

WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

486.4 Order restricting publication — sexual offences. — (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least

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one of which is an offence referred to in paragraph (a).

(2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

. . .

486.6 OFFENCE — (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

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ONTARIO COURT OF JUSTICE

DATE: 11 August 2020

COURT FILE No.: 0911-998-18-6679

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

TAYLOR HAAS

Before Justice A. Wheeler

Heard on

Reasons for Judgment released on February 10, 11, 12, 18, 19, April 15, 2020

G. Skerkowskicounsel for the Crown
J. Neuberger & J. Navarrete..... counsel for the defendant

WHEELER J.:

Overview

1. Taylor Haas is charged with sexually assaulting RH in the early morning of February 22, 2018.

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2. The incident that gave rise to the charge occurred at Mr. Haas's house after a student drinking party that Mr. Haas and RH attended together. It was undisputed that Mr. Haas had vaginal intercourse with RH, and there was no serious dispute that RH was very drunk and has no recollection of having sex with Mr. Haas.

3. Whether the Crown has proved that RH did not consent to sexual intercourse with Mr. Haas, or that she lacked the capacity to consent were the core issues at this trial.

4. The Crown called RH and the four other students who were at the party, and also a friend of RH who had text conversations with her when RH was at the party and later when she was at Mr. Haas's place.

5. Mr. Haas testified that he and RH went back to his place after the party, slept for a few hours, then woke up and chatted for a bit before mutually agreeing to have intercourse. He testified that RH was capable of consenting and did consent.

Background

6. RH, Mr. Haas and the others the party were all university students.

7. RH knew Mr. Haas through her roommates. He had dated one of them, Sam, for a few weeks and had recently broken up with her. RH denied having any romantic interest whatsoever in Mr. Haas, in part out of regard for Sam's feelings.

8. It was reading week and Mr. Haas was one of the few people that RH knew who stayed in town. When Mr. Haas suggested joining him and some of his friends to go out on February 21, she agreed. According to both Mr. Haas and RH, the plan was to "pre" (as in pre-drink) and then go out to the bars. As it turned out, the pre turned into the party and no one went out to the bars.

9. The party was at Axel Ouillette's house. The others at the party were Axel's then girlfriend Delaney Benoit, Axel's roommate Corey Marshall, and another friend, Daniella McKay. These

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witnesses were referred to by their first names throughout the evidence, and I will do the same in my reasons to avoid confusion.

10. Mr. Haas, Axel, Delaney and Daniella were all in the same program at university and were friends. Delaney described herself as very close friends with Mr. Haas. Some of the group knew RH, but not well. Corey did not know either Mr. Haas or RH well, describing them as acquaintances.

11. All of the students were 19 years old and in second year except for Corey, who would have been 20 at the time.

The party up to the point of RH's memory loss

12. RH and Mr. Haas met up at his place around 9 p.m. They had some wine together before walking over to Axel's place. They arrived at Axel's shortly before Axel and Delaney arrived from Delaney's place. Daniella arrived a bit later.

13. The group played drinking games, one of which involved a "death cup" that contained a mixture of everyone's drinks. At one point RH was supposed to drink the death cup, but only took a sip and declined the rest.

14. At some point Axel and Delaney went upstairs to Axel's room. The other four initially remained downstairs.

15. RH testified that she has no memory of the evening after the drinking games and until she woke up in Mr. Haas's bed at approximately 1:15 a.m. It would appear that her memory blank commences around 10:30 p.m. because RH has no or very limited recollection of a text conversation that she had with her friend Alicia Mills starting at 10:42 p.m.

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10:42 p.m. text conversation between RH and her friend Alicia

16. At 10:42 p.m., RH had the following text message conversation with her friend Alicia, who lives in British Columbia. I have used “R” to designate RH and “A” to designate her friend Alicia. The misspellings are as they appear in the texts.

R: Dudee

R: I’m so drunk

R: And I’m so happy

R: And I love u

R: But I’m way to drunk and all I want to do is text Shawn but I feel like I shouldn’t

R: I fell like I’m lily and he’s Rufus and it’s never going to work out and I’m in gossip i

R: Girl

A: *OMG STIP*

R: I LOVE U

A: *Love u more*

R: NO

R: IMPOSZIBE

A: *Nope*

R: Yes

17. RH testified that she had no recollection of this text conversation, but also that she did “not really” remember sending these texts. She explained: “I’m just not sure if what I have in my mind is what – is me sending them, or is how I imagined it would be when I looked back on them.”

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18. RH testified that although her phone automatically capitalizes the beginning of any text, she would have capitalized other words, such as “I LOVE U”.

19. Alicia testified that RH seemed intoxicated to her based on the misspellings and the fact that RH said she was drunk.

RH’s evidence about her alcohol consumption and level of intoxication

20. RH had a glass of wine with dinner, and took the rest of the bottle with her to the party. At Mr. Haas’s place on the way to the party, she had a glass to a glass and a half from a left over bottle of wine that he had. Then at the party she drank the rest of her own bottle as well as the sip from the “death cup” that was part of the drinking games. No one described RH drinking anything else.

21. RH testified that she recalled only being “like a comfortable drunk”, “a fun level of drunk”. She testified that she had been that drunk many times before, and that the amount of alcohol she consumed was typical for her: “I would have drank the entire bottle, but that’s what I usually do. That wasn’t anything substantial for me.”

22. RH also testified that she started taking an anti-anxiety medication about a month earlier. She had been warned that a side-effect was that it could lower her tolerance for alcohol. She testified that she was careful and that “I had drank like different amounts of alcohol prior to this incident to see if like it did, and I found that there was no effect.”

Events after the drinking games and observations of others about intoxication

23. Mr. Haas testified that RH was a bit flirty or familiar with him, for instance saying things or touching his arm in a way that went beyond what a friend would do.

24. At some point Mr. Haas went upstairs and knocked on the door of Axel’s room, because he wanted to go the bars. Mr. Haas testified that RH followed him. Through the door, Axel said

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to give them five minutes. He and RH joked that it was awkward, and then they “just started kissing.” Mr. Haas said that they kissed a couple of times.

25. Mr. Haas testified that when he and RH first went upstairs everyone had finished their drinks and that he and RH were both drunk. He also testified that it was the same as any other night they had been out, and nothing “out of the blue.”

26. Mr. Haas testified that they were upstairs for less than five minutes before returning to the main floor. He and RH talked with Corey and Daniella, but then he and RH went to a couch in the living room where they embraced and kissed. Mr. Haas, Corey and Daniella all testified to that. Mr. Haas testified that this lasted about 10 minutes.

27. Mr. Haas then went back upstairs to check whether Axel and Delaney were ready. Again, RH followed him upstairs. Mr. Haas testified that he and RH were both leaning on the bedroom door when Delaney opened it, and they stumbled in and joked about it. However, both Delaney and Axel described only RH falling into the room. They did not recall Mr. Haas having any such difficulties.

