

File No:  
Registry: Fort St. John

## In the Provincial Court of British Columbia

REGINA

v.

Z

REASONS FOR JUDGMENT  
OF  
THE HONOURABLE JUDGE R.S. BOWRY

COPY

<b>Crown Counsel:</b>	<b>O. Fleck</b>
<b>Defence Counsel appearing by teleconference:</b>	<b>P. Kent-Snowsell</b>
<b>Place of Hearing:</b>	<b>Fort St. John, B.C.</b>
<b>Date of Judgment:</b>	<b>December 10, 2012</b>

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[1] THE COURT: This is my decision with respect to the matter of Z . Z is charged with sexually assaulting K . contrary to s. 271 of the *Criminal Code*.

[2] The incident occurred on the 14th day of August 2009 in Fort St. John, British Columbia. Crown contends that Z intentionally applied force to K without her consent and that the force that Z applied in the circumstances was of a sexual nature, specifically, that the sexual intercourse that took place between Z and K on the date and place set out in the information was without K 's consent and that the Crown has proven its case beyond a reasonable doubt.

[3] In this case, defence simply contends that the Crown has not proven its case beyond a reasonable doubt; further, that the case also raises the issue of credibility.

[4] In assessing the credibility of witnesses, I must first do so taking into account the whole of the evidence. I need to be mindful that cases such as these involve witnesses recounting different versions of the same event or recounting that the event did not occur. It is the witness's ability to observe, record, and remember the events which too often in these types of situations is filled with emotion, and the

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events happened quickly, and that may also cause the witnesses to recount a different version.

[5] In such cases, I am instructed to consider the test and the ruling set out in the Supreme Court of Canada case of *R. v. W. (D.)*, [1991] 1 S.C.R. 742 at page 757. I shall just simply paraphrase what the Supreme Court of Canada said in relation to that test.

[6] If I accept the defence's version of events, then Z is entitled to be acquitted.

[7] I could find that I do not actually accept the defence's version but that the events could reasonably have happened as described by the defence; then, of course, Z must also be acquitted. The defence would have raised a reasonable doubt.

[8] I could, upon considering all the evidence, conclude it was simply impossible to know what happened because the evidence is contradictory, pointing to no clear direction. In this case, the Crown would not have proven its case, and the charge against Z must be dismissed.

[9] Finally, if I am not left in doubt by the evidence of Z, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by the evidence of the guilt of Z.

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[10] The Crown's case consisted of Constables Josefsson, Riendeau, Basi, K , M: , and Mc. . The defence called Z. . Each witness I found to be forthright and provided the court with their best recollection of the observations that they made, keeping in mind that the events took place approximately three years prior to the trial.

[11] The simple facts are that on the evening in question, K and her friend Mc. were out spending the evening introducing Mc to the various nightclubs in Fort St. John, British Columbia. Their last stop was at Looney Tunes pub where they encountered Z. . After a short period at the club, Z , Mc , and K went back to K 's residence. Z and K end up alone in the upstairs bedroom loft. They engaged in foreplay which led to sexual intercourse which K says that she did not consent to.

[12] Constable Josefsson said she was on duty and called to attend at the residence of M: where she found M K and Mc. . M K was crying. It was apparent that she was upset about something. K smelled of liquor. She had been drinking. The officer

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accompanied K to the hospital where a physical exam occurred. The officer took photos of K. The photos of K's neck and clavicle, there was a mark on her neck, a slight mark parallel to her bra strap.

[13] In cross-examination, the officer said that it was difficult to see a bruise. The officer also said that the smell of liquor on K's breath was strong enough that the officer could smell it.

[14] Constable Riendeau said he and Mc returned to K's residence. The officer took photos of the residence and spoke to Mc. The residence is a townhouse with a small living room, kitchen, and dining room. A set of stairs takes you upstairs to an open loft bedroom. The bedroom has no walls or doors. It is open to the lower floor. The upstairs also has a bathroom with a door.

[15] The officer said there was no evidence that Mc had been drinking.

