CITATION: R. v. A.G. and E.K., 2015 ONSC 181
COURT FILE NO.: CR-14-10000003-0000
DATE: 20150112

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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HER MAJESTY THE QUEEN	)	Cara Sweeny, for the Crown
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	)	
	)	
- and -	)	
	)	
A.G.	)	Boris Bytensky, for the Defendant, A.G.
	)	
	)	
Defendant	)	
	)	
-and-	)	
	)	
E.K.	)	Joseph Neuberger, for the Defendant, E.K.
	)	
	)	
Defendant	)	
	)	
	)	**HEARD:** October 27-November 3, 2014, at
	)	Toronto, Ontario

Michael G. Quigley J.

Subject to any further Order by a court of competent jurisdiction, an Order has been made in this proceeding directing that the identity of the complainant and any information that could disclose such identity shall not be published in any document or broadcast in any way pursuant to s. 486.4 of the *Criminal Code of Canada*.

Reasons for Judgment

Overview

[1] A.G. and E.K. are both charged with sexual assault with a weapon and with gang sexual assault against the complainant, J.F. The offences are alleged to have occurred on May 26, 2012. The accused re-elected to be tried by judge alone. The only witness was the complainant. The accused did not testify.

[2] The complainant alleges that she was outside of a downtown Toronto shelter on Queen Street West at about 2:00 a.m. on May 26, 2012 when the two accused passed by. She had a brief conversation with them and agreed to join them for a drink. J.F. went with them willingly, first on foot, and then in their vehicle.

[3] A.G. retrieved their car, which was parked nearby. He was driving. J.F. and E.K. were in the back seat. They gave her vodka and she started to drink a lot of it, very quickly, straight from the bottle. J.F and E.K. were kissing and having conversation. She said they were having a good time. A.G. stopped the car a short while later at a Mac's Milk variety store where he and E.K. purchased various items, including condoms. J.F. stayed in the car. She claimed to have thought of leaving while they were in the store, but she did not leave. She saw the condoms but thought they were intended for use with someone else, not her.

[4] After driving for some further 20 minutes to a half hour, they ended parked beside a field with bleachers located behind a high school in an unknown part of Toronto. J.F. was quite drunk. They walked to the bleachers. She claims that was where the accused sexually assaulted her. One of them pushed her to the ground, demanded sex from her, and told her that she would get hurt if she did not cooperate. She claimed one of them said that he had a knife. They took her clothes off and forced her to perform oral sex on both of them. Then it is claimed that either one or both of them had intercourse with her, and were physically and verbally abusive to her as the intercourse took place.

[5] J.F. insists that she did not consent to having any sexual contact with either one of these two accused, and repeatedly told them "no". She admitted that she did not struggle or resist because of the threat of the knife. She acknowledged that she never saw a knife. She did not think they really had one, but she did not want to take the chance.

[6] Eventually, after the sexual acts were completed, A.G and E.K. drove away and left her there at 4:30 in the morning. She was drunk. She had no idea where she was or how to get back downtown to the shelter. About an hour later, at 5:38 a.m., she came upon a couple walking very close to the field where she said she had been assaulted. J.F. has no idea what happened during that hour. She asked them to call 911. Ambulance medics responded to the call and she was taken to the hospital where she was admitted. Statements were later provided to the police that resulted in these charges being laid against A.G and E.K.

[7] The evidence of the complainant, J.F. is that she did not consent to having sexual relations with A.G. or E.K., but defence counsel contends that she did consent or, at the very least, that A.G and E.K. had an honest but mistaken belief in her consent. There is no specific testimony that contradicts or refutes J.F.'s claim. However, defence counsel argues that on the whole of the evidence, J.F.'s claim that she did not consent cannot be accepted as either credible or reliable.

[8] I accept that when A.G. and E.K met J.F. on Queen Street early in the morning of May 26, 2012, they both would immediately have perceived that J.F. was a person with developmental disability. It would have been obvious to them, as it was obvious to me as I observed her demeanour and manner and listened to her testify. Nevertheless, despite the

obvious imbalance of their relative positions, they appear to have decided to see what might arise out of a brief dalliance with J.F.

[9] Their encounter started with a conversation where a proposition must have been made, where they shook hands, and where they started to walk east on Queen Street with E.K.'s arm around J.F.'s shoulder. It continued during the car ride where J.F. consumed a large quantity of vodka that they provided and that rendered her very drunk, while they drove to a location in a part of the city that she did not know. It ended after they took turns requiring her to give each of them fellatio and having intercourse with her, when they drove away and left her there, without her purse, without a phone, and with no clue as to where she was. But regardless of how reprehensible that conduct may be, it does not answer the question whether or not the sexual interactions between them were consensual or not.

[10] To prove the charges, Crown counsel must prove beyond a reasonable doubt that there was an absence of consent. There is no evidence of consent or lack of consent beyond the words of the complainant. J.F. testified that all conduct until their arrival at the football field was consensual, but she said she did not consent to A.G. and E.K. having sex with her. Whether J.F.'s unrefuted claim that she did not consent can be accepted as meeting the criminal standard of proof beyond a reasonable doubt depends on the credibility and the reliability of her evidence. It depends on the impact on that assessment of the problematic evidence that was present in this case. Unfortunately, while I believe that J.F. was sincere and trying her best to tell the truth as she says she remembered it as she testified, assessing the credibility and reliability of her evidence was a very difficult task because her memory of the central events is very muddled.

[11] There were major inconsistencies in J.F.'s evidence, in her testimony at trial, and also over time, from the information initially provided to the nurses and the police at the hospital, and then to the police in her formal statement, and then at the preliminary inquiry, and finally at this trial. I was unable to ignore those inconsistencies when a number of them dealt with matters that seemed to me to be central to the allegations and about which a complainant likely would not or should not be confused. I could not reconcile the issues relating to the reliability of her evidence. Those inconsistencies, contradictions and uncertainties leave me unsure as to whether she consented or not. They leave me unsure as to whether I can rely on her evidence that she did not consent, despite her claim that she did not.

[12] Nor was I able to find anything in the evidence that assisted in "restoring [my] faith"[1] in the credibility and reliability of her testimony, regardless of the sincerity of her evidence and her efforts to tell the truth as she recalled it at trial, even if that differed materially from earlier recollections. Certainly, her prior well-documented history of lying to persons in authority, and her parsing of the difference between persons in authority to whom it was acceptable to lie, as compared to those to whom it was unacceptable to lie, did not assist in that effort.