28. Delaney testified that RH was actually leaning on the door frame. She thought that Mr. Haas might have been supporting her. In cross-examination she agreed that Mr. Haas could just have had his arm around RH in an affectionate way, but that was not how it appeared to her at the time. According to Delaney, RH stumbled or fell into the room and Delaney had to sort of catch her. RH held onto her or leaned on her for balance.

29. Axel also described RH falling through the doorway. He thought maybe she had been holding onto the door handle and tripped over herself. At the time everyone was drunk and it seemed kind of funny. He testified that RH and Mr. Haas were both laughing.

30. Delaney testified that she herself was not intoxicated when she and Axel went upstairs. She could tell that the others had been drinking, but she had no specific observations about their level of intoxication. However, when she opened the bedroom door to RH and Mr. Haas and they suggested going out to the bars, she thought that RH was in no state to do that. She did not think

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RH should be going out to drink more. According to Delaney, both RH and Mr. Haas had slurred speech. Although Mr. Haas's mannerisms indicated that he had been drinking, she thought that RH was more drunk than Mr. Haas. Axel also testified that RH's speech was slurred.

31. Delaney suggested that they all go out to the porch rather than go to the bars. When Axel and Delaney went to retrieve their coats, RH and Mr. Haas went into the next bedroom and lay on the bed, kissing. Axel also described this and testified that one was lying on top of the other. Delaney told them to come out, but then they went into another bedroom and were again lying on the bed, kissing. Delaney then got them to go downstairs. She thought that their conduct in going into other roommates' bedrooms was out of line and that they would not have conducted themselves that way if sober. Axel was not bothered by it, testifying: "It's happened before. And I'm sure it'll happen again."

32. Mr. Haas described these interactions in his evidence, and testified that it was RH who took him into the bedrooms.

33. At this point, Delaney was uncomfortable with what was going on, and decided to speak to Mr. Haas privately. She testified:

I was just concerned that - because they both seemed to be drunk, that they wouldn't be able to consent to sex, and that I didn't want them to leave together and maybe not realize that they're both too drunk for that. So I wanted to, you know, insert myself and let them know I didn't think it was appropriate.

34. When Mr. Haas came down the stairs, Delaney intercepted him and told him that RH was quite drunk and that she did not think he and RH should leave together because RH was too drunk to have sex. Mr. Haas responded by saying that he was also quite drunk. Referencing the very recent training that she and Mr. Haas (who were members of the same student orientation committee) had about consent and sex, Delaney told Mr. Haas that both being drunk did not excuse it. Mr. Haas told her that he and RH had been hooking up earlier before they got there. Delaney told him that it did not matter because they were drunk now.

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35. Delaney did not have the impression that Mr. Haas was agreeing with her. Rather, she thought his responses were more defensive, and that although not aggressive, he was just retaliating to her comments.

36. The conversation ended because RH started coming downstairs. Delaney did not broach the subject with RH because she did not know her well and because of the two of them Mr. Haas seemed less drunk.

37. Mr. Haas remembered this conversation differently. According to him, the conversation at the bottom of the stairs with Delaney was casual. He described it as follows:

I know Delaney and I had a conversation near the bottom of the stairs, but it was just kind of casual, that she was commenting on like oh, [RH]'s really drunk. And I said yeah, so am I. And then she was like you guys are hooking up. And I said yes. And that's when [RH] started coming down the stairs. I told her we were kissing a bunch that night. That's when [RH] started coming down, so we kind of just ended the conversation.

38. Daniella testified that when RH came back downstairs, she stumbled when trying to sit down on the couch.

39. Most of group went out to the porch. Axel and Daniella stayed inside. Someone was smoking a cigarette and it was passed to RH. RH took a puff and said something to the effect of "oh this is a cigarette." She was surprised and confused that it was a cigarette, and handed it back. This was a further indication to Delaney about how drunk RH was. Delaney also testified that although RH stumbling into the bedroom was the most dramatic incident, RH continued to have trouble balancing. However, she acknowledged in cross-examination that she did not see RH have any trouble walking to the porch. She also had no observations about RH having any trouble comprehending or participating in conversation on the porch.

40. The group spent approximately half an hour on the porch. Delaney estimated that Mr. Haas and RH had been at the house for three or four hours by the time they left.

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41. Corey described RH as being inebriated in the sense of being affected by alcohol, but not really, really drunk, or, in his words, “drunk off the face of the earth.” He did not notice her slurring her speech.

42. Daniella testified that RH seemed drunk, but could not point to anything other than the stumbling when RH went to sit on the couch. She did not recall RH slurring her words or having any difficulty speaking. Her only direct interaction with RH was to say hi when she first arrived, but Daniella did hear RH interacting with others.

43. Delaney believed that RH decided that she was leaving, and Mr. Haas said he would walk her home to her place. Since Delaney was staying over at Axel’s place and she had already made her point with Mr. Haas about not sleeping with RH, she felt it made the most sense for Mr. Haas to walk RH home.

44. Axel testified that RH was very drunk, and needed somebody to walk her home. Apart from RH falling into the bedroom and slurring her words, he could not pinpoint specific things that informed his view, but stated it was “more of a full picture situation.”

45. Axel did not recall who specifically said it to Mr. Haas, but he was sure that as RH and Mr. Haas left, he or someone else told Mr. Haas not to go home with RH, and Mr. Haas said that he would not and that he would just walk her home. They told him just to drop RH off, and not to sleep with her, and Mr. Haas said that he would not.

46. Mr. Haas acknowledged that there was a conversation to this effect as they were leaving. According to him, when he and RH went in to say good bye to Daniella and Axel, Delaney pulled him aside and cautioned him about having sex with RH because she was really drunk. Mr. Haas testified that he was not really thinking about it at that point, “so I kind of just said okay, yeah, I won’t.”

47. Mr. Haas denied that he assisted RH in any physical way as they left the house, which was consistent with the evidence of other witnesses.

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Mr. Haas and RH return to Mr. Haas's place

48. Mr. Haas offered the only account of what happened when he and RH left the party together. RH has no recollection of leaving the party and walking over to Mr. Haas's place with him. Her next recollection is of waking up in Mr. Haas's bed around 1:15 a.m.

49. Mr. Haas testified that he and RH said little as they walked. RH mentioned that the fresh air was nice. They joked about the bars as they walked past them. When they got to where they would have turned for Mr. Haas to walk RH home, he asked her if she wanted him to walk her home or if she wanted to come over. He testified that it was not uncommon for him to have friends over and that RH had come over in the past and stayed over with other friends. RH said that she wanted to come over.

50. Mr. Haas lived with five female roommates and one male roommate but all were away. When he and RH got to his place, they took off their shoes at the front door and went upstairs. Mr. Haas got them each some water and they went to his room.