[16] The officer was tasked with taking statements of K and Mc. K was quite upset and appeared emotionally drained. The officer observed a bruise just below her collarbone on the right side of her neck.

K said that it hurt to pee, and the interior wall of her vagina was sore. The officer took two photos of

K on August 17, 2009: one photograph of K s right chest area and another which was a close-up of the right side, a bruise on the chest area.

[17] In cross-examination, the officer said all that could be seen was a slight discolouration on the chest and no marks on K 's neck. K had advised him that she had been choked, and he informed the court that had he seen marks of that nature, he would have also taken a photograph of her neck.

[18] The officer also spoke to Z . He was polite and cooperating. He looked like someone who could not believe what had happened. He was persistent in telling his version of events, what he says took place on the evening in question.

[19] The officer knew that K had kicked Z off the bed. The officer examined him. There were no bruises, no scratches, or marks. The officer said that Z 's demeanour was indignant and consistent with someone who could simply not believe what was happening.

[20] M testified that he and K had been friends for approximately six years. In the early morning hours of August 14, 2009, K: was pounding at his front door, which awakened him. She was sobbing, shaking. She hugged him, and could not speak. She entered his living

room. Her friend Mc was with her. He thought that the time was approximately 3 a.m. He said K was wearing a black cocktail dress and had no shoes or jacket on.

[21] Mr. M said that he called 9-1-1 and spoke to dispatch. He said he spent a considerable amount of time trying to find out exactly what had happened that evening.

Mc continued to cry loudly, and K tried to respond but just continued to break down. She did eventually tell him that she had been raped.

[22] He said that, physically, he could not see anything wrong with her other than she was shaking; she was dishevelled; her hair and makeup were messy. He noticed that K had been drinking and could not detect whether Mc had also been drinking. He said that due to the inadequate lighting, he did not notice any marks on K while she was in his apartment.

[23] K was transported to the hospital by the RCMP. Mr. M and Mc spoke to another officer. He said that once he arrived at the hospital, he was escorted into the back room where he stayed with K until the doctor arrived. He said he could see a red welt mark, lines on the side of her neck near her voice box and on the right

side. He said that K at this point, was not hysterical and not necessarily talkative.

[24] After K 's examination was complete, he drove K and Mc back to K 's apartment.

[25] In cross-examination, he was presented with the photographs that were taken of K 's neck. He said that he could see that her whole chest was pink. In re-direct, he said he recognized that it had been three years but again confirmed he saw red marks on the right side of K 's neck. He said it was a shocking revelation to see marks on someone who had been attacked.

[26] Mc testified that she had been friends with K since they were approximately nine or 10 years old. They had known each other in Port Alberni, British Columbia. On the evening in question, she and K had gone out. They were checking out the nightclubs. They were at Egan's pub for dinner, then the Condill pub, then the Cheers pub, and lastly, the Looney Tunes pub.

[27] She testified that they arrived at the Looney Tunes closer to midnight and stayed until approximately 1:30. She said she had drinks at Cheers and perhaps a total of five drinks throughout the evening. She could not recall how many



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drinks            K:    had had.    She and            K            were dancing.

          K            was pretty much beside her the whole evening, and they were just simply talking to friends.

[28] When it came time to leave, it was cold out, and Z            offered to give them a ride home. She said that Z            was being nice, and she assumed that he was a friend of            K            's.

[29]            Mc            said that they went straight to K            's apartment. During the drive, the music was on. There was a bit of conversation.            Z            was singing to the tunes of Cheers, and there was light banter between the three of them.

[30] They arrived at the apartment.            Mc            said that she went straight upstairs to the upstairs bedroom loft as she wished to retire for the evening, that            K            and Z            followed her upstairs. He was playful and jumped on the bed. She could not recall how it came about that he was in the apartment. She assumed her friend just simply wanted him there to chitchat.

