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Thanks very much, and if you have any questions please contact me at 945-4872

Please find attached the Transcript from October 12, 2010

Kenneth RHODES

RE:

REMARKS

Total No. of Pages (including this one):

FROM
Name: Monika Kapoor
Office: Prosecutions Service
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TO
Name: Allison Fenske
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Fax No: 934-0596
Phone No:

DATE October 23, 2011

Fax



APPEARANCES:
D. Gray & S. Seesahai, ON BEHALF OF THE CROWN
D. Coggan, ON BEHALF OF THE ACCUSED

Restriction on publication: By court order pursuant to s. 486.4(1) of the *Criminal Code*, any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

CORRECTED REASONS FOR JUDGMENT delivered by The Honourable Justice Dewar, in the City of Thompson, Province of Manitoba, on the 12th day of October, 2010.

Accused.

KENNETH RHODES

-and-

HER MAJESTY THE QUEEN

BETWEEN:

QUEEN'S BENCH
THOMPSON, MANITOBA

1 October 12, 2010

2

3 **Restriction on publication:** By court order pursuant to s. 486.4(1) of the *Criminal Code*, any information that could

4 identify the complainant shall not be published in any

5 document or broadcast or transmitted in any way.

6 S. Seesahat: Good afternoon My Lord. Seesahat,

7 first initial S (inaudible) Wintipeg and my colleague, Mr.

8 Gray, is present in Thompson.

9 D. Cogan: Cogan. I'm appearing for Mr.

10 Rhodes, My Lord. Mr. Rhodes is present, seated beside me.

11 The Court: Right. I can see you folks all

12 right from here. Can you see me?

13 D. Gray: We can My Lord.

14 And you can hear me then. Alright.

15 I've had the opportunity to consider the submissions that

16 were made to me a couple of weeks ago and have arrived at

17 this decision.

18 After a night of drinking when four people decide to

19 climb in a car around 2:30 a.m. to continue to party rather

20 than head home to their own beds something bad is bound to

21 happen. In this case, the complainant has come away

22 following that decision complaining that she experienced

23 unwanted sexual relations and the accused has come away with

24 experiencing the pressure and uncertainty of the criminal

25 justice process. Unfortunately, whatever are the options

26 open to the court, neither the complainant nor the accused

27 can take that decision back to make it all over again.

28 In this case, the accused stands charged with one count

29 of sexual assault, it being alleged to have occurred on

30 August 19, 2006. I have heard evidence from the

31 complainant, her friend and the accused. I have been given

1 pictures of the complainant and two of the items of clothing
 2 which she was wearing that night. On that basis, I am asked
 3 to decide this case.
 4 There are differences in the versions of the
 5 complainant and the accused, perhaps not surprising given
 6 the length of time that has elapsed since the incident date,
 7 and the common testimony that all parties had been drinking
 8 that evening and night. Nonetheless, there are also many
 9 facts which are similar, if not identical. One of those
 10 facts is that there was sexual activity between the
 11 complainant and the accused. The difference is that the
 12 complainant says that she did not consent to it, and the
 13 accused pleads that he believed that she did.
 14 Here are the facts as I find them to be.
 15 On the evening of August 18, 2006, the complainant and
 16 her second cousin, S.M., planned a night of partying. It
 17 started when the two of them purchased a bottle of Crown
 18 Royal and a package of shooters at the local liquor store.
 19 They took their purchase back to S.M.'s trailer where they
 20 consumed some of it. Between 11:00 p.m. and midnight, they
 21 attended the bar at the Burntwood Hotel in Thompson where
 22 they consumed more liquor. At some point in the evening,
 23 and as luck would have it, their designated driver called it
 24 a night and left the complainant and S.M. at the bar with
 25 the keys to S.M.'s car. The two of them remained drinking
 26 at the bar until closing at which time they spilled over
 27 onto the parking lot in front of the bar looking for a party
 28 to which they could attend.
 29 In the meantime that evening, the accused and his
 30 friend, Aaron Lederhous, had been involved in drinking
 31 themselves. They had attended what the accused called a
 32 couple of bachelor parties, one of which celebrated Mr.

1 Lederhous's either recent or soon to be wedding. They
 2 arrived at the Thompson Inn, where they stayed until 1:00
 3 a.m. and then proceeded to the bar at the Burntwood Hotel
 4 and continued their celebrations. The accused estimates that
 5 he drank six to ten beer at the Thompson Inn and more beer
 6 at the Burntwood. At closing, the accused and Mr. Lederhous
 7 found their way onto the parking lot in front of the bar.
 8 According to the accused, both he and Mr. Lederhous
 9 were quite intoxicated at this time. In the course of his
 10 direct examination, the accused described that each of Mr.
 11 Lederhous, S.M., the complainant, and himself were "pretty
 12 juiced" and that he was drunk. According to the
 13 complainant, in her direct examination she said that she was
 14 "pretty drunk" and in her cross-examination she agreed that
 15 when she left the bar she was "buzzed". She remembers that
 16 at one point in time after the bar closed that she felt like
 17 there were lights flashing and she was spinning. She told
 18 police five days later that she was helped to the car by the
 19 accused, presumably because of the state of her sobriety. As
 20 for S.M., she said by the time the bar closed, she was
 21 "intoxicated" and not sober enough to drive. Although I did
 22 not hear evidence from Mr. Lederhous, I was told by counsel
 23 that he was not being called as a witness because his memory
 24 was poor of the events of that night and that his stated of
 25 intoxication on that night contributed to his lack of
 26 recall.
 27 All of these descriptions concerning sobriety lead me
 28 to conclude that each participant was intoxicated, albeit
 29 not to the point of being completely out of their minds.
 30 They were however drunk enough that their judgments were
 31 being affected and their ability to remember somewhat
 32 encumbered.