51. Mr. Haas testified that his bedroom is where his friends hang out when they come over and there was no where else to hang out. He had a TV in his room and sometimes they would watch movies or TV or just chat. Mr. Haas and RH did not do any of those things. They took off their jackets and kissed.

52. Mr. Haas was tired and asked RH if she wanted to stay over. She said that she did and he asked her if she wanted to change into something comfortable, and she said she did. Mr. Haas gave her a long t-shirt. She went to the bathroom to change, and Mr. Haas changed into a t-shirt and shorts. When RH came back from the bathroom, she put her clothes at the end of the bed, and then turned around and pulled at Mr. Haas's shirt, and they kissed again. Mr. Haas testified that he asked RH if she wanted to get into bed and she said she did. RH set an alarm on her phone and put it down on the bed beside her. They kissed and cuddled for a bit and fell asleep.

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RH's recollections from 1:15 a.m. onwards and her communications with Alicia Mills

53. As already indicated, RH testified that she had no recollection of anything at the party after the drinking games, or of going back to Mr. Haas's place. Her next recollection was of waking up in Mr. Haas's bed. She recognized Mr. Haas's room because she had been there before, at parties or hanging out with friends. She was naked and did not know how her clothes came off. Mr. Haas was asleep in bed next to her, also naked.

54. RH had no recollection of either removing her own clothes or of anyone else removing her clothes. She had been wearing blue jeans and a long sleeve bodysuit, a garment that is put on the same way as a shirt, but which has buttons at the bottom between the legs, so that it always stays tucked in.

55. RH testified that she was scared and confused. She tried to piece the night together but could not. She did not know where her clothes, wallet or keys were, but her phone was next to her. She grabbed her phone and went to the washroom. She noticed that her tampon was missing, it was not in the trash can next to the toilet and she had no idea where it was. There was blood on her legs. RH testified that she was extremely upset and crying because she did not know how she got there or what had happened.

56. Asked to describe her level of intoxication at that point, RH testified that she "felt like really out of it", "I was still drunk then", "I was kind of stumbling around", and "I was still quite drunk at that point."

1:15 a.m. text conversation between RH and her friend Alicia

57. RH saw that Alicia had texted her so she replied. She recalled sitting on the floor of the bathroom, crying and texting Alicia to try to figure out what to do.

As reproduced in the screenshots from RH's phone, the conversation was as follows (again the misspellings are as they appear in the texts):

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A: *R u ok*

R: Dude I don't remember half the shit that happened to me tonight.

R: I'm not sure

A: *Well r u home safe now*

R: No I'm still at Taylor's

A: *How and when r u going home*

R: I'm not sure

R: I'm in the bathroom

A: *Okay u need to find your way home*

A: *And u need to do so safely*

A: *Could they have drugged u?*

A: *Are u okay?*

R: I'm scared to go home

A: *Why are u scared to go home*

R: I don't think I have make it

R: I think I'm but too drunk

A: *Hmm well do u feel safe sleeping at their house*

R: I'm too drunk

A: *Could u sleep there*

A: *Or could u cab home*

R: Like yeah

R: I can sleep her

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A: *Why do you have no clothes on*

R: I could also cab idk where my clothes went

A: *I'm confused*

R: Like I'm literally naked rn

A: *Can u calle me*

R: No

R: Me too

A: *Please I'm worried*

R: No

A: *Talk to me*

R: I don't want to

A: *Calm down [name]*

R: Idk how this happened

R: No o

R: I can't

A: *Hey slow down*

A: *Don't run away from me*

A: *Just talk to me*

R: No I'm here

R: Idk what to say

R: I'm just really drunk

A: *Do you remember taking your clothes off*

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R: And idk how this happened

R: No I really don't

A: *Could u have done naked mole*

A: *Are u having sex*

R: At one point

A: *Having sex?*

R: I was wearing a fuckingbodysuit

R: Ya

A: *Okay*

R: Like I was

A: *So maybe your clothes are in his room*

R: Should I just go back and go to sleep

A: *Okay so how about you go get them and go back to the bathroom*

R: Probably

A: *I don't know [name]*

A: *Do you feel safe rhere*

A: *I thought u said you don't know them*

R: I'm in the bathroom

R: I'm just going to go back to his room and hopefully fall asleep

A: *[Name]*

A: *Are u okay*

A: *Do you feel safe*

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A: *I am worried about yhou*

A: *[Name]*

R: Like

R: No but I'll be okay I

R: It's okay

A: *No*

R: Okay

R: Don't worry

A: *It's not ok*

A: *I am worried*

A: *Because I love u*

A: *And u won't call me*

A: *And that's scaring me*

R: I'm literally bleeding so much

R: So like his fault

A: *[NAME – all in caps]*

R: lmk it's okay

A: *PLZ CALL ME*

A: *NOW*

58. RH testified that she thought she had talked to Alicia prior to going out that night, to tell her that she was going out with new people and that she was nervous about it, and that she was going over to Mr. Haas's place to pre-drink beforehand.

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59. RH testified that she recalled feeling that she would not be able to walk home because she was still too drunk, and she also did not know where her keys or clothes were. She remembered thinking that she could not have made it home even though she wanted to go home. She also felt that going back to bed with Mr. Haas was the only option.

60. RH testified that she was reluctant to call Alicia because it did not feel safe to talk out loud to her in case Mr. Haas woke up. She did not know what had happened and did not know if she was safe or if he was going to try and do anything else.

61. Asked about her responses to Alicia about having sex, RH testified that she did not have any memory of having sex with Mr. Haas, but it felt like something had penetrated her and also her tampon was missing. Her period was heavy and she would always sleep with one in because of that.

62. RH testified that she told Alicia that “it’s okay” because she did not want Alicia to worry and because she was trying to tell herself that things were okay.

1:22 a.m. telephone conversation between RH and her friend Alicia

63. Another screenshot from RH’s phone showed a four minute long incoming call from Alicia at 1:22 a.m. on February 22, 2018.

64. When asked about this, RH testified that she believed that Alicia called her and that she picked up. However, she did not remember what was said. She only remembered sitting in the bathroom, crying while on the phone, and not knowing what to do.

65. Alicia testified that she and RH were good friends. They were really close in high school, and stayed in touch when RH left to go to university.

66. Alicia did not remember what she was doing at the time of the text messages with RH. She pointed out that there is a three hour time difference and that it happened two years ago.

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67. Alicia had no recollection of talking to RH on the telephone that night. She also did not remember the next time that she heard from RH.

RH's additional recollections about the night

68. RH went back to Mr. Haas's room and got back into bed. She tried to piece together the events of the night but could not. She thought she got up a few more times to go to the bathroom. She did not attempt to wake Mr. Haas up. It was pretty dark in Mr. Haas's room and she could not figure out where her clothes, wallet or keys were, although she acknowledged that she did not really think to search. She did not feel comfortable looking through his room in case he woke up.

