

 [R. v. Ricchio](#)

Ontario Judgments

Ontario Superior Court of Justice

R.F. Goldstein J.

Heard: November 16-20, 23-25, 2020.

Judgment: December 10, 2020.

Court File No.: CR-18-50000598-0000

[2020] O.J. No. 5656 | 2020 ONSC 7633

Between Her Majesty the Queen, and Gioacchino Jack Ricchio

(85 paras.)

Case Summary

Criminal law — Sentencing — Criminal Code offences — Offences against person and reputation — Assaults — Sexual assault — Sentencing of Ricchio for sexual assault — Ricchio's evidence did not end matter — It has to be determined whether Crown had proven each element of offence beyond reasonable doubt — It was found beyond reasonable doubt that D.J. did not communicate consent to sexual activity — It was found beyond reasonable doubt that Ricchio knew that D.J. did not consent.

Sentencing of Ricchio for sexual assault. Beyo was with his friend Ricchio. Ricchio had a car and was driving. D.J. had never met either Beyo or Ricchio. A.S. had never met Ricchio. During the course of the evening A.S. and D.J. consumed marijuana and alcohol. D.J. also consumed the drug flubromazolam, which went by the street name Xans. It was also sometimes referred to as Xanax, which was an anti-anxiety medication. Flubromazolam was not Xanax. The four went to a hotel in Etobicoke or Mississauga to chill. Beyo sexually assaulted D.J. there. Forensic investigators found his semen in her underwear. Forensic investigators also found Ricchio's DNA on D.J.'s body and in her underwear. The issues were that Ricchio touched D.J. directly or indirectly; was the touching intentional; that the touching took place in circumstances of a sexual nature; that D.J. did not consent to the sexual activity; and that Ricchio knew that D.J. did not consent to the sexual activity.

HELD: Found guilty.

Ricchio's evidence did not end the matter. It has to be determined whether the Crown had proven each element of the offence beyond a reasonable doubt. It was found beyond a reasonable doubt that D.J. did not communicate consent to sexual activity. It was found beyond a reasonable doubt that Ricchio knew that D.J. did not consent.

Statutes, Regulations and Rules Cited:

Criminal Code, [R.S.C. 1985, c. C-46, s. 273.1\(1\)](#), s. 715.1

Counsel

Michael Coristine for the Crown.

Cydney Israel and David R. Newton for Gioacchino Jack Ricchio.

RESTRICTION ON PUBLICATION: Subject to any further Order by a Court of competent jurisdiction, an Order has been made in this proceeding directing that the identity of the complainant and any information that could disclose such identity shall not be published in any document or broadcast in any way pursuant to s. 486.4(1) of the *Criminal Code of Canada*. This ban does not apply to publication of these reasons in law reports nor to a discussion of the underlying legal principles in other publications.

REASONS FOR JUDGMENT

R.F. GOLDSTEIN J.

1 A.S. and D.J. were friends. On March 10, 2018, A.S. was 17 and D.J. was 16. During the afternoon they went to the Kensington Market area of downtown Toronto. A.S. was in touch with her friend Ibrahim Beyo. Mr. Beyo's street name was Paperboy. That is what D.J. and A.S. called him. Mr. Beyo was with his friend, Mr. Ricchio. Mr. Ricchio had a car and was driving. D.J. had never met either Mr. Beyo or Mr. Ricchio. A.S. had never met Mr. Ricchio. During the course of the evening A.S. and D.J. consumed marijuana and alcohol. D.J. also consumed the drug flubromazolam, which goes by the street name Xans. It was also sometimes referred to as Xanax, which is an anti-anxiety medication. Flubromazolam is not Xanax.

2 The four went to a hotel in Etobicoke or Mississauga to chill. Mr. Beyo sexually assaulted D.J. there. Forensic investigators found his semen in her underwear. Forensic investigators also found Mr. Ricchio's DNA on D.J.'s body and in her underwear. He faces one count of sexual assault.

FACTS

3 A.S. and D.J. each gave two statements to the police after the incident. A.S. gave her first statement on March 11, 2018 (the morning after the incident). D.J. gave her first statement on March 19, 2018. Both gave follow-up statements to the police on May 27, 2018. All statements were admitted into evidence pursuant to s. 715.1 of the *Criminal Code*.