1 In the parking lot, the two young women were searching
 2 for a party and the men were looking for a ride. The result
 3 was a conversation between some or all of them. S.M. made
 4 known her desire to go swimming and the fact that she had a
 5 car. The men were prepared to oblige her by driving her car
 6 to Ospagan Lake. Given that the girls and the men were
 7 strangers, that all had been drinking, that the girls were
 8 actively looking for a party and that the men were not
 9 intending to go straight home, that the plan proposed was to
 10 go swimming, and that no one had bathing suits, it would not
 11 be a stretch to conclude that a casual sexual encounter was,
 12 in the minds of at least some of them, more than a remote
 13 possibility. At least, I believe that was the mindset of
 14 the men and I believe also S.M. She readily admitted that
 15 at the first stop along the way that she engaged in "making
 16 out" with Mr. Lederhous. Judging by the later actions of
 17 the complainant, I cannot necessarily conclude such an
 18 intent on her part at the outset, but she at least was
 19 prepared to go along with the others.
 20 At any rate, the four participants squeezed into S.M.'s
 21 two door Cobalt car, and headed south. Mr. Lederhous was
 22 the driver and S.M. occupied the front passenger seat. The
 23 accused and the complainant sat in the back.
 24 The car first made a stop at what was described by the
 25 complainant and the accused as the Jonas Road intersection.
 26 Here the evidence of each participant diverges.
 27 Firstly, S.M. said in her examination in chief that she
 28 didn't recall why they stopped. In her cross-examination,
 29 however she acknowledged that she remembers "making out"
 30 with Mr. Lederhous during that stop, but remembers nothing
 31 else about it. Specifically, she doesn't remember the
 32 complainant then leaving the car.

2

1 Secondly, the accused said that the purpose of the stop
 2 was to enable the occupants to relieve themselves, each
 3 being full of liquor which they had earlier consumed, and
 4 that is what he said he did.
 5 Thirdly, the complainant says that by this time she had
 6 developed an uneasy feeling about this journey, that she had
 7 rebuffed an advance in the backseat by the accused, and she
 8 wanted to go home. She says that she demanded the car
 9 stopped, that she got out of the car, and said she would
 10 walk home. She says that she was mollified into continuing
 11 when S.M. agreed to sit in the backseat with her.
 12 These competing versions do not permit me to determine
 13 what actually happened in that time other than the car came
 14 to a stop, and there was some sexual interaction between
 15 S.M. and Mr. Lederhous. I have difficulty accepting the
 16 complainant's version that she made her discomfort known at
 17 that time because notwithstanding S.M.'s lapses in memory
 18 from time to time (like all of those who testified), she has
 19 no recollection of being the backseat of her car with the
 20 complainant at this time. In my mind, that is a significant
 21 fact and I consider one which S.M. would probably have
 22 recounted had it occurred. To the extent that the Crown
 23 wishes to point to this stop as a demonstration of the
 24 complainant's unease, I cannot accept that submission
 25 because of the insufficiency of the evidence on this point.
 26 At any rate, the car proceeded. The accused testified
 27 that it was in the section of the trip between Jonas Road
 28 and Ospwagan Lake that he attempted to put his arm around
 29 the complainant and was rebuffed with a gesture that
 30 indicated she was not interested. The complainant used the
 31 rationale that she had a boyfriend to support her rebuff.
 32 To me it matters little whether the complainant's rebuff

1 occurred before or after the Jonas Road stop -- it's common
2 ground that the accused made an advance in the backseat of
3 the car and it was rejected by the complainant.
4 When the car reached Ospwagan Lake, it turned right
5 down a narrow gravel road which led to a boat launch area by
6 the lake. The girls were not familiar with either the road
7 or the launch area. I conclude from his testimony that the
8 accused was.
9 When the car reached the lake, S.M., Mr. Lederhous, and
10 the accused immediately disembarked to relieve themselves.
11 The complainant stayed inside the car until the accused took
12 her by the hand or wrist to come outside. It being a two
13 door car with the complainant in the backseat, I accept that
14 the complainant climbed out of the car assisted by the
15 accused. Once outside, the complainant then reported the
16 need to relieve herself and headed into the bush ostensibly
17 for that purpose. She did not however return as promptly as
18 the others, and they began to call out for her. She did not
19 respond and S.M. became concerned for her. She and Mr.
20 Lederhous decided to get back in the car and drive back to
21 the highway to search for her. The accused remained behind
22 to look for her there.
23 When the car left, the complainant came out of the
24 bush. She testified that she had gone into the bush because
25 she was afraid of the accused and not because she needed to
26 urinate. She saw the car drive away, but she also knew that
27 the accused had been left behind. She testified that she
28 came out of the bush when he headed her way. She then said
29 that her plan to protect herself from the accused was to
30 pretend that she liked the accused.
31 The complainant testified that she and the accused
32 engaged in some conversation, the details of which were not