[13] It appears likely to me that when she called them over, these two young men quickly recognized J.F. as someone who was of a diminished developmental state compared to them, and

[1] See *R. v. N.S.*, [2001] O.J. No. 3944, at para. 66; *Regina v. Betker* (1997), 115 C.C.C. (3d) 421, at p. 429 (Ont. C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. 461.

concluded that she might provide them with "a good time" if they ingratiated themselves to her and plied her with enough alcohol. To the extent they took advantage of her vulnerability, that is disgusting and reprehensible on its own, but it is despicable and beyond acceptable human conduct that these two young men would drive away as they did at 4:30 in the morning, leaving this developmentally challenged woman drunk and lost in the hinterlands north of Hwy. 401 after having sexual relations with her. That conduct is beneath contempt. However, again as I have noted, as repugnant as it may be, that conduct does not establish the presence or absence of consent beyond a reasonable doubt.

[14] Under our law the burden to prove the elements of the offences beyond a reasonable doubt rests on the Crown. While it is a difficult conclusion, and one that I have reached only after reviewing the entirety of the evidence several times, I cannot be certain beyond a reasonable doubt that J.F. did not consent to the sexual relations that took place between her and A.G and E.K. In my view, her testimony displays material inconsistencies that undermine both the credibility, and more importantly the reliability of her evidence.

[15] In light of those concerns, in my view, it would be unsafe to enter convictions on these charges having regard to the whole of the evidence. There is simply too much uncertainty and vacillation in the evidentiary record. Accordingly, while it gives me no joy to do so, having regard to the inhuman and abhorrent conduct of these two accused that *is* established by the evidence, even if it is not criminally culpable, I find that the Crown has not proven beyond a reasonable doubt that A.G and E. K. are guilty of these charges. Acquittals will be entered on both charges against each of the accused.

Section 276 Ruling

[16] Immediately before trial, the defendants sought a ruling under section 276 of the *Criminal Code* to permit them to cross-examine J.F. on numerous earlier statements she made to the police with respect to her prior sexual activity with other persons. Those occurrences took place seven years before these charges arose. Two of the occurrences were not of a sexual nature, and could properly be the subject of cross-examination. The others are occurrence reports of prior non-consensual sexual activity, but no charges were laid as a result of any of those prior reports.

[17] Counsel for the defence argued that reports of those occurrences are directly relevant and ought to be admitted under s. 276. They are relevant to show that J.F. is less credible, not by reason or by virtue of that prior sexual activity, but because the evidence shows that the complainant had previously made a number of false reports of having been raped, and thus, has a history of lying to the police.

[18] I ruled at the conclusion of the pre-trial application that several prior occurrences had been proven to be relevant and admissible. I reached that conclusion (i) because I found that the complainant's words as recorded in those occurrence reports showed that each of those three allegations of rape was demonstrably false or recanted, and thus met the admissibility standard

established in *R. v. Riley*[2], and (ii) because I found that the introduction of limited evidence of the complainant's prior sexual activity was not prohibited by section 276(1) of the *Code* since it would not be introduced to support either of the prohibited inferences. Since J.F.'s report of each of those three occurrences to the London Police Service was either demonstrably false or recanted, the defendants were permitted to cross-examine her on those occurrences for the purposes of impeaching her credibility but not for either of the prohibited purposes under section 276.

The Evidence

[19] J.F. was born in 1985 and is now 29 years old. When these events happened on May 26, 2012, she was 27 years old and living at the Florence Booth Shelter for Women on Queen Street West.

[20] J.F. testified that she was sitting on the step outside of the shelter on Queen Street West at Palmerston Avenue that evening. She had been "chilling out" inside the shelter with friends who lived there. She said she stepped out to the veranda around midnight and was having a cigarette and watching people. She thought she smoked several cigarettes, and then she met two individuals who asked her if she would like to go for a drink with them. She said they were in their mid-20s, nicely dressed and she thought it would be okay to accompany them. They spoke to her politely. She understood that they would be going for a drink of alcohol, but she said a pop would also have been okay because she was thirsty. They did not say where they would go. Nevertheless she stood up and walked with them, and E.K. put his arm around her as they walked away.

[21] There was video surveillance footage introduced in evidence from the front of the Florence Booth Shelter on Queen Street looking west that showed her initial interactions with the two accused. That surveillance footage of this initial encounter shows a slightly different chronology. The first video clip shows the accused talking and joking with three other people, a man and two women, with no signs of the complainant being on the street or sitting on any veranda at that time. Then, as the two women and that man moved off to the east and the accused started to walk away west, stopping at the street corner, the complainant came out of the shelter. She called out to them and they turned around towards her. Some words appear to have been exchanged between them, and then they walked towards her. They talked to her, she shook hands with E.K. and she then walked eastbound with A.G and E.K., with E.K.'s arm around her shoulder. Contrary to her evidence, the video surveillance footage does not show the complainant outside smoking cigarettes and watching the people go by before that time.

[22] A second video surveillance tape looking at the same scene from the other angle, down on the sidewalk and eastbound, was introduced. It showed E.K. holding J.F.'s neck at 12:05:26 a.m. J.F. testified that she did not want him to have his arm around her shoulders, but the footage shows no evident effort to ask him to stop as she walked with them down the street. She did not tell them that the shelter had two surveillance cameras overlooking Queen Street, but she knew that they were there.

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[2] [1992] O.J. No. 4072 (C.A.), 11 O.R. (3d) 151.

[23] As J.F. testified, she willingly went with them, first on foot, and later in their vehicle. After walking a short distance, they stopped at a variety store but it was closed. A.G. left to get the car and come to pick them up, so J.F. and E.K. talked together as they waited for him outside of the variety store. J.F. thought that they were going to drive to wherever the two boys lived.

[24] A.G. arrived soon with the car, a burgundy four-door sedan. She and E.K. got in to join him. She sat in the back seat directly across from A.G., who was in the driver's seat, and E.K. sat beside her in the back seat. She said there was a lot of stuff in the car, "everyday stuff" like tennis rackets and clothes.

[25] They drove in the car for a while, and then arrived at a 24-hour Mac's Milk variety store. A.G. and E.K. asked her if she wanted anything from the store. She told him she would like pop and some candy. She stayed in the car while they went into the variety store. When they returned, however, she could see a package of condoms in the bag of their purchases. She thought they were Trojans, but then blurted out an acknowledgement that "any kind of condoms would work," a statement I found to be odd and possibly revealing of her actual state of mind under the circumstances.