4 On the afternoon of Saturday, March 11, 2018 A.S. and D.J. met in Scarborough and took the TTC to Kensington Market. A.S. was to get a body piercing. They had to wait, as the piercing shop was crowded. A.S. and Mr. Beyo agreed to meet up at around 6 pm. Mr. Beyo was with his friend, Mr. Ricchio. Mr. Ricchio drove a white car. The two girls got in. It was the first time D.J. met Mr. Beyo and Mr. Ricchio. It was also the first time A.S. met Mr. Ricchio. They all smoked marijuana at that point. A.S. and D.J. then went to the shop so A.S. could get her piercing. The four

met up again after that. D.J. told the police in her first statement that by that point she was pretty high since she did not regularly smoke marijuana.

5 The boys then asked A.S. and D.J. if they wanted to "kick up" since it was Saturday night. They agreed. At 8:38 pm D.J. texted her mother using A.S.'s phone. D.J.'s phone had run out of power. She texted:

hey its [D.J.] i was wondering if i could go to a party for a bit??

6 The four drove to the Etobicoke area, away from downtown. They decided to obtain alcohol. At 9:22 pm surveillance cameras captured Mr. Beyo and Mr. Ricchio going into an LCBO. They left without making a purchase. Although it is not captured on video, they subsequently obtained a bottle of Hennessy cognac from a different LCBO.

7 A.S. told the police in her first statement that they drove onto a side street to drink. D.J. tried to open the bottle but could not, so she gave it back to Mr. Beyo. Mr. Beyo opened it. He filled a smaller clear bottle with the alcohol. D.J. drank it in one sip. A.S. also had a sip. So did Mr. Beyo. They continued rotating sips of alcohol. A.S. felt dizzy. Mr. Beyo asked if anyone wanted to try a Xanax. A.S. and D.J. at first refused, and then consented. A.S. did not take hers. She put it in her pocket. D.J. took her pill, and then possibly another half-pill.

8 In her first statement, D.J. told the police that she got very drunk. They drank the alcohol in rounds. She thinks she took more than three shots out of an empty bottle and became very drunk because she was, as she put it, "a lightweight" and does not drink much. She also told the police that she was "super-tired" from the marijuana.

9 A.S. told the police that the four of them then drove to another residential street in the neighbourhood. People were playing basketball. Mr. Beyo got out of the car to play. It was around 10:00 pm. A.S. got out of the car for a minute, but then got back in because she felt sick. At some point in the evening, the four discussed getting a hotel room so they could party. After the basketball incident the four of them drove to the hotel. A.S. was unable to identify the hotel.

10 D.J. told the police that Mr. Ricchio reached into the back seat and touched her legs. He did his while the car was parked and Mr. Beyo played basketball, He touched her three times. She found it weird, so she moved her legs away. She did not remember much after that.

11 D.J. also took a video in the car during the basketball session. She did not remember taking it. She later found the video on her phone. She did remember that they drove away and parked. She was very drunk at that point. Mr. Beyo asked her if she had ever tried a Xans -- or flubromazolam -- before. She did not and did not want to. Mr. Beyo persuaded her to try it. She believes she took a half pill and then a full pill. The next thing she remembered was waking up in the hospital. She has no memory of anything between taking the pill and waking up in the hospital.

12 At 10:06 pm Mr. Ricchio and Mr. Beyo went into a convenience store. Mr. Ricchio purchased soft drinks. He testified that the soft drinks were to be used as chasers for drinking the alcohol.

Mr. Ricchio agreed in his evidence that the convenience store was a short distance away from the motel. D.J. had no memory of visiting the convenience store.

13 A.S. told the police in her first statement that Mr. Ricchio went into the lobby and registered. He then came back to the car and took D.J. into the hotel. Mr. Ricchio said they should go in separately as it would look suspicious if they went in together. A.S. said she was 99% sure that he took her in the side door, because there was no way he could have brought D.J. through the front doors in the condition she was in. D.J. didn't seem know where she was. She was falling all over the place and laughing. A.S. and Mr. Beyo waited five minutes, and then went into the hotel through the side door. A.S. said that she felt dizzy and was not sure of what was going on.