1 related to me, and that the accused started kissing her and
 2 she kissed the accused back. They walked together up the
 3 gravel road. At some point along the road, the complainant
 4 says that she stopped to take off her high-heeled boots and
 5 picked up a stick (described as between two and three feet
 6 long and one and a half inches in diameter) which she
 7 intended to use against the accused if it became necessary.
 8 She could not remember the details of what was happening or
 9 any conversation between her and the accused as they
 10 continued their walk up the gravel road towards the highway.
 11 She does remember that when they got to the highway, they
 12 walked to the side of the northbound lane. It was at this
 13 point that the sexual activity which forms the basis of the
 14 charge began.
 15 The evidence of the accused as to what happened between
 16 the lake and the highway differs slightly, although it
 17 mainly corresponded. The accused's evidence is that after
 18 Mr. Lederhous and S.M. drove away, the complainant stumbled
 19 out of the bush. The accused says he helped her up and she
 20 began flirting and grabbing onto him. She snuggled up to him
 21 and they began kissing. As they walked generally to the
 22 highway, he asked her whether he could "taste her nipple"
 23 and she responded "let's go to the highway first". Beyond
 24 that, he says the rest of the walk up to the highway was
 25 uneventful except that they walked with him supporting her.
 26 He did not remember her taking off her boots nor did he
 27 remember her picking up a stick. He did not remember who
 28 started kissing first.
 29 I accept the evidence of the complainant that she did
 30 take off her boots and did pick up a stick. If she was
 31 truly afraid, then picking up the stick was a logical thing
 32 to do. As for who kissed who first, the complainant said

1 that the accused did and I believe her. That makes sense
2 because in both versions of the events that followed, the
3 accused is the one who appears to be taking the lead in the
4 sexual activity.
5 To the extent that the accused testified that he sought
6 some permission on the gravel road to escalate the sexual
7 activity from the kissing that occurred, and the complainant
8 deferring until they reached the highway, it is consistent
9 with the accused's intention to pursue some sexual activity
10 with the complainant. The deferral by the complainant is
11 consistent with an attempt to buy some time and perhaps seek
12 some help on the more open highway.
13 Again, once they reached the highway, the stories of
14 the complainant and the accused are similar in some
15 respects, but diverge in others. The complainant says that
16 when they arrived at the highway, they crossed to other
17 side. At that time, the accused put the complainant on her
18 back just off the shoulder of the highway. He pulled down
19 her shirt and began kissing her bare front. Then he took
20 off her trousers, pulled her panties aside, and inserted his
21 fingers into her vagina. When she complained that it hurt,
22 he responded that he was only using two or three fingers and
23 that it would only hurt for awhile. He then pulled her up
24 by the hair onto her feet, put his back towards him, bent
25 her over and inserted his penis into vagina. After a brief
26 period, his penis slipped out of her vagina and hit her anus
27 at which point she made known her discomfort and he stopped.
28 He then went to his knees and started to perform oral sex
29 upon her. After this went on for, in the complainant's
30 words, "not long" the complainant said that she thought she
31 heard something in the bush, and when that distracted the
32 accused, she ran away into the bush.

1 The complainant also testified that when she was being
2 digitally penetrated and complained that it hurt, she
3 uttered words like "if you're going to kill me, kill me".
4 Although she could not recall any response from the accused,
5 she then said that she began to hit herself on the head with
6 the stick which she had picked up and carried with her. She
7 says that she did so for the purpose of knocking herself out
8 so that she would not be conscious while sexual activity
9 continued.
10 During her examination in chief, after giving her
11 evidence that the accused had digitally penetrated her to
12 the point that she complained that it hurt, the
13 complainant's memory went blank and she could not describe
14 the further activity without her memory being refreshed from
15 a police statement which she gave on August 24, 2006. The
16 police statement was apparently (it was never entered as an
17 exhibit other than for identification) in the handwriting of
18 the officer who took it, but initialed and signed by the
19 complainant. The complainant says that she never read it
20 over before signing it. The fact is however that she
21 testified at trial that it helped her memory.
22 The accused's evidence on the sexual activity on the
23 side of the highway is similar in that he also describes an
24 act of digital penetration, an act of his penis penetrating
25 the complainant's vagina from behind and the accidental
26 touching of his penis to the complainant's anus. He further
27 verifies that he was engaged in oral sex upon the
28 complainant. He further verifies that as he was engaged in
29 that oral sex, the complainant ran away. The accused
30 however indicated that before the digital penetration, he
31 had placed his fingers inside the complainant's pants but
32 outside her vagina before her pants came off. In his direct