[26] Nevertheless, J.F. said that she did not say anything about the presence of the condoms in that bag, and neither, she said, did they have any discussion about sex while they were in the car. She said she had not turned her mind to having sex with those two men, even when she saw the package of condoms. She said she thought that they were for another time to be used with somebody else.

[27] They drove for another 20 minutes or so and then arrived at a park or field that appeared to be behind a school. J.F. did not know where they were. Video surveillance footage shows they were at Newtonbrook High School in the Yonge-Steeles area, a long way north of where they had started. It also shows that the burgundy-coloured vehicle arrived at 2:55 a.m. and left that location at 4:17 a.m. The complainant recalls that there were apartment buildings located nearby and a large football field with bleachers.

[28] They left the car and walked to the bleachers beside the field. She brought the bottle of alcohol along, but she left her purse in the car. J.F. acknowledged that she had been drinking alcohol, vodka, straight from the bottle, for the entire time she was in the backseat of the car with E.K. E.K. might have had a sip or two, but she was not sure. A.G. did not have any vodka because he was driving. It was J.F. who consumed most of the alcohol. She did not remember which of the two accused gave it to her, but she remembered that it was in a 40 oz. glass bottle. She thought that she probably drank between a quarter and half of that bottle of vodka on her own. On her own evidence, she was exceedingly intoxicated – very drunk.

[29] J.F. did not remember if they talked about having sex as they walked to the bleachers, but she said she was not drinking anymore because she "was done," to use her expression. She was groggy and quite intoxicated. Then she acknowledged that at the bleachers, the boys started talking about having sex, but she claims to have said no, and that she was not feeling well. J.F. claims that the two applicants sexually assaulted her at that location. One of the men pushed her to the ground, demanded sex from her, and told her that she would get hurt if she did not

cooperate. One of them said that he had a knife. She did not remember the conversation. Nonetheless, she said she was angry and told them that she was not having sex, but they were being "pushy, mean and rude." They were yelling at her, and calling her a "slut" and a "whore." J.F said they pushed her around "as if [she] was a doll."

[30] They started to take her clothes off, and she realized they wanted to have sex with her. She could not remember what she was wearing, but they removed all of her clothes, except her skateboard shoes: one of her favorite possessions. She did not remember if she was wearing underwear. J.F. testified that after they took her clothes off, they forced her to perform oral sex on both of them. She remembered they made her kiss their genitals although she did not remember any detail apart from a statement that she "performed very lazily." She testified at trial that she then had intercourse with both of them. She claimed they were physically and verbally abusive to her as the intercourse took place, but she had no recollection of any detail relating to the sexual encounters themselves. She acknowledged that she was probably guessing about what happened. J.F. testified that she remembered that there "were limbs going everywhere." Both of them were having sex with her at the same time, "rubbing, touching, sucking, whatever, and anything else you can think of." She could not remember which happened first, oral sex or intercourse.

[31] J.F. insists that she did not consent to having any sexual contact with either one of these two accused, and repeatedly told them "no," but that she did not struggle or resist because of the threat of the knife that was made to her. She acknowledged that she did not ever see a knife. She also acknowledged that she did not think they really had a knife, but she did not want to take the chance. J.F. claimed to have continuously asked them to stop. She also testified they "hit her lightly a couple of times on the face" because she was not doing what they wanted, and was not performing the sexual acts the way they wanted her to. Nevertheless, in contrast to this description, she also said they "treated her gently" during intercourse.

[32] Finally it ended and they said that she could put her clothes on. She testified that she got her clothes and ran away, but she was not sure where she ran. She could not see well because she was drunk. About an hour later, she came upon a couple who were walking on the sidewalk, only about 100 yards from the field where she had been assaulted. She could not account for what happened during that hour. She asked them to call 911 on her behalf. The man called on his cellphone. That call was made at 5:38 a.m. He gave a statement that she was very traumatized at the time. Ambulance medics responded to the call and she was taken to the hospital where she was admitted and statements were later provided to the police.

[33] J.F. was yelling and screaming, and very drunk when she arrived at the hospital. She was very agitated and traumatized so the medics and the people at the hospital helped to restrain her and gave her some sedative medicine to calm her down. Evidently she reacted negatively to one of those medications and had to stay in the hospital for several days while she was treated for side effects.

[34] J.F. testified that she had a few bruises on her arms and legs, but there was no evidence that those injuries came from her sexual interactions with the two accused. Further, she did not believe or could not recall that she had any pain in her vagina or associated with the sexual

intercourse itself. She could not recall any bruises or visible injuries from the sexual activity. She had to go up to Vaughan Police Services to retrieve her purse.

[35] Later in her evidence, in cross-examination, J.F. said that she was really drunk by the time A.G and E.K. went into the Mac's Milk variety store to buy her pop and candy. She also testified, for the first time, however, that she was ready to hop out of the car and leave, but changed her mind when she saw them coming back from the store. So she said that she got back in, shut the door of the car and carried on with the two boys as they continued to drive north towards the final destination.

[36] J.F. acknowledged in cross-examination that she always liked drinking alcohol. She testified that she drank alcohol whenever she could get it. She acknowledged that she was probably on medication at that time, but did not know whether her medication would have interacted with the alcohol, although she knew that alcohol and pills generally do not mix. When asked to describe her level of inebriation, she said on a scale of 1 to 10, where 10 is passed out completely, she was at about 7.

[37] J.F. acknowledged her extensive criminal record, which was entered as Exhibit 4. She is no longer on probation for any prior offences, but her record is lengthy, and includes 22 assault convictions. The last offence recorded was a conviction for failure to comply with the terms of her probation dating from June 11, 2012, a month after these events took place. J.F.'s record shows that in earlier times, when she was in her late teens and early twenties, there were many instances where she was unable to contain her anger and assaulted people. I note, despite a criminal record always being a factor to consider relative to a witness's credibility, that J.F.'s record evidences no crimes of dishonesty.

[38] Nevertheless, the prior occurrence reports that do relate to credibility were introduced in cross-examination. Those reports relate to sexual assaults or other incidents reported to the London Police Service (LPS) and recorded in the sealed police occurrence reports that were lettered as Exhibits A, B, C, and D rather than numbered. Three of those occurrences, dated August 31, 2004, October 15, 2004 and April 13, 2005, were ruled admissible on the application brought by the defence under s. 276. There were other reports that did not relate to sexual conduct. In one, it was plain that J.F. called the EMS and reported an assault, where it was later shown that the real motive for that call was simply to get a ride home. In the second instance, J.F. called EMS and police from the lobby of a motel in south London because she claimed to have been stabbed, but there was only a minuscule scratch on her arm that EMS concluded was plainly not a stab wound. Some days later J.F. contacted the officer in charge that evening to apologize because she acknowledged that she had not been stabbed at all.