14 A.S. told the police in that first statement that the hotel room number was 2-11. She was pretty sure that Mr. Ricchio had left the door slightly open for them. In cross-examination, she agreed that she could not be sure whether the door was open, or Mr. Ricchio let them in the room. When she and Mr. Beyo entered the room, Mr. Ricchio took D.J. into the washroom. She testified that she heard D.J. making noise. It sounded as if she were saying that she did not want to have sex with him. A.S. was feeling dizzy and out of it, so she laid down on the bed. A.S. recalled Mr. Beyo sitting in the chair rolling a marijuana cigarette. After about five minutes, Mr. Ricchio came out of the bathroom. Mr. Ricchio was pulling up his pants and fixing his chains. A.S. told the police, referring to D.J. and Mr. Ricchio: "And she said she didn't wanna have sex with him, but he had sex with her." In the first part of her statement A.S. said she had to use the washroom. She went in to talk to D.J. D.J. didn't know anything that was going on. A.S. had to step out as her head was spinning. Mr. Beyo then went in. A.S. told the police that Mr. Beyo "went in after me and not sure if they had sex or anything, but I'm pretty sure they did."

15 Later in her first statement A.S. told the police that Mr. Beyo then went in to the bathroom when Mr. Ricchio came out. Mr. Beyo was in the bathroom with her. After two minutes or so A.S. said she needed to use the bathroom. She asked him to come out. Mr. Beyo then angrily yelled at her. He called her a "waste bitch". He came out of the washroom, dressed. A.S. then went in and saw D.J. lying on the floor. Her shirt was missing. She was laying on the floor, up against the bathtub, dressed only in her bra and underwear. D.J. asked her if they had sex with her. A.S. said she did not know. A.S. brought her out of the bathroom and put her on the bed. D.J. started screaming and they put on her pants.

16 In her second statement, A.S. told the police that Mr. Ricchio and D.J. were in the bathroom for 15 or 20 minutes. She heard noises and knew something was wrong, so she told Mr. Beyo to check on them. A.S. and Mr. Beyo told Mr. Ricchio to open the bathroom door. The bathroom door had been locked. When Mr. Ricchio opened it, A.S. saw D.J. lying on the floor wearing only her bra and underwear. Mr. Beyo was then alone in the bathroom with D.J. for three to five minutes. He brought her out and they all helped D.J. on with her clothes. A.S. tried talking to D.J. but she was not responding.

17 The four of them left the hotel. They eventually went to a park because D.J. was going to be sick. At 11:54 pm a surveillance camera captured an image of Mr. Ricchio's car making a turn from The East Mall to Robinglade Drive. That was near a park and housing complex at 607 The East Mall. They parked so that D.J. could get out of the car. Eventually, Mr. Ricchio's car was

captured by other surveillance cameras in the area as it drove around. At about 12:07 am (it was now March 11, 2018) Mr. Ricchio's car went forward a few feet on Robinglade, then reversed. A.S. got out of the car. She left for two minutes to look for D.J. but could not find her. She went back to the car and had a moment's conversation with Mr. Beyo. Mr. Ricchio then took off. He drove quickly and went through a stop sign on his way out to The East Mall. A.S. called 911.

18 Adam Chaumont was a Toronto Police officer doing uniformed patrol on March 11, 2018. At 12:24 am he and his partner responded to a call about an incident at 607 The East Mall. They arrived at approximately 12:40 am. D.J. was there at the housing complex. She was unable to stand and was being assisted by A.S. She was wearing her bra and a jacket, but no shirt. She was slurring her words and had no idea where she was. Constable Chaumont was concerned about her well-being and ordered an ambulance. He had to assist D.J. to get to the ambulance as there was no way she could walk by herself. He went to the hospital, but they did not communicate. D.J. was out of consciousness at that point.

19 When D.J. was placed in the ambulance Constable Chaumont spoke to A.S. A.S. gave him 1 1/2 pills, possibly in three pieces. He kept the pills on him, then placed them in a property bag at the station. He sent them to Health Canada for analysis. It is an agreed fact that the substance turned over to Constable Chaumont was flubromazolam, which is the same substance subsequently found in D.J.'s body.