69. RH testified that it felt like she spent the rest of the night drifting in and out of consciousness, and wondering what had happened. She did not know whether she slept. At times Mr. Haas would put his arm over her and try to cuddle her. She tried to pull away but he would hold her tighter. She did not want him to hold her like that but felt too scared to say anything directly to Mr. Haas to tell him stop.

70. RH also had a number of minor marks on her body – on her neck, right arm and on both knees – that she did not have before that night and she did not know how they occurred. Mr. Haas testified that he probably caused a hickey on her neck, but otherwise did not know how the marks occurred. These marks were not a focus of the Crown's cross-examination of Mr. Haas or submissions in support of its case.

Mr. Haas's evidence about a sexual interaction at 4 a.m.

71. Mr. Haas testified that after he and RH went to bed, his next recollection was of waking up and needing to use the bathroom. The clock on his nightstand said it was just before 4 a.m. When he returned from the bathroom, RH was propped up on her elbow. Mr. Haas was not sure if RH still felt like being intimate with him, so when he got back into bed, he lifted his arm, and when RH put her head on his chest, he put his arm around her. They started talking and had a more personal conversation than they had had previously. According to Mr. Haas, they talked about

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growing up in Vancouver and in particular Kitsilano, a café owned by Mr. Haas's parents and whether RH might have gone there, playing field hockey and Granville Island. Mr. Haas said that he looked at the clock again and it was just past 4 a.m. When he looked back at RH he wanted to kiss her, but was not sure if she wanted to kiss. He leaned in and she kissed him.

72. Mr. Haas testified that this progressed to mutual touching, taking off their clothes and sexual intercourse. According to Mr. Haas, as he touched RH and his hand approached her genitals, he asked "can I?" and RH responded "oh yeah". While touching RH, he noticed that there was a string, so he told RH about it and she said that she was on her period. Mr. Haas testified that he paused and told RH that he was okay with it if she was, and she said that she was. They continued touching one another, and since he was not sure what to do, Mr. Haas asked RH what he should do with the tampon. RH told him to just throw it in the trash. Mr. Haas testified that he gently removed it and threw it in the trash.

73. As they continued touching one another Mr. Haas asked RH if she was on birth control and she said that she was. Mr. Haas testified that RH also asked him how her roommate would react to them hooking up, and Mr. Haas told her that he had ended things with the roommate because he did not feel a connection to her and did not want to lead her on, and that was a little while ago. He told RH that he was actually into her and asked her if she believed him and she said that she did. He also told her that it was okay if they did not do anything if she did not want to, and she said that she did.

74. Mr. Haas testified that he looked for a condom on his bedside table, and when he did not find one he asked RH if he should go and get one. RH responded by saying that she was not worried that he was a "player" or anything. He testified that they mutually agreed not to use a condom, and that they then had sexual intercourse. Mr. Haas testified that although they were both still feeling the effects of alcohol, there was nothing abnormal about RH's behaviour. He testified that they were both into and engaged in the sexual contact. He testified that they then fell asleep again.

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The interaction between Mr. Haas and RH in the morning

75. Both Mr. Haas and RH testified about the conversation they had when they woke up in the morning.

RH's account

76. RH testified that when she and Mr. Haas woke up, she asked him what had happened the night before. Mr. Haas told her about things that happened at the party, and that they had left the party together around 11:30 or 12:00, walked to his place together, and then went upstairs and hooked up. She had to ask him directly if they had sex and he said yes, and then she asked him if they used a condom and he said no, and immediately followed that up by saying that she was on birth control so it didn't matter. Although she was on birth control, RH testified that she always used a condom when sleeping with someone for the first time.

77. In addition, Mr. Haas brought up the fact that she was on her period, and told her that she had said it was okay to have sex on her period. He showed her that there was blood on his fingers. RH testified that she did not know what to say, and that Mr. Haas went on to describe how they were making out before having sex, that he mentioned the tampon, that he removed it and threw it across the room and into the trash can. He said something about being proud that he landed it in the trash can, that it was a good shot.

78. RH asked Mr. Haas if he was doing this to get back at her roommate, because the roommate had sex with one of Mr. Haas's friends after they broke up. She asked him that a few different times, and Mr. Haas always denied it. At one point he said "you can literally ask any of my friends, that's not why I did this." She testified that that comment kind of scared her.

79. RH testified that she kept saying that she should probably leave because she was going to Ottawa that day and needed to get ready, but Mr. Haas kept saying that she should stay longer, that he did not want her to leave. He also repeatedly offered to either take her out for breakfast, or to make her breakfast, including going to the store to buy eggs and bacon. He would also put his arm around her and pull her closer, but she pulled away and said she had a train to catch. She felt like

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he was keeping her there. Mr. Haas finally got out of bed. When she told him that she did not know where her things were, he went around the room and collected her clothes, which were scattered around the room.

80. Mr. Haas continued stalling a bit as she tried to leave. Just before she left, he tried to kiss her again. She tried to pull away, but testified “not as much as I should have” because she was scared. He pulled her in closer again, they kissed, and she left. She did not want to kiss him but testified that she did not say or do anything to communicate that, and felt that she needed to go with what he wanted to do. She further described her thoughts as follows:

And like I don't know, like I still didn't know like – like anything that I knew of that night, he would have told me. So like I don't know, like maybe – like I don't know, like maybe I was wrong about what had happened and like I was overreacting. And if then I like brought it up, and I was like oh, like it wasn't okay that you did that, what – like he was the one that knew what happened. I didn't. So I didn't want him to like freak out and get mad at me, and then for him to just like totally spin it on me or something. Like I just – I didn't feel safe, and I didn't feel like I had the option to say no, because it was his word against mine.

Mr. Haas's account

81. Mr. Haas testified that RH's cell phone alarm woke them up at 7 a.m. He offered to make her breakfast or that they could go out for breakfast. He also offered her an Advil if she had a hangover, but she declined. RH said she had a train to catch at 1 p.m. but since that was some time off, they cuddled and went back to sleep. RH's alarm went off multiple times and she would hit snooze or reset it until they got up at 9:30.

82. Mr. Haas testified that he again offered RH breakfast, and did so multiple times, but she said she was fine. They then had what he described as a casual conversation going over funny things that had happened that night until RH said that she had a lot to drink and did not really remember everything. Mr. Haas thought that RH was referring to the party so he went over that part of the night, but when he stopped talking RH asked him if they had sex. Mr. Haas testified that he was confused by this because he thought she would remember that. He asked her “do you

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not remember having sex with me,” to which she responded “I think so, it’s just a bit fuzzy.” The conversation then turned to the roommate again, with RH asking him what she would think. Mr. Haas tried to reassure RH that he was actually interested in her, and that he had ended things with the roommate because he did not feel a connection.