1 examination, he said that he then took off her pants to
 2 digitally stimulate her, but later in his testimony he said
 3 that he could not remember how her pants came off.
 4 A major difference from the complainant's testimony is
 5 that the accused says that the complainant was never on her
 6 back on the ground. The accused said that the complainant
 7 was standing at all times. He says that he may have gone
 8 down on a knee when he digitally penetrated her. As for the
 9 vaginal intercourse, the accused says the complainant agreed
 10 by turning around for him.
 11 The accused says that when the complainant indicated
 12 that his digital penetration hurt her, he stopped. He does
 13 acknowledge that he may have said something "stupid" along
 14 the lines that "it will only hurt for awhile". He does
 15 emphasize that he was not out there to hurt anyone.
 16 The accused however does not recollect the
 17 complainant's utterance about "killing me" at that time, but
 18 does recall the complainant yelling something about
 19 "killing" from the bush after she ran away.
 20 Later in my decision, I will provide my conclusions on
 21 my findings of fact about what took place at the side of
 22 highway.
 23 In his testimony, the accused testified that when the
 24 complainant ran off into the bush, he called out for her to
 25 come out but without success. He picked up her pants and
 26 her boots and walked south along the highway first,
 27 periodically calling into the bush to the complainant, and
 28 then turned around and proceeded north along the highway.
 29 He encountered the car driven by Mr. Lederhous near the
 30 intersection of the gravel road. He says that he got into
 31 the backseat and told the occupants that the complainant had
 32 headed south in the bush. Mr. Lederhous turned the car

1 around and drove south for awhile, and then turned and
 2 headed north again. As they were heading north, the
 3 complainant flagged them down. S.M. and the complainant
 4 then sat in the back and the accused and Mr. Lederhous in
 5 the front as then headed back to Thompson. I accept this
 6 evidence.
 7 From all accounts, when S.M. saw the complainant get
 8 back in the car without her pants and boots, she demanded to
 9 know what had happened. Both the complainant and the
 10 accused described her as being loud and aggressive (the
 11 complainant said "freaking out"). When asked what happened
 12 to her pants and boots, the complainant told her that she
 13 had gone swimming. During the course of the trip to
 14 Thompson, S.M. continued to rant about what might have
 15 happened. The accused and Mr. Lederhous as well as the
 16 complainant attempted to settle her down. At one point, Mr.
 17 Lederhous gave his wallet to S.M. ostensibly for the purpose
 18 of confirming that he and the accused had nothing to hide.
 19 When the car reached the intersection of Wolf and
 20 Deerwood in Thompson, Mr. Lederhous and the accused
 21 disembarked. Once they were out of the car, the complainant
 22 testified that she "sort of told" S.M. that she had been
 23 raped, and broke down and cried. S.M. drove the car past
 24 the two men who were walking away and threatened them with
 25 the fact that her then fiancée had gang affiliations. S.M.
 26 then drove the car to the Pizza Hut parking lot where she
 27 and the complainant spoke further. The complainant was
 28 still upset. S.M. drove the car to the police detachment
 29 building, but it was closed. She then telephoned the
 30 detachment and asked them to send a police officer to the
 31 Canadian Tire parking lot where they were parked. The
 32 police arrived and S.M. got out of the car to speak to the

1 police. When she left the car, the complainant locked the
 2 doors and would not speak to the police on that evening.
 3 When examined at trial, the complainant said that she did
 4 not want to talk to anyone at that time.
 5 After the police left, S.M. took the complainant back
 6 to her trailer where the complainant was able to shower, get
 7 a clean set of clothes, and have a sleep. The next day,
 8 S.M. noticed a number of bruises and scratches on the
 9 complainant's body.
 10 Also on the next day, Mr. Lederhous and the accused
 11 encountered S.M. and the complainant outside S.M.'s trailer.
 12 Mr. Lederhous had come to retrieve his wallet. S.M.
 13 remained feisty about what had happened the preceding night,
 14 but the complainant asked her to fetch the wallet and give
 15 it back. During the course of this encounter, the accused
 16 approached the complainant, and according to the complainant
 17 said "nothing happened, did it". According to the accused,
 18 he was exhorting the complainant to tell S.M. that nothing
 19 had happened in order to convince S.M. to settle down. In
 20 either case, the conversation was cut short by Mr. Lederhous
 21 who told the accused to get back into his truck.
 22 Over the next few days, the complainant's mother and
 23 another cousin persuaded her to report the matter to the
 24 police.
 25 After the police became involved, the accused heard
 26 about the investigation. The accused testified that he and
 27 Mr. Lederhous, having nothing to hide, attended at the
 28 police station to clear things up. That occurred on August
 29 25, 2006. At that point in time, the accused first told them
 30 that there had been no significant sexual activity. The
 31 accused testified that when the police impressed upon him
 32 the seriousness of the allegation, he then proceeded to tell