20 Vanessa Cairns is an EMS paramedic. She and her partner arrived at the scene at 12:57 am. Constable Chaumont was assisting D.J. D.J. was having a hard time walking. She had no shirt on, only a bra and pants with a jacket draped around her. She was confused and incoherent. She slurred her words and was scared to answer questions. She was also incontinent. Her pants were covered in urine. The paramedics took D.J. to the hospital. They did that based on D.J.'s state of dress. D.J. kept asking if she had been raped and if she had anything to drink.

21 Two police officers went to the hospital at approximately 7:00 am on March 11. They spoke to D.J. D.J. told them that "nothing had happened". She also told them that she had told "the white guy" -- Mr. Ricchio -- that she did not want to have sex with him and he had stopped. She also told the police that nothing had happened with "the black guy" -- Mr. Beyo. The officers noted that D.J.'s eyes were glazed and half-closed, that she was confused, and that she slurred her speech. At 7:50 am a nurse noted that D.J. had trouble keeping her eyes open, that her speech was slurred and minimal, and that she was not very coherent. D.J. had no memory of the conversation with the police officers at the hospital that morning.

ISSUES AND ANALYSIS

22 The elements of the offence of sexual assault are set out in the Canadian Judicial Council's model jury instructions. I must be satisfied beyond a reasonable doubt of each of these elements:

- * First, that Mr. Ricchio touched D.J. directly or indirectly;
- * Second, that the touching was intentional;

- * Third, that the touching took place in circumstances of a sexual nature;
- * Fourth, that D.J. did not consent to the sexual activity; and
- * Fifth, that Mr. Ricchio knew that D.J. did not consent to the sexual activity.

23 There is no doubt that the first three elements of the offence are satisfied. If I believe Mr. Ricchio, or his evidence leaves me with a reasonable doubt on either of the fourth or fifth elements (or both), then I must acquit him. Even if I do not believe him or I am not left in a state of reasonable doubt, then I must still consider whether the Crown has proven the fourth and fifth elements beyond a reasonable doubt: *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at para. 28.

24 I frame the issues this way:

- (a) Do I believe Mr. Ricchio or does his evidence leave me with a reasonable doubt?
- (b) Did D.J. communicate consent to sexual activity?
- (c) Did Mr. Ricchio know that D.J. did not consent to the sexual activity in question?
- (d) Given that this is a circumstantial case, is guilt the only reasonable inference?

(a) *Do I believe Mr. Ricchio or does his evidence leave me with a reasonable doubt?*

25 Mr. Ricchio testified in chief that on Saturday, March 11, 2018 he met up with Mr. Beyo at around 5 pm. Their plan was to smoke some marijuana and get some food. He and Mr. Beyo picked up A.S. and D.J. at Queen and Spadina in downtown Toronto at about 8 pm. The plan was to go to get a bottle of alcohol and go to a hotel, although the plan evolved. Neither he nor Mr. Beyo were 19, so they had to use Mr. Ricchio's fake identification. Mr. Ricchio was shown the video of him and Mr. Beyo entering an LCBO at 9:22 and leaving empty-handed at 9:23 pm. He was not too sure about visiting a second LCBO. He did know that they purchased a bottle of Hennessy cognac. After purchasing the bottle, they went to a convenience store to purchase soft drinks. Mr. Ricchio identified himself coming into the store at 10:06 pm. He recalled that the drinking began after the convenience store because nobody wanted a drink without a chaser. After the convenience store visit Mr. Beyo offered pills to everyone. Mr. Ricchio did not take one. He thinks Mr. Beyo took one. He said that he was not too sure whether A.S. and D.J. took pills. They then went to the Super Five Inn, where Mr. Ricchio registered.

26 Mr. Ricchio further testified in chief that he and D.J. left the car ahead of Mr. Beyo and A.S. They went into the hotel through the front door and into the hotel room. He was not too sure of the room number or the floor. When they got to the room he put music on and pulled out a joint. He and D.J. then started making out on the bed. She showed no signs of intoxication. They had kissed earlier. They were kissing and touching. Mr. Ricchio touched and kissed her breasts. He also touched her vagina over her underwear with a wet finger. She touched his penis. They had all their clothes on. The makeout session ended when Mr. Beyo and A.S. knocked at the door. The door was closed. Mr. Ricchio opened it for them.