[39] J.F. testified that she went to the police to report every time that she was sexually assaulted, but that she would never lie about a sexual assault. However, as described later in these reasons, the occurrence reports relative to those reports suggest otherwise.

[40] There is one further piece of evidence that is important to this case. That is the evidence of Yong Ho Son, given at the preliminary inquiry in December 2013, but admitted at this trial on the consent of counsel for the truth of its contents. Mr. Son and his wife were on their way to

Mass at 5:30 in the morning. The Mass was scheduled for 6:00 a.m. They were walking on Tangreen Circle. Mr. Son testified that a woman ran towards him and asked him to call 911. He called 911 with his cell phone and then handed the phone over to the woman. She was talking to people at 911 but he did not understand what they were talking about.

[41] Mr. Son said that the woman seemed very disoriented. Her clothing looked messy and at first he thought she was drunk or intoxicated, and that was why she behaved strangely, or perhaps, he thought, she was homeless. She did not tell him why she wanted to call 911. He said that she looked like a person who was out of her mind.

[42] Mr. Son said that he did not understand the English word "rape," but he did understand the meaning of "sexual assault". In cross-examination, Mr. Bytensky asked him if he had any recollection of hearing the words "rape" or "sexual assault" being spoken in his presence by the disoriented woman. He said he did not recall. In further cross-examination, he agreed with Mr. Neuberger that when he said she appeared disoriented, Mr. Son meant that she looked confused and out of it because he thought that maybe she was drunk.

[43] While the Crown adduced this evidence of Mr. Son's encounter with J.F. and his recollection of what transpired, it was of note to me that no actual recording of J.F.'s call that morning with the 911 operator was tendered as evidence, so there is no evidence of what J.F. actually said to that operator in the course of that call.

Analytical Framework

[44] A sexual assault requires proof beyond a reasonable doubt of an intentional touching of the complainant in circumstances of a sexual nature. It requires the Crown to prove beyond a reasonable doubt that (i) the sexual conduct occurred, (ii) without consent, and (iii) without the presence of any evidential foundation to support an honest but mistaken belief on the part of the accused that the complainant was consenting to the activity that took place.

[45] The caution in *R. v. Starr*[3] also bears repeating, that while absolute certainty is neither required nor possible, the standard of proof is much closer to certainty than it is to the balance of probabilities. The mere likelihood or probability that the accused committed the offences is not enough for convictions to result. The decision of the defence to call no evidence also calls for a sharp reminder that an accused person is presumed innocent of any offence unless and until the Crown has proven all of the elements of the offence beyond a reasonable doubt. The defence bears no evidential burden of proof whatsoever.

[46] J.F.'s un-contradicted evidence is enough to establish that sexual acts took place between her and the two accused. The defence does not challenge J.F.'s evidence that sexual relations took place between them. Thus, the sole element of the offences in issue in this case is whether there was consent.

[3] 2000 SCC 40, [2000] 2 S.C.R. 144.

[47] J.F. says she did not consent to having sexual relations with A.G. and E.K. The Crown bears the burden of proving that absence of consent. J.F.'s evidence must be credible and reliable to permit the Crown to discharge its burden to prove the elements of the offences, including the absence of consent, beyond a reasonable doubt. Here, that requires the Crown to prove beyond a reasonable doubt that the sexual activity between J.F. and A.G. and E.K was neither consensual, nor based on an honest but mistaken belief that consented to that sexual activity. I note at this juncture that neither Crown nor defence counsel made any argument focused on honest but mistaken belief. Except for questionable reply submissions that skirted this issue, it was not raised. The Crown relied for proof of the charges simply on J.F.'s evidence that she did not consent to have sexual relations with A.G. or E.K.

[48] To determine whether the Crown has proven the offences beyond a reasonable doubt, I must assess the credibility and reliability of J.F.'s evidence. Crown counsel argues that J.F. was honest and sincere in her testimony notwithstanding the plain evidentiary deficiencies to which I will refer later in these reasons, and that her evidence ought to be believed and considered reliable, notwithstanding prior history that calls into question the reliability of her evidence.

[49] Taken in summary, defence counsel take the position that the internal and external inconsistencies in J.F.'s evidence, and her prior documented occurrences of having made false reports to the police, must cause me to have grave concern, not only about the credibility of her testimony, but also its reliability. In their view, it would be unsafe to find either of the accused guilty of the offences charged against the evidential background that is present in this case.

[50] Returning to the framework for analysis, Crown counsel relied upon the decision in *R. v. H.C.*[4] as being supportive of her position that the evidence of the complainant is both credible and reliable. She also referred to *R. v. Ewanchuk*[5], which amongst other things establishes that there is no defence of implied consent in Canadian law. Ironically, only the day after I heard argument at the end of this trial, the Court of Appeal released an important decision that is relevant here. I did not call counsel back to speak to it, because it is simply the most recent expression of the concepts articulated in *H.C.*, but it does provide a helpful framework for this analysis.

[51] *R. v. A.M.*[6] speaks to the manner in which a trial judge must go about assessing the credibility and reliability of the evidence of a complainant in circumstances like these, where there are allegations of sexual assault. In that case, the accused appealed his conviction of sexual interference. There, like here, the accused did not testify or call any witnesses at trial. He appealed on the basis that the trial judge made errors in the manner in which he had assessed the complainant's testimony and failed to address the numerous inconsistencies and improbabilities that existed in her testimony.

[52] In that case, the sexual abuse continued over 10 years, commencing when the complainant was a child of seven and extending until she was about 17 years old. In contrast, in

[4] 2009 ONCA 56.
[5] [1999] 1 S.C.R. 330.
[6] 2014 ONCA 769, released November 4, 2014.

this case, the alleged sexual assault was a one-time event of claimed gang sexual assault by these two accused, which took place when J.F. was 27 years old. J.F. is admittedly developmentally delayed, but no argument was made here nor was any evidence led that J.F.'s evidence ought to have been assessed as if she were a child. Nor did the Crown adduce any expert evidence relative to J.F.'s state of physical, emotional and mental development.