83. Mr. Haas denied that he at any point held up his hand to show RH that there was blood on his fingers. He testified: “That seems like a really insensitive thing to do and it’s also just – like that would be kind of gross.” However, he did agree that in their morning conversation RH said that she was on her period, and he responded with a joking comment that he threw the tampon across the room into the trash, because he was not sure if she had seen him land it in the trash. He testified that he did not perceive RH to be nervous, and that it was a normal conversation.

84. Mr. Haas testified that the rest of their conversation was casual until RH left. He helped gather RH’s clothes for her because he knew she was naked in bed, so that she could dress without getting up to go and find her clothes. He gave her the clothes, turned around and she got dressed. He walked her to the door, they hugged, and she left.

Text message exchange at 10:42 a.m.

85. After RH left, Mr. Haas sent her a text message at 10:42 that morning, as follows:

T: Hey I just wanna make sure you’re ok with everything that happened last night. I feel bad for not realizing you were that drunk.

RH responded:

R: Yeah its totally okay don’t worry about it.

86. Mr. Haas testified that he sent this text because after RH left he thought about what she had said about being really drunk and not remembering everything. He testified that he was interested in RH and he wanted to make sure she was okay with everything that had happened. He denied that this was an apology for taking advantage of her, and testified that this was in response

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to her telling him that she had a fuzzy memory of having sex with him. According to him he was checking because, “It’s the right thing to do when someone brings up a concern like that.”

87. RH testified that when she sent her response she was trying to piece everything together and talking with her roommates by text. She did not know what Mr. Haas was going to do and she also did not want to believe what had actually happened between them. She wanted it to go away and she did not want Mr. Haas to come out and tell everyone what had happened. She did not know what to do, she was scared, and wanted it not to be true.

Mr. Haas’s conversation with Axel the next day

88. Axel spoke to Mr. Haas the day after the party and asked him if he has slept with RH. Mr. Haas told him that he had not slept with RH that night, but that he had slept with her the next morning.

RH’s conversations with others after the incident

89. RH testified that when she got home in the morning her roommate Sam texted to ask how her night was. RH testified that she did not know how to respond. (Mr. Haas had recently broken up with Sam.) She first talked to another roommate, Kristina, and told her that she did not know what to tell Sam “because I think I slept with Taylor but I don’t know.” When RH explained to Kristina that she did not remember what had happened and that she only learned about it from Mr. Haas, Kristina told her that “what he did wasn’t okay, and that if I didn’t remember it and if I was that drunk, I wouldn’t have been able to consent.” RH told Sam later that day, and she told the rest of her roommates when they returned from reading week.

90. At some point RH also spoke to Delaney to get her perspective on the events of the night. RH wanted Delaney to help her piece together what had happened at the party. RH testified that based on Delaney’s perspective, “it was just kind of undeniable that something happened that shouldn’t have.”

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91. RH denied that any of these discussions influenced her account: “I didn’t piece together the story with other people. I pieced it together myself.” She testified that she spoke to others in a “supportive capacity” to help her know what to do. Delaney was the one exception in that Delaney helped her understand what occurred during her memory blank while she was still at the party. However, she denied that her views were influenced by others telling her that if she was intoxicated and did not remember then it was a sexual assault; this was something she already knew. She testified:

I did know that myself, but – like with being at Queen’s and going through orientation week, like I – I have received training on what consent is. I did know myself that I – being that level of drunk, that was not consent. And I did know that if I don’t remember having sex, for whatever reason, whether I’m blacked out or drunk or drugged...I know that’s not consent.

92. RH denied that she looked to Delaney to tell her she was too drunk to consent, stating: “I knew I was.” She elaborated:

Well, I don’t remember consenting. And I know to get to the point where I don’t remember, I would have had to be incredibly intoxicated, or drugged, or whatever, for whatever reason. I know that the fact that I don’t remember what happened, that – like that puts me in a state where I cannot consent, so.

Mr. Haas’s text messages with RH’s roommate five days later

93. On Tuesday February 27, RH’s roommate Abby sent a text message to Mr. Haas, confronting him with an allegation of sexual assault, as follows:

A: Hi Taylor, I was asked to convey a message to you on behalf of [RH], and this is what she has to say:

“Last Wednesday night I was looking forward to having a good time with you and the rest of our friends, I saw it as a good opportunity to get to know all of you better and I went into it trusting you, but it turned into a terrifying experience for me. I don’t remember much of that night, but what I do remember is the absolute fear of waking up with no clothes on, having no idea of where I was or

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how I had got there. I was drunk out of my mind, and in no way gave consent. What you did was incredibly wrong, disgusting, and it was sexual assault.”

From this point forward it would be preferred that you do not have any contact of any form with [RH], or try to discuss it with myself or any of our mutual friends in any capacity.

94. RH testified that she and her roommates worked on this message together and sent it because they wanted Mr. Haas to know that what he did was wrong and that he should stay away from her.

95. Mr. Haas responded over an hour later, as follows:

T: I am so beyond sorry that she feels that way. I have no words except for I'm sorry... I know that doesn't make up for what happened in the slightest but I hope you truly know I had no intention to hurt her in anyway. I know I'm the last person in the world she wants to talk to right now but I'm really confused by this whole situation. Reading your text I now understand I fully misjudged what was going on at the time. We had slept for a couple hours and chatted for a while before hooking up at something like 4am, hours after we'd stopped drinking. When we got home I knew she was too drunk, this is why we did not hookup at first. But when we woke up hours later, she didn't give me any indication that she was still in the same state. We had a full conversation about having sex before hooking up. I noticed she was on her period, she said it was fine and asked me if I still wanted to continue. She asked me if I was just hooking up with her because of Sam. In the morning the only indication that I got that something was wrong was that she said she was really drunk last night. I immediately asked if she was ok and she said she was fine with it. She even stayed over for a couple hours that morning and chatted. In telling you this I am in no way trying to invalidate her story or how she feels. I just want to give you my perspective of that night because I am confused about this situation and heartbroken that I made someone feel this way. I know neither you or [RH] want to talk to me at the moment, and I respect that you need your space. But I want to know what went wrong that night because I never want to make someone feel like that again.

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Legal framework

96. Mr. Haas is presumed to be innocent. I can find him guilty only if the Crown proves each element of the offence beyond a reasonable doubt.

97. Criminal offences have both physical and mental components.

98. For the offence of sexual assault, the physical component requires the Crown to prove beyond a reasonable doubt the fact of the sexual touching and the fact that the complainant either did not consent or did not have the capacity to consent.

99. Consent in this aspect of the analysis is subjective to RH, in that it is “determined by reference to the complainant’s subjective internal state of mind toward the touching at the time it occurred” (*R. v. G.F.*, 2019 ONCA 493, citing *R. v. Ewanchuk*, [1991] 1 S.C.R. 330 at paras. 25-26). Consent is the “conscious agreement of a complainant to engage in every sexual act in a particular encounter” (*R. v. J.A.*, 2011 SCC 28 at para. 31). The complainant does not have to express her lack of consent (*R. v. Barton*, 2019 SCC 33 at paras. 87-89, citing *J.A.* at para. 37).