27 Mr. Ricchio testified that when Mr. Beyo and A.S. came into the room Mr. Beyo sat on the chair while A.S. sat on the bed next to D.J. They drank more and smoked a joint. D.J. said she

was feeling a bit sick and went into the bathroom. Nobody went to check on D.J. until Mr. Beyo got up and went to the bathroom. A.S. next went to the bathroom. He heard nothing from D.J. He then heard A.S. and Mr. Beyo raising their voices and calling each other names. A.S. and D.J. then came back to the bed. D.J. was wearing her shirt and just her underwear. She seemed pretty out of it. She threw up in a garbage can. Mr. Ricchio helped D.J. get dressed at A.S.'s request. He and Mr. Beyo decided to leave and go get some food, but A.S. insisted that she and D.J. go with. They were going to go to a McDonald's, but stopped instead at a park because D.J. said she might throw up again. Everyone got out of the car at the park. Mr. Ricchio and Mr. Beyo smoked another joint. They started to drive away but stopped because A.S. pointed out that D.J. was not in the car. A video from the nearby housing complex shows Mr. Ricchio's car on Robinglade Avenue parked at 12:07 am. A.S. got out of the car. About two minutes later A.S. returned to the car. A.S. stated that she would call the police if the boys did not help her look for D.J. Mr. Ricchio then drove off at Mr. Beyo's urging.

28 Mr. Ricchio agreed in cross-examination that the group got to the convenience store at about 10:06. It was a short drive to the hotel. He was not too sure whether they stopped anywhere. He was not too sure at what point in the evening everyone decided to get a hotel room. There was no discussion of why the group headed to Etobicoke when they were in downtown Toronto and A.S. and D.J. lived in Scarborough. He said that there was a sexual spark of some kind with D.J.

29 Mr. Ricchio also testified in cross-examination that D.J. was in really bad shape when they decided to leave the hotel. The plan was to leave the Super Five Hotel and go left on Dundas to the McDonald's which was not far away. Mr. Ricchio was shown a map of the area, including 607 The East Mall. That was the housing complex next to the park where D.J. and A.S. were left. Mr. Ricchio testified that he was not too sure that how long A.S. and D.J. were off in the park while he and Mr. Beyo -- who smoked another joint -- waited. He also testified that he was not too sure whether, in fact, he initially drove off without D.J.

30 The defence argues that Mr. Ricchio's evidence should be accepted. When he was confronted with minor discrepancies, he conceded he could not remember. He admitted it when he did not remember something. He was also candid about driving after consuming alcohol and marijuana. The gaps in his memory are understandable given the passage of time and do not indicate a lack of credibility. Finally, his evidence is logical in the overall context of the case.

31 With respect, I cannot agree. I find that Mr. Ricchio was not a truthful witness. I reject his evidence and it does not leave me with a reasonable doubt.

32 I understand that Mr. Ricchio was 18 years old, with all of the poor judgment associated with being a teenaged boy. Poor judgment, or caddish behaviour (such as abandoning the A.S. and the incapacitated D.J. in a park), is not criminal and does not affect my evaluation of his credibility or his reliability. Mr. Ricchio's lack of credibility is not due to minor discrepancies in his evidence, memory gaps, or the passage of time.

33 Certain things about Mr. Ricchio's evidence, however, make no sense. He testified that the plan was to go to a McDonald's a short distance from the hotel. In fact, he drove to a park over

five kilometers from the hotel. Mr. Ricchio testified that they stopped there because D.J. was going to be sick. The park, however, is significantly out of the way of the McDonald's.