1 the police of the sexual conduct that transpired. He
2 maintained however that any sexual activity was consensual.
3 The police took a further lengthy statement from the
4 accused on September 20, 2006 in which he reiterated that
5 the sexual activity was consensual.
6 At the trial the accused raised three defences.
7 Firstly, that the Crown had failed fully to prove the
8 charge in that the indictment reads the offence took place
9 in or near the Postal District of Thompson and no evidence
10 was led as to where that was.
11 Secondly, that the complainant consented to the sexual
12 activity.
13 Thirdly, if I find that there was no consent, that the
14 accused had an honest but mistaken belief that there was
15 consent.
16 Let me deal firstly with the defence concerning the
17 failure of the Crown to prove that the offence occurred in
18 the Postal District of Thompson.
19 Counsel for the accused is quite right when he says
20 that there was no evidence that the alleged sexual assault
21 took place in the Postal District of Thompson. There was
22 plenty of evidence however that the activity took place at
23 Ospwagan Lake some 20 miles south of Thompson. I do not
24 consider the location of the offence to be a major issue in
25 this case. It is clear that the sexual activity occurred in
26 a place over which this court has jurisdiction. No one is
27 misled by the allegation in the indictment that the offence
28 occurred in the Postal District of Thompson. To the extent
29 that the indictment says "Postal District of Thompson", that
30 does not nullify the facts proven at trial that the sexual
31 activity took place in a location known to everyone which

1 was within this court's jurisdiction. This defence has no
 2 merit.
 3 Let me pause to relate my understanding of the law as
 4 it pertains to the two remaining defences raised by the
 5 accused.
 6 The law regarding the offence of sexual assault lays
 7 down a particular analytical procedure. Like most criminal
 8 offences, there must be an actus reus (the physical
 9 components of the offence) and there must be a mens rea (a
 10 guilty mind). The actus reus of sexual assault consists of
 11 three elements.
 12 Number one, a touching.
 13 Number two, the touching must be of a sexual nature.
 14 And number three, there must be an absence of consent
 15 to the touching.
 16 In order to secure a conviction, the Crown must
 17 establish each of those criteria beyond a reasonable doubt.
 18 However, to avoid the controversies that may develop as
 19 to whether the apparently consensual actions of the
 20 complainant really demonstrate consent, the law says that
 21 for the purpose of determining the absence of consent as an
 22 element of the actus reus, the actual state of mind of the
 23 complainant is determinative. And it goes further to say
 24 that the court should look at the subjective state of mind
 25 of the complainant. That doesn't mean the court has to
 26 accept the complainant's version without question. The
 27 court is entitled to make findings of credibility against
 28 the complainant, and if a court is not convinced that the
 29 complainant subjectively did not consent, then the Crown has
 30 not proven the actus reus and the case is dismissed.

1 As to mens rea, in the case of *R. v. Ewanchuk*, [1999] 1
2 S.C.R. 330, at paragraph 41, the majority decision says
3 that;
4 "The Crown need only prove that the accused
5 intended to touch the complainant in order to
6 satisfy the basic mens rea requirement."
7 The court went on however to provide an accused with a
8 defence of honest but mistaken belief that consent did
9 exist. In the words of Mr. Justice Major, at paragraph 42,
10 "However, since sexual assault only becomes a
11 crime in the absence of the complainant's consent,
12 the common law recognizes a defence of mistake of
13 fact which removes culpability for those who
14 honestly but mistakenly believed that they had
15 consent to touch the complainant. To do otherwise
16 would result in the injustice of convicting
17 individuals who are morally innocent: see *R. v.*
18 *Crighton*, [1993] 3 S.C.R. 3 (S.C.C.). As such,
19 the mens rea of sexual assault contains two
20 elements: intention to touch and knowing of, or
21 being reckless of or willfully blind to, a lack of
22 consent on the part of the person touched. See
23 *Park, supra*, at para. 39."
24 However, Parliament has decreed that there are further
25 limitations to those identified in the paragraph 42 which I
26 have cited relating to the availability of the defence of
27 honest but mistaken belief. Section 273.2 of the *Criminal*
28 *Code* reads as follows;
29 "It is not a defence to a charge under section
30 271, 272 or 273 that the accused believed that the
31 complainant consented to the activity that forms
32 the subject-matter of the charge, where

1 The accused's belief arose from the accused's
 2 i) self induced intoxication, or
 3 ii) reckless or willful blindness; or
 4 b) the accused did not take reasonable steps, in
 5 the circumstances known to the accused at the
 6 time, to ascertain that the complainant was
 7 consenting.
 8 Subparagraph (a) (ii) is a reflection of the decision
 9 cited in *R. v. Park* cited in the excerpt that I have just
 10 read. Subparagraph (a) (i) is simply an elaboration of that
 11 principle by taking the defence away from the accused who
 12 has been rendered incapable of forming any intent because he
 13 drank too much.
 14 Subparagraph (b) however inserts another limiting layer on
 15 the availability of the defence. It says that, with
 16 appreciation for the facts known to the accused, if the
 17 accused did not take reasonable steps to ascertain that the
 18 complainant is consenting, the defence does not apply.
 19 Further case law has determined that silence, passivity, and
 20 ambiguity on the part of the complainant is not sufficient
 21 for an accused to rely on this defence.
 22 What then of the second defence -- Did the complainant
 23 consent to the sexual activity with the accused?
 24 As indicated, it becomes necessary to firstly determine
 25 whether the Crown had proven an *actus reus*. There is no
 26 doubt in this case that there was a sexual touching between
 27 the complainant and the accused. Both of them have
 28 testified that there was. The question is whether the
 29 complainant consented to that touching. Upon a review of
 30 all of the evidence, I am satisfied that the complainant did
 31 not consent to the sexual activity at the side of the