[53] Nevertheless, at paragraphs 8 through 20 of his reasons in *R. v. A.M.*, Watt J.A., sets out a number of principles that are directly relevant to assessing the evidence of witnesses in a case like this. That case contains the same essential principles that are set out in *R. v. H.C.*

[54] First, that analysis confirms that I must take the evidence of the complainant from her as she is, with whatever allowances that need to be made for her as she delivers her evidence before this court. Watt J.A. makes the point in *A.M.* that this does not amount to treating the evidence of the complainant with the sensitivities it would receive if she were a child witness, but it does acknowledge that witnesses are to be taken as they present themselves to the court. He observed that every witness, irrespective of their age, is an individual whose credibility and evidence should be assessed according to criteria that are appropriate to his or her mental development, understanding, and ability to communicate. No inflexible rules dictate whether and when the evidence of a witness should be assessed relative to "adult" or "child" standards.[7] In a phrase, they are who they are, and are to be listened to and heard for what they say, taking account of all the strengths and deficiencies that they bring to court with them.

[55] At paragraphs 12-14 and 17-18, he continued as follows relative to the process of assessing witness credibility and reliability:

> [12] Fourth, one of the most valuable means of assessing witness credibility is to examine the consistency between what the witness said in the witness box and what she has said on other occasions, whether or not under oath. Inconsistencies may emerge in a witness' testimony at trial, or between their trial testimony and statements previously given. Inconsistencies may also emerge from things said differently at different times, or from omitting to refer to certain events at one time while referring to them on other occasions.
>
> [13] Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned.
>
> [14] Fifth, a trial judge giving reasons for judgment is neither under the obligation to review and resolve every inconsistency in a witness' evidence, nor respond to every argument advanced by counsel… That said, a trial judge should address and explain how she or he has resolved major inconsistencies in the evidence of material witnesses.

[7] *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 134. See also Canada Evidence Act, R.S.C. 1985, c. C-5.

…..

> [17] Eighth, where a case turns largely on determinations of credibility, the sufficiency of reasons must be considered in light of the deference generally afforded to trial judges on credibility findings. It is rare for deficiencies in a trial judge's credibility analysis, as expressed in the reasons for judgment, to warrant appellate intervention.
>
> [18] Nevertheless, the failure of a trial judge to sufficiently articulate how credibility and reliability concerns are resolved may constitute reversible error… After all, an accused is entitled to know why the trial judge had no reasonable doubt about his or her guilt.[8]

[56] In summary, *R. v. A.M.*, and *R. v. H.C.* before it, show that the inquiry into the credibility of J.F.'s evidence requires an assessment of (i) whether she was being truthful and honest in the testimony that she provided regarding the events that occurred, as she recalls them, and (ii) of her recollection, and her ability to describe what transpired. Where a witness (i) has demonstrated past untruthfulness, (ii) was evasive or reluctant to answer questions that were asked in examination or cross-examination, or (iii) volunteers information that was not asked, these factors may suggest an untruthful witness.

[57] However, even if her evidence is credible, it may not be reliable. It may be unreliable because she may have a questionable ability to recall the events or to describe what transpired.

[58] When a witness gives evidence that conflicts with or that contradicts their own previous statements, or that displays internal inconsistency or confusion, those factors will require that the credibility and reliability of the witness's testimony be seriously questioned and may undermine proof to the criminal standard.

[59] Caution must also be exercised in accepting the evidence of a witness as reliable in circumstances where their memory or aspects of their evidence appear to be reconstructed. This must be the result in the face of material changes in the witness's story or recollection over time, notwithstanding the witness's own personal belief in the truth of their testimony or their insistence that their memory is improving with the passage of time.

Credibility and Reliability of the Complainant's Evidence

[60] In this case the entire analysis focuses on J.F. and her testimony. To provide some understanding of her, I commence my analysis of her credibility and reliability by setting the stage with several observations about her appearance, demeanour and mannerisms.

[61] J.F. displayed a somewhat childlike demeanour as she testified. She would turn towards me to ask questions, or to apologize if she thought she had done or said something that she thought was incorrect or inappropriate or improper as she gave her evidence. That childlike

[8] All case references and citations omitted.

manner was also evident when she turned and asked me probingly, in the middle of one line of cross-examination questions that were posed to her by defence counsel on October 31, if I would like a chocolate bar, since after all, it was Halloween. On several occasions as she testified, she giggled at things that she said that she obviously thought were humorous.

[62] Apart from those anecdotal observations, and even though there was no expert evidence, it was accepted by counsel and plainly observable that J.F. is an individual who is developmentally challenged. That fact was evident from her mannerisms and from listening to her speak. She is not a child, however, and some of the detail and answers she provided in her evidence showed plainly that she is a 29 year old, sexually mature adult, who has experienced a great deal of life, the good and the bad, and who has been both onside and offside of the law.

Credibility

[63] I look first at whether J.F.'s testimony was credible – whether she was a truthful witness and a truthful person. Crown counsel insists that J.F. was a very credible witness who was trying to tell the truth and intended to do so and that she did her best. She acknowledged things that she had said before that she no longer agreed with, and this is claimed to be a mark of the truthfulness of her testimony. Crown counsel says that such disagreements by witness between what they said on a prior occasion and what they said before the court at trial are usually accompanied by excuses for why those evidentiary changes occurred, but J.F. made no such excuses. She simply said that her testimony before me at this trial was what she now remembered, and that her memory was better now than it was two years ago when the events occurred, or when she initially reported to hospital staff and then the police within hours of the assaults taking place, or when she gave her police statement or testified at the preliminary inquiry, or at any other time in the interim.

[64] The Crown states that J.F. was plainly traumatized when she was at the hospital and argues that it is not reasonable to believe that trauma arose simply because two men with whom she had just had sex would not give her a ride home. In her submission it is much more than that, and she argues that the evidence of Mr. Yong Ho Son supports the common sense inference that J.F. is telling the truth and had just been raped when she came upon and asked Mr. Son to call 911 on her behalf. Crown counsel insists that that is corroborative of the credibility of her story.

[65] In my view, however, Mr. Son's evidence does little to corroborate the credibility of J.F.'s story relative to the element of consent. Her trauma does not establish that she did not consent or that she may not have consented. It simply confirms that she was disoriented and evidently still very intoxicated an hour after the alleged events, and that she asked him to help her by calling 911, not surprising since she had left her purse and phone in the car. However, Mr. Son had no knowledge of what was spoken between J.F. and the 911 operator, did not recall either the word "rape" or "sexual assault" having been spoken by J.F. when she was in his presence and speaking on his cell phone. His assessment of her was that she was "out of her mind," disoriented, that she looked confused, and that he thought that was because perhaps she was drunk. That is the extent of his evidence. Nor was any evidence adduced of the actual content of her call to the 911 operator.