34 Mr. Ricchio's memory was just too convenient. He often recalled important details that helped him and answered that he was "not too sure" on details that undermined his evidence. For example, he recalled that he brought D.J. into the hotel through the lobby. That was important because it contradicted A.S.'s evidence that Mr. Ricchio and D.J. went through a side door due to her condition. That would reinforce his own evidence that D.J. was "fine". Although he remembered the trip through the lobby, he could not recall the room number or floor. He was then able to remember the sequence of events in the hotel room with great clarity, including whether he left the door to the hotel room door closed (thus forcing Mr. Beyo and A.S. to knock, thus interrupting the make-out session), when D.J. went into the bathroom, when she was sick, the order in which Mr. Beyo and A.S. followed, and D.J.'s condition when she came out of the bathroom. He recalled specifically that she was perfectly fine when they were making out, but then after A.S. and Mr. Beyo arrived she went into the bathroom, was sick, and was out of it. He recalled specifically that he wetted his finger and touched her vagina on the outside, rather than the inside of her underwear during their makeout session, which seems rather bizarre. He testified in chief that Mr. Beyo offered pills to everyone, but that he could not recall whether the girls had actually taken the flubromazolam pills. He was not too sure how the passing of the pills happened but he did not agree that they all pulled over so that Mr. Beyo could distribute them. That, of course, is a convenient memory lapse since Mr. Ricchio could say that he might have been driving when the pills were distributed.

35 It is also curious that Mr. Ricchio could not remember the name on his fake identification that he used to check in to the hotel and buy alcohol (presumably not for the first time) but could remember the events inside the hotel room in detail -- despite having smoked an enormous amount of marijuana that evening, on his own evidence. Marijuana is not usually considered to be a substance that enhances memory and recall.

36 Mr. Ricchio also had a convenient memory regarding timing and the order of events. The group went to the first LCBO at about 9:22, then went to a second LCBO (which was not captured on film), and then stopped at the convenience store at 10:06. According to Mr. Ricchio's evidence in chief, it was at that point that they had the alcohol, then had the pills, then went to the hotel. If his timing was correct, that would mean that D.J. would not have taken either the alcohol or the pills until just before going to the hotel. There are, however, problems with Mr. Ricchio's timing and order of events. First, in cross-examination Mr. Ricchio sometimes stuck to that timing and sometimes stated that he was not too sure of the timing -- which, to be fair, does not necessarily indicate a lack of truthfulness. Second, however, it contradicts the evidence of A.S. and D.J. that they did not have chasers. D.J.'s evidence -- which was unchallenged on that point -- was that she had no memory after taking the Flubromazolam, and she had no memory of stopping at a convenience store. Moreover, Mr. Ricchio was not drinking alcohol. If the soft drinks were chasers, they were not chasers for him to drink. I find that it is also contrary to the evidence of the basketball video. Although the video is not time-stamped, it seems likely that D.J. took it after she drank alcohol (as she and A.S. show signs of intoxication).

37 In my view, when I look at the totality of his evidence, I cannot say that his ability to remember some details but not others is purely coincidental. I do not, however, reject his evidence solely or even largely because of problems with details.

38 More importantly, there is extrinsic evidence that contradicts Mr. Ricchio's evidence. I find that he was untruthful on the point of exchanging numbers and social media information with D.J. This is an important point for two reasons: first, it impacts on his truthfulness generally; and second, because it contradicts Mr. Ricchio's contention that D.J. was interested in him sexually. In cross-examination, Mr. Ricchio testified that D.J. might have been interested in him (and I do not want to put it any higher than that, to be fair). That would contradict D.J.'s evidence that she had no interest in Mr. Ricchio and found it weird when he touched her legs. Mr. Ricchio testified that he took it as a signal when they exchanged telephone numbers and social media information: as he put it, when a girl gives you her number, she is interested in you. The problem with that is that D.J. testified that as of her first statement she did not know Mr. Ricchio's real identity. There is no indication she had a social media address or phone number for him, and she surely would have provided it as the police asked her to scour her phone for information. Moreover, D.J.'s phone had died at some point earlier in the evening. She used A.S.'s phone to text her mother at 8:39 pm. She later charged her phone in the car, as evidenced by the basketball video. While this part of the evidence is not conclusive that Mr. Ricchio lied about exchanging social media information (it could, theoretically, have been exchanged before D.J.'s phone died) it casts doubt on his account. As of her second statement, D.J. was aware that Mr. Ricchio's street name was G.K. I draw the inference that D.J. had no telephone number or social media information for Mr. Ricchio or G.K. because they did not exchange numbers. Mr. Ricchio was untruthful about it.