1 highway. I am particularly persuaded that the complainant
 2 felt frightened of the accused by these facts.
 3 1. That these events occurred between the accused and the
 4 complainant in the middle of the night in a remote area
 5 of the province.
 6 2. That the accused was essentially a stranger to the
 7 complainant.
 8 3. At the time of the activity, no one else was around.
 9 4. Earlier in the evening the complainant had rebutted the
 10 accused's advances.
 11 5. When the car arrived at the lake and she was helped out
 12 of the car by the accused, she went to hide in the
 13 bush.
 14 6. The complainant ran away from the sexual activity into
 15 thick bush with one sock and no pants and by so doing
 16 she sustained a number of scratches and bruises on her
 17 body as a result.
 18 Running into the bush and sustaining injuries which
 19 were ultimately observed by S.M. and somewhat corroborated
 20 by the photos marked as Exhibit 1, demonstrates to me that
 21 the complainant was not, at least in her own mind, happy
 22 about participating in the activity at the side of the road.
 23 There is no reasonable explanation for her running into the
 24 bush without one sock and no pants and a shirt pulled down
 25 around her waist other than she was afraid. Also, her
 26 subsequent emotional collapse after the two men left the car
 27 is further evidence that something had happened to her
 28 earlier in the night without her consent. There is
 29 compelling evidence in this case to support the fact that
 30 the complainant subjectively was afraid of the accused that
 31 evening.

1 The accused has argued that the complainant's responses
2 to the inquiries of S.M. in the backseat of the car
3 following the sexual activity should be viewed as evidence
4 that the sexual activity had been consensual. I think not.
5 If the complainant was truly afraid of the accused as she
6 says she was, her attempt to be deflected the inflammatory
7 questioning of her friend was simply to maintain a degree of
8 stability within the car until the two men left.
9 Furthermore, her refusal to speak to the police that evening
10 can be explained on a number of fronts. The simplest
11 explanation is that something frightening had just happened
12 to her and she just wanted to be left alone. Or,
13 recognizing that she had, to some extent, engaged with the
14 accused in some sexual physical activity (and I mean in
15 particular the kissing that occurred on the road leading to
16 the highway), she may also have felt that no one would
17 believe her in any event. Whatever the case, her lack of
18 cooperation with the police on the morning in question is
19 not determinative of consent on her part.
20 I therefore find that the actus reus of the offence has
21 been proven. She did not consent to the accused's advances
22 in the backseat of the car. She only pretended to like the
23 accused on the gravel road leading to the highway in order
24 to protect herself. And as indicated above, she continued
25 to be afraid of the accused at the side of the highway. The
26 second defence of the accused fails.
27 What then of the third defence -- Does the defence of
28 honest and mistaken belief apply in this case?
29 I now come to a consideration of the mens rea portion
30 of the matter and this requires a consideration of the
31 defence raised by the accused that he had an honest but

1 mistaken belief that the complainant was consenting to all
2 the sexual activity that took place.
3 At the outset, had there been any jury in this case, I
4 would have put the defence to them. I say this because the
5 complainant herself testified that on the gravel road
6 between the lake and highway she gave some indication of
7 willingness to engage in sexual activity by returning the
8 kisses of the accused. It must be acknowledged that the
9 parties met in what can only be described as "inviting"
10 circumstances. At 2:30 on a summer morning, two young
11 women, one of which was dressed in a tube top without a bra
12 and jeans, and both of whom were made up and wore high
13 heels, in a parking lot outside a bar, made their intentions
14 publicly known that they wanted to "party". Then, the women
15 (in particular S.M.) made the suggestion that the group
16 should go swimming, notwithstanding that not one of them had
17 any bathing suit. These facts could fairly conjure up in
18 the mind of the accused that getting together with these
19 women had potential that sexual activity lay ahead. Then,
20 to see Mr. Lederhous and S.M. "making out" at the stop at
21 the Jonas Road could further heighten the anticipation in
22 the mind of the accused that further sexual activity could
23 well occur. And, although the complainant had rebutted his
24 advances in the backseat of the car, her demonstrated
25 willingness on the gravel road to hold onto him and kiss him
26 and pretend to like him could surely leave an impression
27 that the door was then not closed to further sexual
28 activity.
29 This is especially so since there is no evidence before
30 the group got out of the car by the lake there were any
31 threats or excessive advances made by the accused.