100. The fact that Mr. Haas had sexual intercourse with RH is admitted, so with respect to the physical aspect of the offence the issue is whether the Crown has proved beyond a reasonable doubt either that RH did not consent or that she lacked the capacity to consent.

101. The law on consent to sexual interactions and capacity to consent is set out in the Court of Appeal’s decision in *G.F.* Consent and capacity to consent are separate issues and the analysis must be kept separate. When consent and capacity to consent are both issue, the trial judge should first examine whether the Crown has proved lack of consent beyond a reasonable doubt. If the Crown fails to discharge its burden on that issue the trial judge should then determine whether the Crown has proved beyond a reasonable doubt that the complainant lacked the capacity to consent.

102. The mental component of sexual assault requires the Crown to prove beyond a reasonable doubt that the accused touched the complainant intentionally, and knew (or was reckless or wilfully blind) that the complainant did not consent or lacked the capacity to consent. When assessed for

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the purposes of the mental element of sexual assault, the focus is on whether the complainant communicated consent, in that she said “yes” through words or actions. See *Barton* at para. 90.

103. Given my findings that the Crown has not proved its case on either lack of consent or lack of capacity, I do not delve into proof of the mental element.

Has the Crown proved beyond a reasonable doubt that RH did not consent?

104. Here, the issue is whether the Crown has proved beyond a reasonable doubt that RH did not voluntarily agree to have sexual intercourse with Mr. Haas.

105. As the Crown recognizes, there is no direct evidence that RH did not consent to have sex with Mr. Haas, because of RH’s memory blank.

106. Mr. Haas and RH gave very different evidence that bears on the issue of consent. Mr. Haas testified that he and RH had a conversation in which she affirmatively communicated her consent to sexual intercourse. RH testified that although she does not recall the interaction, she is sure she would not have consented, for several reasons.

Mr. Haas’ evidence about the conversation

107. Mr. Haas was adamant that he and RH had a detailed conversation prior to having sexual intercourse and that RH communicated consent. If I accept his evidence on this point, it would support an inference of consent.

108. The defence points to the fact that Mr. Haas knew that RH was on birth control. RH herself testified that he included this detail in the account he provided to her in the morning after she told him that she did not recall what had happened. The Crown says that this is such a generic fact that Mr. Haas could have made it up, or made a lucky guess. I disagree. The fact that Mr. Haas knew that RH was on birth control does tend to suggest that she told him that, which in turn supports his account that the two of them had a conversation prior to having sex.

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109. Mr. Haas's testimony about the conversation also includes a detailed account of what they talked about before they discussed issues related to sex such as condom use and the fact that RH was menstruating. He testified that they talked about growing up in Vancouver - Kitsilano, a café that his parents own, playing field hockey and Granville Island. RH testified that she was not "a field hockey person" and had played it maybe once, in a high school gym class. The fact that she has limited interest in field hockey does not mean that it could not have come up in conversation related to growing up in Vancouver. Mr. Haas's account is not a bald assertion that RH communicated consent. His account is set in a broader and detailed description of their interaction. Although I do not see this as a decisive factor, it is something that in my view lends some support to the credibility of his account that they did have a conversation.

110. The Crown argued that a finding about when the intercourse occurred should be a core part of my assessment of Mr. Haas's credibility. I agree that this is an important issue.

111. On RH's evidence, the only reasonable inference is that sexual intercourse occurred prior to her 1:15 a.m. text conversation with Alicia. RH testified that she woke up naked next to Mr. Haas who was also naked, she felt like she had been penetrated, her tampon was missing and there was menstrual bleeding. On the other hand, Mr. Haas testified that they did not have sex until around 4 a.m.

112. RH had a solid recollection of being in the bathroom, naked and texting with Alicia. I accept her testimony about waking up naked next to Mr. Haas, making her way to the bathroom, realizing that her tampon was missing, feeling like she had been penetrated, seeing blood, and texting Alicia. She was very clear in her recollection on these points.

113. There was a controversy between Crown and defence about the evidentiary value of the 1:15 a.m. text messages. The Crown argues that they are admissible for the truth of their contents pursuant to the *res gestae* exception to the hearsay rule. The defence argues that their only value is as narrative, and that they cannot be used for truth of their contents.

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114. I agree with the Crown on this point. Although it can be hard to assess the emotional tone of text messages, these particular messages do convey the fact that RH was distraught. Alicia clearly had that impression as the recipient of the texts. RH recalled being very upset while sitting in the bathroom and texting Alicia. In my view, the circumstances in which the texts were sent can safely discount the possibility of concoction. See: *R. v. Khan*, 2017 ONCA 114 at para. 15. In making this finding I want to be clear that the stress or pressure that grounds my finding of admissibility of the texts for the truth of their contents arises from RH waking up naked in Mr. Haas's bed, not knowing where her clothes were, and going to the bathroom and discovering that her tampon was missing. The finding of substantive admissibility does not turn on what, if anything, occurred between Mr. Haas and RH prior to 1:15 a.m. or whether it was consensual.

115. That said, in my view the most significant evidentiary value of the text messages is to establish the timing, that it was approximately 1:15 a.m. when RH woke up and went to the bathroom.

116. Even leaving aside RH's feeling that she had been penetrated, the fact that she and Mr. Haas were both naked, and the fact that her tampon was missing provide strong circumstantial evidence that sexual intercourse had already occurred. Mr. Haas's own account was that they removed their clothes and that he removed the tampon as a direct precursor to sexual intercourse. His evidence differed only on the timing.

117. I reject Mr. Haas's evidence that the sexual intercourse occurred shortly after 4 a.m., for several reasons.

118. First, RH's 1:15 text messages to Alicia provide powerful objective evidence of when it was that RH found herself naked and with her tampon missing.

119. Second, although not as drunk as RH, Mr. Haas had also consumed a lot of alcohol.

120. Third, from the moment his friends admonished Mr. Haas not to have sex with RH because she was too drunk, Mr. Haas had a motive to deny that they had sex shortly after getting to his place.

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121. Finally, RH had a very good recollection of her conversation with Mr. Haas in the morning, and the fact that they slept for several hours prior to having sex was not part of anything that she recalled Mr. Haas telling her. She testified that Mr. Haas told her that they went to his place, then went upstairs and had sex.

122. The Crown argued that if I reject Mr. Haas's evidence about the timing of sexual intercourse, it should cause me sufficient concern that the rest his evidence should not factor into my determination of whether the charge has been proved beyond a reasonable doubt. I disagree. I can accept some, none, or all of a witness's evidence. While I completely reject Mr. Haas's evidence (and his utterances to Axel and the text to RH's roommate) that the sexual intercourse occurred close to 4 a.m., I am not able to determine what lies behind this inaccuracy. Is this something he wanted to be true and then believed to be true in order to avoid the unpleasant truth that he had sex with someone who was extremely intoxicated and who was not actually interested in him? Was it always a fabrication, perhaps originally borne of an attempt to avoid the disapproval of his friends? Is it the unreliable account of someone who was also very drunk and might have misread his bedside clock? I cannot speculate. I must look to the evidence for answers and on this point the evidence does not assist me.