39 Most importantly, I do not believe Mr. Ricchio on the point of D.J.'s capacity, and his evidence does not leave me with a reasonable doubt. The reason I do not believe him is because his evidence makes no sense in the overall circumstances of the case. There is no doubt that in the course of the evening D.J. had consumed alcohol, marijuana and flubromazolam. In cross-examination, Mr. Ricchio insisted that D.J. was "perfectly fine" and showed not the slightest hint of intoxication. She was not slurring her words and walked perfectly well, even though, on his own evidence, a short time after making out she was "out of it".

40 That testimony is not believable on its face and does not leave me with a reasonable doubt. Expert evidence is not required to infer that if someone drinks a lot, they will show signs that they have been drinking. Expert evidence is required to calculate blood alcohol content, or perhaps to say at what point impairment is reached. One does not need expert evidence to know that a 16-year old girl with no history of heavy drinking, who drank enough to have no memory of taking the basketball video or of going to the convenience store or of being at the hotel will show at least some signs of impairment. Mr. Ricchio's claim that D.J. seemed "perfectly fine" and did not even appear tipsy is not credible.

41 Mr. Ricchio's evidence is contradicted to some degree by the basketball video. That video is not conclusive that D.J. was drunk at the time it was taken. One could argue that it only shows

excited teenage girls, but in my view it is some evidence that D.J. was showing signs of alcohol ingestion, particularly since she testified that she could not remember taking the video.

42 The evidence of Betty Chow also provides some assistance on this point, although it is obviously not definitive. Ms. Chow is a toxicologist. D.J. provided blood and urine samples during the evening of March 12, 2018. Ms. Chow analyzed them. She found tetrahydrocannabinol -- marijuana, essentially -- in D.J.'s urine. She also found flubromazolam in D.J.'s urine. Ms. Chow did not test for alcohol. Based on the elimination rate and the timing, she did not expect to find alcohol.

43 Ms. Chow was unable to say when D.J. was actually affected by the flubromazolam; when the peak effect would have occurred; which effects would have been most pronounced; or when those effects would have shown. Flubromazolam is a recreational drug; there is no standard dose. Ms. Chow was able to say that usually Flubromazolam takes effect after about 30 minutes. It could take effect even more quickly depending on the dose and the manner of ingestion. Flubromazolam, like alcohol, is a central nervous system depressant. It slows down the functioning of the brain. It can result in impaired motor coordination.

44 I must be careful how I use Ms. Chow's evidence, given that she was uncertain about the timing. I do, however, find that D.J. likely took the flubromazolam pill (or pills) some time prior to going into the hotel room with Mr. Ricchio. The sequence appears to be that D.J. had alcohol, she filmed the basketball video, she took the Flubromazolam pill, they drove to the convenience store, and then they drove to the hotel. Mr. Ricchio registered for the hotel before going to the room with D.J. Even if all those things happened very quickly, it seems to me that there would have to have been more than 20 minutes between D.J. ingesting the flubromazolam and then going into the hotel room. It seems to me that it would have been at least 30 minutes between D.J. ingesting the alcohol and then arrival at the hotel, and probably more,

45 I also bear in mind A.S.'s evidence on the point. A.S. testified that D.J. was very impaired when they got to the hotel. A.S.'s evidence is highly problematic. As I will relate in the next section of these reasons, I must approach her evidence with caution. I find, however, that she was accurate and truthful on the point of D.J.'s intoxication when they arrived at the hotel. I am well aware that a criminal trial is not a credibility contest. I do not simply choose which version I believe. At the same time, "an outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence": *R. v. D.(J.J.R.)*, [2006 CarswellOnt 7552](#), [\[2006\] O.J. No. 4749](#), [215 C.C.C. \(3d\) 252](#) at para. 53. A.S.'s evidence of D.J.'s condition is not the only reason to reject Mr. Ricchio's evidence, but it is a reason.

46 I therefore find as a fact that D.J. would have shown clear signs of impairment before going in to the hotel. Accordingly, when I consider all of the evidence I reject Mr. Ricchio's evidence and find that it does not leave me with a reasonable doubt.

47 I cannot give any weight to D.J.'s comments to the police officers on March 11 that she was

not sexually assaulted. All parties agreed that those statements were not admissible for the truth of their contents. Those statements were not factually accurate. At best, they are some evidence of her state of mind at the time she made them.