1 By the time he was walking hand-in-hand with the complainant
 2 up the gravel road to the highway, I find that the accused
 3 was not aware of the complainant's fear of him and that he
 4 honestly believed that increased sexual activity was still a
 5 possibility. I do not accept that the accused had formed
 6 any intention at this time to impose his desires upon the
 7 complainant, since it would have made more sense to impose
 8 them in the privacy of the gravel road than in the more
 9 relative openness of the highway.
 10 However, by both accounts the accused at the side of
 11 the highway did proceed to take the tryst to the next level.
 12 But this is where the stories diverge. Although I am not
 13 able to accept the testimony of the complainant that she hit
 14 herself on the head with a three foot stick while she was
 15 being digitally manipulated, I am prepared to accept her
 16 evidence that she uttered some words about "killing" at this
 17 stage. The accused admitted that there was some use of the
 18 word "kill" that night and I consider it more likely than
 19 not that it was used as related by the complainant.
 20 Notwithstanding, at the very least, the complainant gave no
 21 overt signals to the accused that the conduct which was
 22 about to occur and which subsequently occurred was in any
 23 way something she wanted to do. I accept her evidence in
 24 preference to that of the accused when she says that he put
 25 her down on her back and that he was the one who took off
 26 her top. I accept her evidence that the digital penetration
 27 occurred when she was lying on her back. There is some
 28 support for this from the injuries described as having been
 29 found on the back of her legs and buttocks. I accept her
 30 evidence that the accused raised her to a standing position,
 31 bent her over and inserted his penis into her vagina from
 32 the rear.

1 I accept her evidence on these points notwithstanding her need to refresh her memory at trial. Her evidence is
 2 logically consistent with an escape to the bush and
 3 resultant injuries which she incurred. At trial, she gave
 4 her evidence in a straightforward and passive manner. I
 5 could see no reason why she would want to fabricate the
 6 evidence. Although I am not prepared to accept some of her
 7 evidence (her version of what happened at the Jonas stop and
 8 the notion of hitting herself on the head with the stick),
 9 my reasons for doing so have more to do with the
 10 insufficiency of such evidence. However, her version of the
 11 sexual contact at the side of the highway is consistent with
 12 her escape to the bush and her subsequent emotional release
 13 when the men left the car.
 14 Although I do accept some of what the accused has to
 15 say, I do not accept that he was especially receptive to any
 16 signals which the complainant may have given. I do not
 17 accept his evidence that at the highway, she pulled down her
 18 top after he made a further inquiry nor do I accept that the
 19 accused digitally penetrated the complainant while she was
 20 standing up.
 21 In short, I have misgivings about some of his evidence
 22 being shaped to justify his position. He did that when he
 23 first spoke to the RCMP in that he held back the fact that
 24 sexual intercourse had occurred, until he was challenged.
 25 Later, even when he admitted that sexual intercourse had
 26 occurred, he told the RCMP the complainant ran "giggling"
 27 into the woods. Although not repeated at trial in chief,
 28 this version is symptomatic of his desire even then to shape
 29 his story. And, at some parts of his testimony, he
 30 professes an inability to recall details and at another he
 31 said that his memory is better now because the more a person
 32

1 thinks about something, the better they can recall. The
2 fact is that he has been thinking of this case for four
3 years and I believe has convinced himself that he did not go
4 overboard that night. Indeed at trial he posited the theory
5 that the two girls had planned to separate Mr. Lederhous and
6 the accused so that they could each engage in sexual
7 activity with the men. Frankly, if the women were so
8 inclined, they wouldn't have had to create a ruse to
9 convince these men to have sex with them. This unconvincing
10 theory however is indicative of the accused's inclination to
11 attempt to justify his position. I am not prepared to
12 accept his evidence that he was quite the gentleman that he
13 would have us believe.
14 I conclude that although the accused was led by the
15 circumstances to conclude that sex was "in the air", he was
16 insensitive to the fact the complainant was not a willing
17 participant. It was fairly argued by the Crown that as
18 required by section 273.2(b) he did not take reasonable
19 steps to verify consent. I accept the evidence of the
20 complainant that when the accused laid the complainant down
21 by the side of the road, he did not inquire whether she
22 wished to continue. There was no similar inquiry after she
23 complained about being hurt by his digital penetration, even
24 in the evidence of the accused. Given that the complainant
25 was a stranger to him and that he was alone in the middle of
26 the night on a remote stretch of highway with a young woman
27 who is smaller than he, a woman who is 16 years his junior
28 and who he acknowledged showed signs of intoxication and who
29 had rebuffed his advances earlier in the evening, forging on
30 with the sexual activity on the side of the highway without
31 further inquiry either before it began or midway through