[31] She said that all three of them were on the bed for a split second and that            Z            was flirting. He was friendly with            K:            . She was not sure if            K            liked him and did not want to get in the way. They started to

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kiss, and she wanted to give them some space so she decided to go to the living room and sleep on the couch.

[32] At trial, although not in her statement, she said that she had her laptop on and that she was listening to music. She did not fall asleep, but approximately 10 minutes later she heard a thud and M K crying and asking her to open the door and get him, Mr. Z, out. It was not that long after that she had come downstairs and laid on the couch that this incident occurred.

[33] She said M K ran straight out the front door toward her vehicle crying, sobbing, and making gestures for Mc to get Z out of the apartment. Mc then went upstairs and told Z to leave. She found him naked. He got dressed and could not find his keys. She asked what was wrong. He said, "I don't know." He seemed nonchalant about the whole incident. He acted as though nothing had happened.

[34] She said he looked around for two seconds for his keys. Once outside, he did not leave. He was banging on K's car window, saying words such as *douchebag*, *cunt*; he just would not leave. He sort of jumped on the hood of the car and was tapping on the windshield and the sunroof. K was inside the vehicle and had the doors locked. She

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appeared scared.

[35] Z then went back into the apartment and found his keys.

[36] She said that when Z and K were upstairs, she did not hear anything. She did not hear any screaming or anything of that nature. She said she would have heard it had there been any. She did have her laptop on but said that it was not cranked; she was simply listening to soft music. She concluded that she had never seen K like that, not even close to that demeanour. She said that K was normally calm and collected, and on that night, she could not even speak.

[37] In cross-examination, Mc said that she did not recall that in her statement to the RCMP she said that when Z and K were on the bed, they had starting kissing each other. She said she simply wanted to give them some space, and she was the first to go upstairs to use the washroom.

[38] She said in cross-examination, as well, that the interaction between K and Z was not hot and heavy.

[39] Mc testified forthrightly when she advised the court that she had not been in an intimate relationship

before and did not know what to expect when two individuals were having, as she said, sexual intercourse. She said she thought that maybe K would "do" him or that they would have sexual intercourse. She said that she is not sure what she heard as she has not had sexual intercourse before. She said she felt awkward and uncomfortable. She could hear breathing noises, like gasping.

[40] She confirmed that she was only downstairs for a short period, perhaps 10 minutes, before she heard the thud and

K coming down the stairs and heading out the front door. She went on to say, in cross-examination, that she did not know whether K and Z were having sex. She did ask him if they had had unprotected sex, simply because of the way that K came down the stairs crying. It was the first thing that came to her mind. She said that when she asked him if they had had unprotected sex, he replied, "Yes." She said it was "super awkward." He was calm, polite, and almost nonchalant and not yelling. He just simply appeared confused.

[41] K testified that prior to living in Fort St. John, she lived in , British Columbia. She testified that in the early hours of August 14, 2009, she and her colleagues from her former place of employment had dinner

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at Egan's, and from Egan's pub, she and her friend McI went back to her apartment, changed, and then went out to the Condill, Cheers, and Looney Tunes pubs in Fort St. John, British Columbia. She said she was wearing a black stretchy dress and high heels. She said that she had a drink at the Condill and then she and McI walked to Cheers pub. They stayed at Cheers pub for a while, had a drink, met some acquaintances that drove them to the Looney Tunes pub. Her recollection was that it was about 11 p.m. when they arrived at the Looney Tunes pub. They hung around, drank, simply watched people, and spoke to individuals that she said she knew from work.

[42] She met Z and talked to him. She and Z were making casual conversation. They had a few short conversations, and she danced with him.

[43] She claimed she did not have any interest in him and that they stayed at Looney Tunes pub for approximately two, two and a half hours.

[44] She said : Z knew she and McI had been making comments about how sore their feet were and offered them a ride home. They were planning to walk. She said the conversation on the way home was of no importance. The general mood was light, and it was not tense.