123. For the reasons already outlined and despite my concerns about Mr. Haas's evidence about the timing of intercourse and about what he said to others about that, I do accept his evidence that he and RH had a conversation prior to having sex.

RH's evidence about the reasons she would not have consented

124. RH gave four reasons for why she believed she did not consent to have sex with Mr. Haas. (1) She was menstruating and she does not have sex when menstruating. Her menstrual flow was heavy and she finds the idea of having sex while on her period to be revolting and gross. (2) No condom was used and RH testified that she always insists on a condom the first time she has sex someone and that before having sex without one, she always has a conversation with the person about being tested for sexually transmitted infections and making sure they are clean. She had not previously had sex with Mr. Haas and there was no conversation about STIs. (3) RH testified that

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she was not sexually attracted to Mr. Haas. (4) Mr. Haas's recent relationship with her roommate Sam would be "a major deterrent" because she knew Sam was still interested in Mr. Haas and would not be comfortable with any of her friends sleeping with Mr. Haas. RH testified: "I would not have done that to Sam, as she was one of my best friends at the time."

125. I would have difficulty making a finding of lack of consent based on this evidence, because objectively by RH's conduct, reasons 3 and 4 are not supported by the evidence. Without doubting the sincerity of RH's belief that she would not have consented to have sex with Mr. Haas, two of the reasons she gives are contradicted by what transpired at the party. The others at the party perceived the physical intimacy between RH and Mr. Haas at the party to be mutual and consensual.

126. There is a big difference between kissing and touching, and sexual intercourse. RH's first and second reasons (menstruation and condom use) bear on intercourse but not on kissing and touching. Furthermore, just because RH apparently consented to kissing and touching with Mr. Haas at the party does not mean that she is not credible when she says she would not have consented to intercourse, or that she was more likely to consent to intercourse later on. Those would be prohibited, improper inferences. However, the fact remains that the interactions at the party stand in contrast to two of RH's four reasons for saying that she knows that she would not have consented to any sexual contact with Mr. Haas.

127. In addition, I am concerned that RH's belief – although honestly held – may have been unwittingly influenced after the fact either by other people (discussions with her roommates and/or Delaney), or by her own concerns given the circumstances as a whole (the potential fallout with her roommate; her own fear that Mr. Haas was simply using her to get back at her roommate).

Conclusion on consent

128. In view of the fact that I accept Mr. Haas' evidence about the conversation, and my concerns as set out about RH's evidence on the issue of consent, I find that the Crown has not proved beyond a reasonable doubt that RH did not consent to have sex with Mr. Haas.

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Has the Crown proved beyond a reasonable doubt that RH lacked the capacity to consent?

129. Lack of capacity to consent is easily established when a person is unconscious or asleep. As discussed by the Court of Appeal in *G.F.*, incapacity caused by intoxication is a more difficult issue. The following points must guide the factual determination of whether the Crown has proved beyond a reasonable doubt that the complainant lacked capacity to consent (see *G.F.* at paras. 36-38):

- A complainant lacks capacity to consent if the Crown establishes beyond a reasonable doubt that the complainant did not have an operating mind capable of appreciating the nature and quality of the sexual activity, or knowing the identity of the other person, or understanding that she could agree or decline to engage in or continue the sexual activity.
- Capacity does not require the cognitive ability to make a considered evaluation of the collateral risks and consequences of sexual activity.
- Lack of capacity is not proved only by “drunkenness, loss of inhibitions, regret for a bad decision or some memory loss.”
- Lack of capacity is not precluded by evidence that the complainant was able to do things like walk a short distance, make a phone call or talk, and/or had some awareness of resisting the sexual activity, or memory of the events.

Factors that bear on whether RH had the capacity to consent

130. Several aspects of the evidence bear on whether the Crown has proved beyond a reasonable doubt that RH lacked the capacity to consent. I will address these in roughly chronological order, as follows:

RH’s text conversation with Alicia at 10:42 p.m.

131. There are spelling mistakes in these texts and RH appears to be happy and very open about her feelings, which is not surprising given that she was chatting by text with a close friend. In

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those texts, RH makes an analogy to two characters in a television show to explain to Alicia why she thought things would not work out between her and someone named Shawn.

132. RH testified that she was not sure whether she had an actual memory of sending these texts, or whether she was imagining how she felt when she looked back at them. With respect to the text about Shawn, she testified: “I knew I would kind of make a fool of myself, drunk texting him.”

133. The 10:42 p.m. text messages and RH’s evidence about them tend suggest that RH was drunk, but that she was also self-aware of being drunk, able to engage in some level of abstract thought (the analogy that she and Shawn were like the T.V. show characters) and able to assess the pros and cons of her behaviour (e.g. that it was a bad idea to drunk text Shawn). In my view, the 10:42 p.m. text messages do not support a finding that RH lacked the capacity to consent to sexual contact at that point. To the contrary, they tend to support a finding that RH, although intoxicated, was capable of making decisions at that point in the evening.

Observations and opinions of others at the party

134. RH was slurring her words, and there were some indications that her balance was off. She fell into Axel’s room when the door was opened, and she had difficulty when she went to sit down on the couch. On the other hand, there was no indication that she had any trouble going up and down stairs under her own steam. Her reaction to being passed a cigarette on the front porch is particularly telling. She took it and took a puff, but then realized it was a cigarette and said that she did not want it. Before leaving she went inside to say good-bye to the others who had not gone to the porch. No one saw her have any difficulty putting on her coat or walking away from the house with Mr. Haas, and there was no evidence that Mr. Haas had to assist her. This evidence also points to a finding of capacity.

135. There are then the opinions of Axel and Delaney, and the fact that they took the step of cautioning Mr. Haas about sleeping with RH. The line between bad idea sexual interactions and criminally unlawful sexual assault is clear in law, but can be difficult to apply. In law, a person can be very intoxicated, but still have capacity to consent to sexual interactions. And yet, most

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people would probably take the view that it is a bad idea to have sex with a new partner when very intoxicated. Axel and Delaney clearly thought it would be a bad idea for Mr. Haas to have sex with RH, but it is not clear to me that their concerns extended to the point that they thought RH lacked the capacity to consent as defined in the criminal law.

136. Overall, it is my view that despite RH being very intoxicated, her conduct at the party appears to indicate that she did still have the capacity to consent at the time she left the party around midnight.