[66] While the circumstantial evidence of Mr. Son may help to establish J.F.'s dishevelled and traumatized state at that time, an allegation that J.F. had just been raped is not the only reasonable inference that could be drawn from that circumstantial evidence, especially since Mr. Son had no recollection of hearing J.F. use the word "rape" or "sexual assault" at any time when she was on the phone with 911. However, this does seem contrary to common sense, because if J.F. was calling 911 to obtain ambulance or police assistance because she had just been sexually assaulted, it seems more likely to me that she would have used those words in the course of that phone call. She would have told them why she needed their assistance. Perhaps she did. There is no evidence of that, however, because Mr. Son did not hear what was being said between the disoriented woman and the 911 operator and I did not have the benefit of hearing the 911 call itself.

[67] The evidence as a whole plainly shows that J.F. has a past history of not telling the truth. Her statement given to the police shortly after the events took place is that her memory is extremely poor, but that she remembers that she did not consent to having sex with either or both of A.G. or E.K. Nevertheless she has no recollection of the conversation that took place in the car. She has no memory of what was said when the three of them were at the bleachers. She has no initial certainty whether she had intercourse with only one, or both of them. The following paragraphs set out some of the inconsistencies in her evidence relative to truthfulness and whether she has a history of not telling the truth:

(i) J.F. initially appears to tell the ER nurse that the rape occurred at knifepoint, but only a short while later, her story changed and J.F. acknowledged that she never saw either A.G. or E.K. produce a knife. She simply assumed that there was one.

(ii) When asked, J.F. said that she did not lie that she had been stabbed on a prior occasion. However, the October 12, 2012 LPS Occurrence Report shows that she had claimed that she had been stabbed on a prior occasion, that it was plain to EMS staff that the inconsequential injury on her arm was not a knife or stab wound, and that J.F. later went to the police officer in charge to tell him that she had been lying and felt badly about that.

(iii) J.F. claims to no longer have a recollection of the three prior occurrences of August 31, 2004, October 15, 2004, and April 13, 2005 when she falsely made reports to the LPS that she had been sexually assaulted or raped, or made accusations and claims that she later recanted. In fairness to J.F., however, she admitted that if the occurrence reports showed a claim had been made and was then recanted or proven false, it was probably true. The same pattern of false accusation and recantation characterized each of the three 2004 and 2005 occurrences. The file note of P.C. Catherine Fountain captures the sense of all three occurrences when she wrote as follows in regard to the April 13, 2005 occurrence:

> This complaint is unfounded. The complainant, J.F.is afflicted with mental health issues and is developmental delayed. She seems to feel that her regretting having sex makes it a sexual assault, stating

> "all my one [night] stands are rapes". She also admitted that the involved male would not have known she did not want to participate.

(iv) When questioned whether she had a history of lying, at first J.F. said she could not remember, but then acknowledged that she did tell lies when she was under the influence of alcohol. However, she was insistent that she had never lied to the police, contrary to the prior occurrence reports and her preliminary inquiry evidence. When confronted with her preliminary inquiry evidence that she had lied to many people, she admitted it was correct, but tried to distinguish between lying to police officers and other persons in authority. J.F. said "it is less important to tell the truth to the shelter workers because they can't run my life. Yes, I remember lying a few times." This was the first time J.F. made a distinction that lying to certain kinds of authority figures was acceptable, while lying to others was not.

(v) J.F. finally admitted that she did have a history of lying "sometimes." She said if it was written down that she had acknowledged that she had a history of lying, then even though it was not the truth, it was what she must have said. Next, adding further confusion, she stated that "it was a lie that she lied." Seconds later, she said she only lied when she was younger.

(vi) When it was put to her that she demanded that A.G. and E.K drive her home when they told her they could take her to a bus but not drive her home because they had had drinks, J.F. said that she did not remember. She was confronted with contradictory testimony from the preliminary inquiry where she testified that she did demand that they drive her home and was very angry that they did not. Only then did she acknowledge that "it might have been true."

[68] These inconsistencies necessarily weigh heavily on my assessment of the credibility of J.F.'s testimony. I do not question it in the sense that I believe that she believes, from her perspective, that what she was testifying before me at trial was the truth, and that she believes that her memory has improved with the passage of time, but that is not human experience, and that is not the measure of credibility.

[69] In fairness to her, J.F. was fair in accepting anything that was written as having been stated by her on prior occasions, even though she no longer remembered it or was now in disagreement with what she had previously said. She simply claimed that that was no longer the truth as she remembered it – and that is the fundamental problem that the court must have with the credibility of her evidence. It is not a product of an intent or effort to deceive the court. It is the product of a confused, muddled and disoriented mind, as Mr. Son described her manner and behaviour only an hour after the events took place.

[70] At one point as I listened to her evidence, and the bouncing around that appeared to characterize it, I wrote in my notes that she is "totally lost." Then, as she had on prior occasions, the initial story provided to persons in authority changed materially with the passage of time, and

J.F. insisted that her memory was improving. But instead, those claims raised real concerns for me about her evidence being reconstructed to compensate for her level of intoxication at the time, which renders it impossible for her to actually know what transpired.

[71] When I collectively consider (i) J.F.'s prior false reports of sexual assault, (ii) the probability that J.F. was very angry at A.G. and E.K. when they would not drive her home, (iii) J.F.'s level of intoxication and lack of knowledge of what happened during the hour that preceded the 911 call, (iv) the absence of evidence of what was actually said on the 911 call, (v) her false claim five months after these events of having been stabbed and her use of London EMS as a substitute taxi service at that time, (vi) her inability to tell the truth about lying and her seeming willingness to lie if it served her needs, and (vii) the extensive revisions to her story that were evident in her testimony before me, I am left with profound questions about her credibility. Indeed, she herself is uncertain whether she had sex with one or both of A.G. and E.K. I find against that background that I cannot be sure that she did not consent to the sexual acts that occurred in this case.

Reliability

[72] Turning to reliability, even Crown counsel acknowledged that I need to be concerned about the reliability of J.F.'s testimony relative to consent. In her submission, however, the only real issue is whether J.F. consented. She argues that J.F. may get the peripheral details wrong in her testimony, and she may demonstrate significant inconsistencies in her story, but if I believe what J.F. said in her testimony, then I ought to consider it to be reliable and on that basis, the consent element of the offence will have been made. I do not understand, however, how a trier of fact could believe J.F.'s claim that she did not consent, without taking account of whether other aspects of the totality of the evidence presented at trial call the reliability of that evidence into serious question.