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[45] They drove to her apartment. He asked for a drink of water. He walked into the apartment. She grabbed him a glass. He did not need one; he simply drank from the tap. She said he needed to use the washroom, and she directed him upstairs. She did not want him to be alone upstairs, so she followed him upstairs and sat on the bed and waited for him to get out of the washroom.

[46] When they first arrived at the apartment, she, Mc , and Z had a short conversation, nothing of importance. She said she probably led him upstairs to the bathroom. She said he was in the bathroom, and she simply sat on the bed waiting for him. Mc was with her on the bed at this time, and when he came out of the bathroom, he came towards them and talked, and Mc got up and went downstairs.

[47] She said that she tried to get up to show him the way out, then recalls Z shoving her onto the bed. She said, no, she did not want that. He kissed her, and she said no. He brushed her leg at that point, and she just commented about how that seemed to be just an accidental brush at that point and did not think anything of it.

[48] She said that when he pushed her onto the bed, she did not have her balance, and then he ended up straddling both

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legs and putting his hand on her neck. She said that she was facing the closet and that both legs were touching the bed at an angle. She said that she tried to stand up, and then there was a push. He put his left arm across her collarbone and throat on the right side. She could not recall where his right hand was. Her left arm was pinned. Her other arm was free, and she was trying to use it to get her balance back to get up. He then straddled her legs, his on the outside of hers. He grabbed her left leg, pulled it outside of one of his legs, and used his hand to drag her left leg toward the middle of the bed to the left of her body and her right leg pinned.

[49] She said he peeled off her underwear down to approximately the left thigh. He then struggled with his pants and underwear, and she tried to say, "Please, no, don't," but his arm was on her, and she could not. She said she tried to make loud noises, but all that she could get out were raspy sounds because his wrist and hand were across her throat. She said she could barely breathe, and there was sort of an obstruction to her windpipe. She was not able to get any words out. She was trying to push his arm away. She said she pushed the entire time.

[50] She said his penis was exposed but she could not see if

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he was erect as she was lying down. He pushed himself onto her. She was trying to get him off. He forced his penis into her vagina for a few minutes, not very long. She was trying to tell him to stop and pushed away. She managed to push away at the end, but then he ejaculated. He relaxed and slumped towards the edge of the bed. She pushed him with her shoulders and arm, and he fell towards the closet. She said her dress was still on, and her bra was still on, but she had to pull her panties up.

[51] She ran down the stairs and grabbed the car keys, which were on the couch, and ran out to the vehicle and locked herself into the vehicle. She told Mc to get him out of the apartment.

[52] She said she recalls Mc with Z. They were talking for a moment. She said she recalls Z saying that she was a "douche" and a "bag" and a "cunt." She said she was not in the car for very long. She said Mc was outside, and she could not hear Mc talking to Z.

[53] She confirmed that she and Mc when to M's home and then to the hospital. She said she was crying. Her neck, collarbone, and vagina were sore, and there was blood coming from her vagina. She waited for



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approximately 10 minutes at Z 's [sic] and then, of course, confirmed the attendance at the hospital and the examination by the doctor.

[54] In cross-examination, K confirmed that she had had five to six drinks that evening. She did not recall dancing with Z nor did she recall kissing him at Looney Tunes pub. She could not recall Z asking if he could come over to the apartment to play video games. She confirmed that he had asked for a drink of water and that she did not think it odd that he was asking to come in for a drink of water in light of the fact that he had water bottles in his vehicle.

[55] She confirmed that it was Z who wished to use the bathroom and not Mc , as suggested by defence counsel. She said that Mc and she went upstairs to let him into the bathroom. They could have remained downstairs but simply did not like the idea of him being by himself up there when her bedroom did not have any doors.

[56] She confirmed that he was being playful and jumped onto the bed. She did not recall kissing him upstairs nor that the kissing progressed to making out. She said that she did not have a clear recollection of that part of the evening, nor did she have a recollection of Mc being there while he

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was kissing her upstairs or Mci leaving to go downstairs because she became uncomfortable.

