term "weapon" in the *Criminal Code*, with the assistance of the analysis in *Lamy*, I am not persuaded that the black marker is a "weapon" to establish the offence of sexual assault with a weapon, contrary to s. 272(1)(a) of the *Criminal Code*.

95 Having reached this conclusion, it is still open for the court to find the accused guilty of the lesser and included offence of sexual assault. On the evidence before me, I am not satisfied beyond a reasonable doubt that a weapon was involved, but I am satisfied beyond a reasonable doubt that force was applied by the accused to the complainant in circumstances of a sexual nature without the consent of the complainant. Having reached this conclusion, the accused is found not guilty of the offence as charged, namely, sexual assault with a weapon, but guilty of the included offence of sexual assault, contrary to s. 271 of the *Criminal Code of Canada*.

CONCLUSION

96 For the foregoing reasons, the accused is convicted of Counts 1, 2 and 3 in the Indictment. Count 4 is stayed. With respect to Count 5, the accused is found not guilty of sexual assault with a weapon, contrary to s. 272(1)(a) of the *Criminal Code*, but guilty of the included offence of sexual assault, contrary to s. 271 of the *Criminal Code of Canada*.

E.E. GAREAU J.

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