[73] Crown counsel concluded her submissions by asking me to pay particular attention to the surveillance video footage from the front of the shelter on Queen Street, in considering the evidence and the situation as a whole. She claims they are very helpful, but also disturbing, because she argues that they reveal a "targeted" pickup of the complainant by these two accused. In her submission, if we did not know otherwise, the video surveillance would appear to suggest two men picking up a prostitute. Crown counsel argued that A.G. and E.K. targeted J.F. and "took advantage of J.F.'s extreme vulnerability" and what she claimed, with no apparent evidentiary foundation, was J.F.'s "inappropriate familiarity with people she did not know".

[74] There is a disturbing quality to the initial encounter between both accused and the complainant, and it does appear that A.G. and E.K. do turn back from the corner and approach J.F., talk to her briefly, and then leave with her, with E.K. having his arm around her shoulder. Importantly, but overlooked in Crown counsel's submissions, the video surveillance footage has no sound, and thus does not record what actually transpired and what was said. In fact, as J.F. admitted in her testimony, A.G. and E.K. turned around and approached J.F. in response to *her* having called out to *them*. Moreover, even the Crown's claim of a predatory aspect to the

behaviour of the two accused does not necessarily equate to an absence of consent relative to subsequent sexual interactions between them.

[75] In order to be satisfied beyond a reasonable doubt that the complainant did not consent, I must be satisfied beyond a reasonable doubt of the credibility and reliability of her claim. Defence counsel argued that two fundamental points undermine the reliability of J.F.'s testimony. The first is her intoxication and its impact on her ability to perceive and recall information and on how her memory has changed over time, which they argue calls into question the reliability of her evidence. The second is the changes to her memory that she acknowledges have occurred over time.

[76] Several different aspects of J.F.'s evidence raised issues about the reliability of her evidence. The linchpin to these concerns was the unreliability of her memory. That absence of reliability showed itself in her responses to a number of discrete areas of questioning that I have grouped under the headings set out below.

(i) The impact of alcohol on J.F.'s memory:

[77] J.F. acknowledged that she drank between a quarter and one half of the large bottle of vodka while she was in the car with A.G. and E.K. At the preliminary inquiry, J.F. acknowledged that the amount of alcohol she drank had negatively affected her memory. She admitted that she would do things when she was drunk that she would not do if she was sober: that the "alcohol could take over" and control her conduct. J.F. stated at the preliminary inquiry that she did not remember much at that time about what had happened, When she initially reported this assault to the police, she specifically told them that she could not really remember much of what had occurred because she was really drunk.

[78] J.F did not remember any sexual discussion having taken place between herself and A.G. and E.K., but she "assumed it was just conversation." Later in her testimony, however, it seemed her memory improved. She actually admitted that she "might have told" A.G. and E.K., when they were in the vehicle, "that she had not had sex in a long time." This contradicted her evidence in chief that they had never had any discussion about having sex. But then she backed away from that admission, indicating that she could not recall every detail, so she did not know for sure whether she told them that or not.

(ii) The improvement of J.F.'s memory:

[79] J.F. claimed on numerous occasions to have no recollection of what she had said at the preliminary inquiry. But then, as her statements at the preliminary inquiry were read back to her in cross-examination, she insisted that she had a very different memory today of what had transpired than those statements indicated she did at that time. She told counsel, frankly and in a fulsome manner, that her memory "has changed over time on all aspects of the case."

[80] J.F. maintains that her memory is better now that it was in December 2013 when the preliminary inquiry was held, and that it is better than it was when she gave her initial statement on June 1, 2012, shortly after events are alleged to have occurred.

[81] When she was asked, J.F. she said she did not know if she expected A.G. and E.K. to drive her home, is unsure today, and does not remember. But when confronted with her answer from the preliminary inquiry that she demanded that they drive her home, she simply sloughed off the significant inconsistency, stating that she did not remember what she said at the preliminary inquiry. In fairness to her, however, she agreed that if the preliminary inquiry transcript indicated she had said something, then she must have said it, even if she had no recollection of it.

(iii) The plan to escape at Mac's Milk:

[82] J.F. claimed in cross-examination that she was initially unsure whether she should go with the two accused in the car. Although she gave this evidence at trial, she admitted that she did not tell the police that she had any such uncertainty when she gave her initial statement on June 1, 2012.

[83] Then later at this trial, J.F. testified that she seriously thought about jumping out of the car and leaving the two accused when they stopped the vehicle and went into the Mac's Milk store to make purchases. However, that was in stark contrast to her evidence at the preliminary inquiry that she stayed in the car with A.G. and E.K. because "they were still hanging out together" and "she was having a good time."

[84] When pressed on the point, she admitted that she had never before said that she considered leaving the vehicle. However, J.F. does acknowledge asking A.G. and E.K. to buy her some pop and candies, and seeing the condoms in the Mac's Milk bag. This is not a mere peripheral detail, in my view, because it goes to her state of mind. Her new story would suggest an underlying fear of being with A.G. and E.K., but her prior evidence was that they were having a good time and continuing to chill out together.

[85] Defence counsel questioned this change between what she had said at an earlier time and what she said at trial. J.F. snapped back that "[i]t's not about what's written, it's about what I remember!" I took that to mean that she did not care if she had been recorded having said something entirely different on an earlier occasion. What mattered to her was what she was saying currently, because, as she continued to insist, her memory has been improving with the passage of time.

(iv) Details of the sexual assault:

[86] Apart from whether there was discussion about sex when J.F. was in the car with A.G. and E.K., J.F. admitted that there was discussion about having sex when they were at the bleachers. In response to defence counsel's suggestion, she was certain that she did not make any advances towards either of them. She insisted that she had a totally clear memory of what

happened when they were sitting at the bleachers, in spite of her level of intoxication. That was when the two accused males started talking about sex. She insisted that she did not consent to the sexual interactions that followed. She insisted that she had been raped, and since they raped her, she called the police.

[87] When questioned by Mr. Bytensky, J.F. told him that everything that took place between the three of them was consensual until they got to the school. She was asked about her earlier statements that A.G. and E.K. called her names and were verbally abusive towards her. Initially she would not answer, even though she had previously testified that they did. She said it was hard to remember, but then she said that she did remember that they called her names. She also remembered that she told the police in her June 1, 2012 statement that they had called her names and pushed her around. However, when a portion of the December 4, 2013 preliminary inquiry transcript was put to her, she seemed to contradict those allegations of verbal and physical abuse when she acknowledged that she had testified at that time that they were "gentle" with her throughout the sexual encounter between them.