[57] She confirmed that Z pushed her onto the bed. She denied defence counsel's suggestions that she had performed oral sex for 45 seconds and then asked Z to just "fuck" her; that in fact, he got off the bed, took off his shirt and pants, and that she was the one that took her left leg and placed it over his shoulder and they began to have intercourse and that she was speaking softly, "spank me," "choke me," and that they both engaged in doggy style intercourse.

[58] She denied having sexual intercourse in any of those positions and continued to stress in cross-examination that he had his arm across her hard, it was hard for her to breathe, and that her words were raspy. She confirmed that he did ejaculate and denied asking him whether he was finished and his reply being yes.

[59] She went on in cross-examination that he was using all of his strength to hold her down. He was doing it forcefully; that he grabbed her left leg tightly and held it there. She did not know how long that was because at that point he had pinned it down with his own leg and then his arm was across her collarbone and throat.

[60] She said that she used all her power to push him away. She just managed to kick him, and he fell off the bed.

[61] The statement that she provided to Constable Basi was put to her. She confirmed that she told the RCMP that Z 's left arm was on her neck and the right one was holding her leg down. She said that she did not feel that she was drunk but perhaps tipsy, and recognized that alcohol might affect her ability to remember the events.

[62] Z testified that he was at the time of this incident. He currently works and lives in . He said that he was in Fort St. John on business on the evening in question. He had had a beer in his room at approximately 9:30 p.m. and then went to the Looney Tunes pub at about 11:30 p.m. with a friend.

[63] He said that he had contact with K He spoke to a number of people that evening. He said that K bumped into him and just sort of casual chitchat ensued. He did a shot with her. He believes it was a shot of tequila. He said that he had seen K flirting with another male and thought it was her boyfriend. He asked her if that was her boyfriend, and she replied no.

[64] They did another shot and they were flirting. There were more shots consumed. He said that he danced with her on the

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floor and that they were French-kissing while they were dancing. He said that they bumped into each other again and had a nice conversation. He sort of thought the mood was celebratory. They began kissing again. The conversation arose as to whether there were any plans for the balance of the evening. They began talking, and a conversation arose about hanging out after Looney Tunes pub, perhaps to play some video games.

[65] He said he drove K and Mc home. He said that he could not recall any conversation about the two of them wearing heels and that their feet were sore and needing a ride home.

[66] When it was close to closing time, there was a conversation about "Let's go," and the answer was, "Why not?"

K. was in the passenger seat, and her friend was in the back. The rapport seemed to be the same on the way back to K. 's apartment.

[67] He said he was confused by K 's statement that he wanted to go into the apartment for a drink of water as he always carries water in his vehicle. He said the plan was for all of them to go inside and spend some time together, perhaps playing video games.

[68] When they entered the home, and in particular, the living

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room, he noticed the Rock Band video games, and they all had a chuckle. They had had a conversation about this video game earlier in the evening. He said Mc went upstairs. He does not recall why. He then asked if he could use the washroom, and K and he went upstairs and she hung out with Mc while he used the washroom.

[69] He came out of the washroom, and they were all sitting on the bed. K was to his right, and Mc was on the far side. He sat on the side closest to the stairwell. He confirms that he sat on the bed, but he did not think he had jumped on it hard. He said he gave K a kiss on the cheek and then a couple more kisses and they began to French-kiss again. He said he put his hand up her dress and that as soon as Mc saw this, she just simply said, "I'll just give you some alone time" and left to go downstairs.

[70] He said he had his hand under her dress and at that point his finger in her vagina for approximately less than a minute. He took off her underwear and put his tongue inside her, kissing her and pulling her underwear down with one hand. He said his face was by her vagina, and then she said, "Okay, just fuck me" two or three times. At that point, he was fully clothed, so he took off his pants and shirt and belt and did

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what she suggested. He said that he did not wear underwear, so he was confused about her statement as to why she had said he had struggled with his pants and underwear.