1 after she exhibited discomfort does not satisfy the test of
 2 273.2(b) .
 3 Holding hands with the complainant, exchanging kisses
 4 with the complainant and walking arm and arm up the highway
 5 did not entitle the accused to engage in the more elevated
 6 sexual conduct without first further inquiry on his part.
 7 I do not accept that the accused asked the complainant
 8 at the side of the road for any permission to proceed. He
 9 simply moved further to the next level. And when his
 10 digital penetration hurt the complainant, there was no
 11 further inquiry to ensure consent but simply an escalation
 12 of the sex he had imagined when he left Thompson in the
 13 first place.
 14 I believe the accused has convinced himself that he did
 15 nothing wrong on that night in question. Perhaps somewhat
 16 blinded by his own consumption of alcohol, he did not see
 17 the need when they arrived at the highway to be sure that
 18 the complainant was a willing participant. Upon a review of
 19 all of the evidence, I am convinced beyond a reasonable
 20 doubt that the accused when they reached the highway failed
 21 to take any reasonable steps to ascertain the complainant
 22 was consenting to further sexual activity with the accused
 23 and thereby imposed his will on the complainant without her
 24 consent.
 25 I therefore find the accused guilty as charged.
 26 What are people's thoughts about sentencing?
 27 S. Seesahai: My Lord, what I would suggest a
 28 Pre-Sentence Report (inaudible) including the order in this
 29 case.
 30 The Court: Mr. Coggan, did you hear that.
 31 D. Coggan: That was exactly the - what I was
 32 going to ask for My Lord.

1 The Court: All right. I will then order
2 preparation of a Pre-Sentence Report. The Crown, presumably
3 will ascertain whether there will be any Victim Impact
4 Statements.
5 S. Seesahai: Yes, I will making those inquiries
6 during the period of preparation of the report, yes.
7 The Court: Is there anything else other than
8 to then adjourn this matter to the next or to an assignment
9 court in Thompson from which a sentencing date can be
10 arranged?
11 D. Gray: My Lord, Gray, on behalf of the
12 Crown, three things. The first is, the date that I'm going
13 to propose is January the 10th - I think that's the January
14 date. Madam Clerk?
15 D. Coggan: I'm on holidays at that time.
16 The Court: Is that - what are you propose --
17 D. Gray: It's January the 17th.
18 The Court: -- (inaudible).
19 D. Gray: January the 17th just to set the
20 date, My Lord. It's taking about 12 weeks in Thompson to
21 have the report prepared and should be prepared before we
22 actually set the sentencing date. So I'm going to suggest
23 January the 17th as the date. For - not - not the date -
24 that's just the date to set a date. To make sure it's
25 ready.
26 The Court: The problem that I have with that
27 is this has gone for an awfully long time.
28 D. Gray: Okay.
29 The Court: And if we don't set a date until
30 January then it will be another three months from then
31 before we'll find the date. And - and my - my preference

1 would be to set it on assignment date in early - in
 2 December.
 3 D. Gray: December the 13th, I think is that
 4 date then. Is that correct Madam Clerk?
 5 The Court: (Inaudible).
 6 The Clerk: Yes.
 7 D. Gray: December the 13th.
 8 D. Cogan: What is it opposite?
 9 The Court: And for the parties - and for the
 10 parties at that time to give a date with the officer who's
 11 doing the report and get a reasonable sense of when this is
 12 going to occur and we may be able to set a date a little
 13 sooner by doing it that way.
 14 D. Gray: Yes, My Lord. In fact, I will
 15 communicate with the Area Director of Probation Services and
 16 communicate to him your - your desire to have it sooner
 17 rather than later. The second --
 18 The Court: Cogan - Mr. Cogan, is that
 19 trouble you?
 20 D. Cogan: The date being suggested?
 21 The Court: Yes.
 22 D. Cogan: No, that's fine.
 23 The Court: December --
 24 D. Gray: 13th.
 25 The Court: -- 13th.
 26 D. Gray: The second thing then, My Lord, is
 27 that I'm going to ask that there be variation of the
 28 recognizance to require an additional condition of the
 29 accused. That is, that he's to report no later then by
 30 Friday of this week to Probation Services and thereafter as
 31 required for the preparation of the report.
 32 D. Cogan: That's fine My Lord.

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The Court: So ordered.

D. Gray: Thank you My Lord. The - the last

thing, and it's just a point of clarification, during the

course of your reasons you made comment that you preferred

the testimony of the complainant to the accused and I'm sure

that you intended to say that you had rejected - before

doing that, you had rejected the evidence of the accused and

(Inaudible) no - and you found no reasonable doubt based on

it, in accordance with the test in *W.D.*

The Court: There is - I have rejected the

evidence of the accused primarily in part - in relation to

the events that took place on the side of the highway.

D. Gray: Yes, My Lord. Thank you My Lord.

The Court: Is there anything else we need to

address?

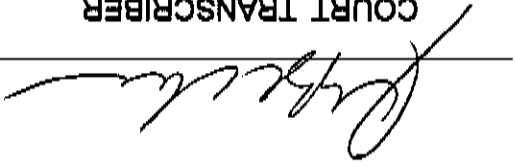
D. Gray: No, My Lord. Thank you very much.

S. Seesahai: (Inaudible) My Lord.

The Court: Thank you.

(PROCEEDINGS CONCLUDED)

11 COURT TRANSCRIBER

10 

9

8 understanding.

7 a court clerk/monitor, and transcribed by me to the best of my skill, ability and

6 by a sound recording device approved by the Attorney-General and operated by

5 numbered 1 to 27, are a true, accurate transcript of the proceedings recorded

4 I, SHANNON BECKER, certify that the foregoing pages of printed matter,

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1 CERTIFICATE OF TRANSCRIPT