[88] J.F. was challenged on whether she had sexual intercourse with both A.G. and E.K. or only one of them. When those questions started, she answered that "she only remembered bits and pieces" of what happened. In her testimony at trial she was certain that she had sexual intercourse with *both* of the accused, but in her statement to police on June 1, 2012, she did not remember whether she had intercourse with one of them or with both of them. This is another instance where her memory has allegedly improved, since she is now certain that she had intercourse with both of them when she could not remember that only four days after the events took place.

[89] On the same point, in contrast to her trial evidence, it is relevant that J.F. spoke to P.C. Bartlett at 11:50 a.m. on May 26, 2012, only six to eight hours after the assaults. At that time, she gave a different story of what transpired than what she told at trial. J.F. told P.C. Bartlett that she had performed oral sex on both of the accused, but had intercourse with only one of them. Further, just a short while earlier, while she was in the hospital after being picked up by the ambulance service, the ER triage nurse recorded in her notes that J.F. told her that "[s]he had been making out with Boris [i.e. E.K.] but that *a knife was then produced and sex was demanded at knife point*." She told the nurse that she was scared and that she was raped. In contrast, her evidence before this court has been that no knife was ever produced, and that she did not believe that they had a knife, even though she said they threatened her and that she complied because she did not want to take a chance in case they did have a knife.

[90] I find these to be significantly inconsistent evidentiary positions. When confronted with that statement as recorded in the notes made in J.F.'s medical records, J.F. claimed to have no recollection of it, but she guessed that the nurse had probably written down what she thought she had heard, even if it was not correct. But while it is true that the nurse's notes are not necessarily a verbatim recounting of what she was told by J.F., plainly there would have been no incentive for the nurse to write down that the assault occurred at knifepoint, with the implicit visibility of a knife, unless that was what the complainant had said.

[91] Inevitably, this means that on her first report to persons in authority of the incidents that underlie these charges, J.F. reported (i) having been raped "at knife point", and (ii) having had oral sex with both men, but having had intercourse with only one. Yet later *that same day* when she spoke to the police, the report no longer includes a threat from a *visible* knife, but only the *verbal* threat of a knife, and even though she acknowledges having little memory of the events, she is now certain that she had intercourse with both men.

(v) Summary:

[92] Peoples' memories do not generally improve with the passage of time. When a witness is insistent, as J.F. was, that her memory is improving with the passage of time, it raises the need for caution in the mind of the trier of fact. It raises the prospect that the witness is not actually remembering what happened, but is instead, wittingly or unwittingly, reconstructing or modifying the story as time passes, even though they maintain an honest and sincere belief that they are being truthful.

[93] This goes to the heart of reliability. Nevertheless, J.F. was sincere in her belief, professed several times as she answered questions in cross-examination, that she was being truthful and as helpful as she could be in giving the current evidence she gave, even if it conflicted materially with her initial statement to the police or her evidence at the preliminary inquiry. The problem was that she no longer seemed able to differentiate between what actually may have happened, what she has told people happened in the past, and what she was telling me at this trial.

[94] I found myself unable to reconcile these inconsistencies in J.F.'s testimony about issues that are not peripheral, but central to the nature of the sexual conduct that took place between them and whether it was consensual or not. I agree with the position of defence counsel that these problems go to the root of the reliability of J.F.'s evidence regardless of its credibility. Even if I had not found myself unsure of whether or not J.F. may have consented to the sexual relations that took place between her and the accused, the problems with the reliability of J.F.'s evidence prevent the elements of the offences from being proven beyond a reasonable doubt.

Conclusion

[95] One final point needs to be addressed. At the end of her reply submissions, for the first time in this trial, Crown counsel claimed that since A.G. and E.K. watched J.F. consume the vodka, they were willfully blind to J.F.'s state of inebriation and that because of that state, and the fact that our law does not permit consent to be given involuntarily, they could not have had an honest but mistaken belief that J.F. was consenting. Given that the issue was never raised in chief, it must have been an afterthought, but I considered it inappropriate to make that submission in reply five minutes before the end of the trial, when no claim of honest but mistaken belief was advanced by the defence. It was out of line because it assumed that J.F.'s claimed absence of consent was a necessary and inevitable consequence of her inebriation, because it assumed, without any evidence to support it, that J.F. could not have consented to sexual relations with A.G. and E.K. Then Crown counsel added a final disturbing statement.

[96] Her exact words were as follows:

> Finally, with respect to the lies, there are two people in this room who know whether or not [J.F.] is lying, and what she is lying about, and they chose not to testify. …The submission I take from my friends is that she is lying about everything, all kinds of thing, but we don't know if she if she is lying about those things, because we have no other evidence to contradict her.

[97] It was very surprising to me that the very experienced Crown counsel in this case would have directed innuendo towards the accused in her reply argument relative to their failure to testify in this case. That was improper in my view. That is why I again include the sharp reminder that an accused person is presumed innocent under our system of law, unless and until the Crown has proven all of the requisite elements of the offence beyond a reasonable doubt. The accused never have any burden of proof. Further, to raise the inference that they needed to testify, impermissibly shifts the burden of proof in my view. There does not have to be direct evidence contradicting the complainant's claim that she did not consent. Having regard to the whole of the evidence, the presence of real and meaningful concerns about J.F.'s credibility is sufficient to create uncertainty about her lack of consent.

[98] Here, as I have indicated, there appears to be a great deal about which J.F. shows at least a casual attitude towards the truth, regardless of her protestations and the Crown's arguments of her sincerity. The outcome is not affected by the decision of the accused not to testify. It is entirely a product of the panoply of difficulties in J.F.'s evidence, and the other evidence adduced at trial.

[99] As noted above, the burden to prove the elements of the offences beyond a reasonable doubt rests on the Crown. Having reviewed the entirety of the evidence several times, I cannot be sure that J.F. did not consent to the sexual relations that took place between her and A.G and E.K. In light of those concerns and having regard to the whole of the evidence, in my view, it would be unsafe to enter convictions on these charges. I find that the Crown has not proven beyond a reasonable doubt that A.G and E.K. are guilty of these charges. Acquittals will be entered on both charges against each of the accused.

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Michael G. Quigley J.

Released: January 12, 2015

CITATION: R. v. A.G. and E.K., 2015 ONSC 181
COURT FILE NO.: CR-14-10000003-0000
DATE: 20150112

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

A.G.

Defendant

- and -

E.K.

Defendant

REASONS FOR JUDGMENT

Michael G. Quigley J.

Released: January 12, 2015