[71] He said that she remained lying in the middle of the bed. He went on to say that they had sex missionary position, legs down, and that at no time did he pull or straddle her, force her, or pull on her legs. He then went on to say that the position changed. She took her left leg, put it over his shoulder, and asked him to go faster, the other leg remaining on the bed.

[72] He said that they changed positions to doggy style and flipped over on all fours facing away from the stairwell and she said, "Go even harder." He said that they changed positions again, with her legs by his head, and she asked him to spank and choke her, to become rougher. She was encouraging him to have rough sex. He did say that he had his hand on her neck for a few seconds but it was only simply so that he could maintain his balance, but at no time would he have obstructed her breathing.

[73] He said that when she had one leg on his shoulder, he would have had to have one hand on her chest just simply to balance.

[74] He said that once he ejaculated, he tried to pull out.

They relaxed and kissed. She said, "Are you done?" He said, "Yeah." She asked if he was wearing a condom, and he said no. He said that is when K "kind of freaked." He said that he went into the washroom, and at no time did she ever utter any words that she did not wish to have sexual intercourse with him, nor did she say anything to stop him or take any action to make him think she wanted him to stop.

[75] He said that after K ran downstairs, Mc came upstairs and was quite surprised and asked if they had had unprotected sex. He said yes. Mc assumed that Z had advised K of that. He said that he felt bad that K was feeling bad about what had happened and that he and Mc were talking together, trying to get 's attention after she had locked herself into the vehicle.

[76] He said that after about seven minutes he did ask Mc why K was being a "cunt." He said during the course of the evening while they were at Looney Tunes pub they were all joking with each other about being "douches" and "bags." He said that he did call her a "douche" and a "bag" in the same bantering way that they were talking to one another at Looney Tunes pub. He was simply trying to lighten up the situation and make her feel better.

[77] He said that he told Mc that he had had a good time with both of them and asked for contact information.

Mc said that it was nice of Z to stay, that K was acting stupid, and that it was not like her. She was quite drunk. Mc then provided Z with K's telephone number.

[78] He said that he left and the following day was at work. He was surprised when the RCMP first attended at his residence. He thought that perhaps he had touched somebody on the dance floor, and he was shocked when the officers said why they were there attending at his residence. He confirmed that he had no bite marks, no scratches on his back, no bruises, and no physical signs of a struggle. Nothing appeared for days. He said he had scratches on his back and thinks it might have been when Mc was pulling at him.

[79] He confirmed in cross-examination that at some point he did have his hands on K's neck. He said that his hands were there for a few seconds only and, again, to maintain his balance. In cross-examination, Z said that he did not force her or push her down. He did not apply pressure on her so that she could not speak. He said he did not force her to have sexual intercourse with him. He denied that there were no words of communication that she did not



want to have sexual intercourse with him. In fact, he said it was exactly the opposite conversation.

[80] Z contends that M<sup>c</sup> K consented to the sexual intercourse. In assessing this, the Supreme Court of Canada in *R. v. A. (J.)*, 2011 SCC 28 at paragraph 46, the court provides the following comments when assessing consent in sexual assault cases:

[46] The only relevant period of time for the complainant's consent is while the touching is occurring: *Ewanchuk*, at para. 26. The complainant's views towards the touching before or after are not directly relevant. An offence has not occurred if the complainant consents at the time but later changes her mind (absent grounds for vitiating consent). Conversely, the *actus reus* has been committed if the complainant was not consenting in her mind while the touching took place, even if she expressed her consent before or after the fact.

[81] Keeping these words in mind and the whole of the evidence, I will assess the evidence of Z, K, and M<sup>c</sup>, together with the photographs from the point of time when the three are -- there is the encounter upstairs in the loft.

[82] M<sup>c</sup> says the following: She was the first one to go upstairs to use the washroom, and it was Z and K that followed. Z and K were kissing, and she did not wish to be in the way. She wished to give Z and K their space, and went downstairs. At trial she recalled that she was on the

couch in the living room listening to music on her laptop and that she heard noises from the bedroom. Not having had sexual intercourse before, she could not say what was happening other than that they were breathing noises, like gasping noises, and she thought K was going to "do" him, Z, meaning that they were having sex. She said she was trying to tune out what was happening upstairs. She heard a thud, then sees K run down the stairs crying and telling her to ask Z to leave. She goes upstairs and she finds Z naked.