Timing of sexual intercourse

137. The timing of sexual intercourse is a very important issue, because that is the point where a person must have capacity to consent. I have already set out my reasons for finding that the sexual intercourse occurred prior to 1:15 a.m. That puts the sexual intercourse at a time that is reasonably proximate to both RH's departure from the party and her conversation with Alicia Mills at 1:15 a.m.

Mr. Haas's evidence about the conversation before they had sex

138. I have already addressed Mr. Haas's evidence that he and RH had a conversation before they had sex. Mr. Haas testified that it included discussion of the tampon, birth control, Mr. Haas's prior relationship with RH's roommate and her potential reaction, and whether Mr. Haas should look for a condom. Mr. Haas testified that he told RH that they did not have to do anything if she did not want to and that she said that she did. I have already made a finding that I accept Mr. Haas' evidence about the conversation. The conversation points towards a finding that RH had the capacity to consent.

RH's communications with Alicia at 1:15 a.m.

139. At 1:15 a.m. RH had a lengthy text conversation with Alicia. Those texts indicate the following: she knew where she was, she knew she wanted to go home but she did not know where her clothes were, and she was too drunk to make it home and she was scared to try. RH was clearly

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distraught and still very intoxicated, but the text conversation is lengthy and her texts are substantially coherent. In my view, the text conversation actually points away from a finding that RH's impairment was to the point that she lacked capacity to consent at that time.

RH's lack of recollection

140. I accept RH's evidence that she has no recollection of having sex with Mr. Haas. Her memory blank extends back to approximately 10:30 p.m., during the party at Axel's place. The fact that RH does not remember events is consistent with other evidence that she was very drunk, which in turn points towards lack of capacity. And yet, the memory blank is also unhelpful to the Crown's case on lack of capacity because it includes the time period of RH being at the party and engaging in what appear to be capacity-based activities: choosing to follow Mr. Haas up and down stairs, exchanging affection with him, going out to the porch and mistakenly accepting and then rejecting a cigarette, exercising good manners in saying good-bye to the people who had stayed inside, and choosing to leave the party.

141. It would strain the analysis of both consent and capacity to say that anything done during the period of a memory blank was done either without consent or without capacity to consent. While lack of memory is definitely relevant to the analysis, it does not by itself establish either lack of consent or lack of capacity to consent.

Mr. Haas's text message to RH's roommate on February 27

142. In his text message to RH's roommate on February 27, Mr. Haas stated: "When we got home I knew she was too drunk, this is why we did not hookup at first." In his testimony, Mr. Haas repeatedly asserted that he did not really think about having sex with RH when they first got to his place because they were both drunk and tired, and as a result he did not evaluate at that point whether RH was too drunk to consent. That evidence stands in stark contradiction to his assertion in the text message that they did not have sex upon returning to his place because RH was too drunk. Based on the text message, he did think about having sex, but concluded that RH was too drunk.

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143. Mr. Haas also testified that although sex might have crossed his mind, it was not an appropriate time to have sex when they first got to his place. He testified that he might have been interested in kissing RH some more, but that he was not in the mood to have sex with RH when they first got back to his place. He attributed this to the fact that they had both been drinking and RH had smoked a cigarette.

144. The Crown argues that Mr. Haas's evidence that he was not thinking about having sex with RH when they went back to his place is preposterous given the intimacy between them at the party, the fact that they resumed kissing immediately upon getting to his place, including in his bed and with RH clad only in a t-shirt. Furthermore, his concerns about smoking and drinking made no sense given that these factors did not prevent him from kissing RH.

145. The defence cautions that the Crown's argument invites reasoning on the basis of stereotypes about male sexual aggression and that the argument asks me to infer Mr. Haas's state of mind based on logic that would be clearly prohibited if applied to RH.

146. I share the concerns raised by the defence on this point. However, the fact remains that Mr. Haas's evidence is starkly inconsistent with his text to RH's roommate. Mr. Haas's response to the roommate is lengthy. He clearly thought about what he wanted to say in that text. There is nothing in the context that causes me concern that he did not mean exactly what he said when he asserted that: "When we got home I knew she was too drunk, this is why we did not hookup at first." I reject Mr. Haas's evidence that he did not think about having sex with RH when they first got to his place, or that he did not consider her capacity to consent.

147. Mr. Haas's text assertion that "she was too drunk, that is why we did not hookup at first" points towards a finding of incapacity. On the face of it, it would appear to be a very damning admission. However, I have difficulty knowing what weight to give to it for much the same reasons as I have difficulty knowing what weight to ascribe to Delaney's and Axel's opinions that Mr. Haas should not have sex with RH because she was too drunk. As already indicated, that type of opinion evidence could speak to a level of intoxication that is so pronounced that the person lacks capacity to consent, such that it would be a crime to have sexual contact with the person. Or

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it could speak to a level of intoxication that is still very pronounced, but which falls short of depriving the person of capacity to consent.

148. As with Mr. Haas' contention that they had sex at close to 4 a.m., I have no idea what is behind his assertion in the text message in terms of whether it was part of a concocted false narrative, something he has convinced himself is true because of what his friends said at the party, or the unreliable and inaccurate recollection of someone who also had a lot to drink that night.

Conclusion on capacity to consent

149. This is a circumstantial case. When I consider all of these factors together, I find that the Crown has not proved beyond a reasonable doubt that the only reasonable inference is that RH lacked capacity to consent to have sex with Mr. Haas.

150. The critical time period where sexual intercourse must have occurred is bracketed by the evidence about RH's conduct and level of intoxication at the party up until about midnight, and the evidence about her waking up at about 1:15 a.m. and the text conversation with Alicia.

151. In my view, the evidence points to RH being very intoxicated by the time she left the party, to the point that others, notably Delaney and Axel and possibly also Mr. Haas himself, were of the view that it would be at least a bad idea for Mr. Haas to have sex with RH. However, that evidence has to be considered alongside the descriptions of RH's interactions and behaviour, which indicate that she was able (with some imperfections) to move about unaided, and that she was able to a certain extent to evaluate circumstances and make decisions.

152. Similarly, the evidence regarding RH's text message conversation with Alicia at 1:15 a.m. supports an inference that RH was very intoxicated, but it does not show that her level of intoxication was such that she lacked capacity at that point.

153. I have rejected Mr. Haas's evidence that the sexual intercourse occurred after 4 a.m., and I am troubled by his text message assertion that RH was too drunk to have sex when they first got

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to his place. Nevertheless, I have accepted his evidence that they had a conversation before having sex. This is an important factor in the analysis.

154. When I consider all of the evidence, the factors that weigh in favour of a finding of capacity cause me to conclude that the Crown has not proved lack of capacity beyond a reasonable doubt.

Conclusion

155. I find that the Crown has not proved beyond a reasonable doubt that RH did not consent to have sex with Mr. Haas or that she lacked the capacity to consent. Accordingly, I find Mr. Haas not guilty of sexual assault.

Released: August 11, 2020



Signed: Justice A. Wheeler

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