[83] K said that all three went upstairs together. She and Mc waited for Z to finish using the washroom. She said as her bedroom did not have walls or doors, she did not wish him to be upstairs alone. Once Z finished in the washroom, K said he joined her and Mc on the bed. She said that Mc went downstairs. She did not say why. She said that once Mc was gone, Z pushes her on the bed, straddles both her legs. Z has his forearm and hand over her throat and collarbone. He was holding her throat, choking her. He takes her left leg, pulls it over his leg using his right hand, and he pulls her panties down. While maintaining a hold on her with his arm and hand on her throat, he struggles with his pants and underwear. She said

she could not speak or breathe, simply making raspy sounds. He pulls down his pants and underwear and forces intercourse upon her. All the while, he is holding her throat with one hand and using the other hand to hold her leg down. He ejaculates, and she pushes him off, and he falls off the bed.

[84] Z said that he was not the first to go upstairs to use the bathroom; it was Mc . He and K followed and sat on the bed. He said that he and K were kissing and she was kissing him back. They were French-kissing. He said that once he placed his hand up K 's dress, Mc said that she would give them some privacy and she goes downstairs. He said he inserted his finger in her vagina and she appeared to like this. He said he pulled her panties down and engaged in performing oral sex on her while she laid back. She then said to him, "Just fuck me." He said at this point he undid his belt, took off his pants, took off his shirt - he does not wear underwear - and they engaged in a number of sexual positions. He said that he only had his hand or arm on her neck for a short time. He said it was to balance himself. He said that once he ejaculated, K asked him if he was done and whether he was wearing a condom. At this point she pushed him away and he fell. He told her he did not, and she looked scared and left running to go down the stairs. He

confirmed that Mc came upstairs to find him naked.

[85] Both Z and Mc said that

Mc went upstairs first and that Mc left after a few minutes when Z and M K began to kiss, yet K could not recall this.

[86] The photos taken show redness around K's collarbone. This redness can be consistent with either K's version of events that Z's left arm was on her neck obstructing her breathing, and Z's version that at one point he places his arm on her neck to maintain his balance and only for a few seconds.

[87] In cross-examination, Officer Josefsson said that it was difficult to see a bruise. In cross-examination, Officer Riendeau said all that could be seen was a slight discolouration on the chest and no marks on K's neck. K told that officer that she had been choked. If that officer had seen any marks on her neck, he said he would have taken a photograph.

[88] The injuries noted do not support the version of events as described by K. There was no evidence of bruising to the neck or on her legs. K said that Z had held her leg down.

[89] Mc said that she found Z naked and

that after Mc found him, he also said that he was naked and had to put his pants and shirt on. K said that he struggled with his pants and shirt, yet he had had her held down the entire time and she describing where both arms were.

[90] K said that she tried to get up a few times only to be pushed down; yet Mc said that she heard noises, like breathing and gasping and a sudden thud.

[91] Z said that he had ejaculated. K asked if he had used a condom. He replies no. She freaks and pushes him and he hits the floor, consistent with the sudden thud heard by Mc and also consistent with K's description of pushing him off the bed after he was done.

[92] When considering the whole of the evidence, I am unable to reconcile these differences. I have to consider the whole of the evidence and what was happening at the moment that the interaction was taking place between K and Z. Other than through the testimony of Mc, although she had difficulty testifying about the event, the difficulty was her own modesty in describing such acts, her evidence being consistent on a number of points as noted, and that consistency being with what Z's evidence has

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been. I accept her evidence.

[93] The version of events as described by Z could have occurred as he described on the evening in question. I am not convinced beyond a reasonable doubt as to Z's guilt. So Z is acquitted on Count 1.

(REASONS CONCLUDED)