48 Of course, the fact that I reject Mr. Ricchio's evidence does not end the matter. I must still determine whether the Crown has proven each element of the offence beyond a reasonable doubt. That is what I turn to next.

(b) Did D.J. communicate consent to sexual activity?

49 The defence position is that the Crown has not proven beyond a reasonable doubt that D.J. did not consent to sexual activity or was not was not capable of consenting to sexual activity. That is because the key evidence regarding the timing of D.J.'s capacity comes from A.S. A.S.'s testimony was coloured by an attempt to protect Mr. Beyo. She controlled the narrative. Mr. Beyo was influencing her. As a result, her testimony must be seen through this lens. Furthermore, A.S. told several lies to the police, to the 911 despatcher, to D.J.'s mother, and to D.J. herself. As a result, the defence argues, A.S. cannot be believed.

50 I respectfully disagree with the defence position. I find that the Crown has proven beyond a reasonable doubt that D.J. did not consent because she was not capable of consenting when Mr. Ricchio engaged in sexual activity with her. I also find that D.J. communicated her non-consent to Mr. Ricchio, even though she has no memory of doing so.

51 Consent means the voluntary agreement of the complainant to engage in sexual activity: *Criminal Code*, s. 273.1(1). There is no consent where the complainant is unconscious or is otherwise incapable of consenting: *Criminal Code* s. 273.1(a.1) and (b). See: *R. v. Barton*, [2019 SCC 33](#), at para. 91.

52 Consent and capacity should be considered in a two-step process where both are at issue. A trial judge should first determine whether the Crown has proven beyond a reasonable doubt that the complainant did not consent. If lack of consent is proven, there need not be a further inquiry into capacity: *R. v. G.F.*, [2019 ONCA 493](#) at paras. 41-48; *R. v. Hutchinson*, [2014 SCC 19](#) at para. 4. The Crown must prove consent by reference to the complainant's subjective state of mind: *G.F.* at para. 32. There may be factual circumstances where intoxication is relevant to both consent and capacity: *G.F.* at para. 49.

53 In *R. v. Al-Rawi*, [2018 NSCA 10](#), Beveridge J.A. for the Nova Scotia Court of Appeal considered the test for capacity. I set out the relevant passage, found at paras. 62-67, in full:

What then should be the test for capacity to consent? The common law has always recognized that if the complainant were deceived about the nature and quality of the sexual act or the identity of the participant, there is no consent (see: *R. v. Clarence*, *supra* and its progeny; *R. v. Cuerrier*, *supra*. at para. 118; *R. v. Mabior*, *supra*. at para. 39).

The Supreme Court adopted these common law requirements that the complainant understand the nature of the act and identity of the specific partner as informing the inquiry under s. 273.1(1) as to the existence of a "voluntary agreement ... to ... the sexual activity in question" (see: *R. v. Hutchinson*, *supra* at paras. 54-58).

It therefore stands to reason that a complainant must at least possess the capacity to appreciate the nature and quality of the sexual activity in question and the identity of the person.

Numerous cases have, as well, recognized that to have capacity to consent a complainant must also be able to understand that she can agree or decline to participate in the sexual activity in question (see for example *R. v. Jensen, supra*; *R. v. Siddiqui, supra*; *R. v. Patriquin, supra*; *R. v. R. (J.), infra*. at para. 41).

Therefore, a complainant lacks the requisite capacity to consent if the Crown establishes beyond a reasonable doubt that, for whatever reason, the complainant did not have an operating mind capable of:

1. appreciating the nature and quality of the sexual activity; or
2. knowing the identity of the person or persons wishing to engage in the sexual activity; or
3. understanding she could agree or decline to engage in, or to continue, the sexual activity.

In cases where consent and capacity to consent are live issues, the trial judge must determine if it has been established beyond a reasonable doubt that the complainant did not consent, or lacked the capacity to consent. As detailed above, these inquiries are entirely subjective.

54 The test for capacity that is set out in *Al-Rawi* was adopted by the Ontario Court of Appeal in *G.F.* at para. 37.

55 This is one of those cases where consent and capacity are both influenced by intoxication. I am satisfied beyond a reasonable doubt that D.J. did not consent to sexual activity with Mr. Ricchio because she was not capable of consenting. When I apply the factors set out in *Al-Rawi*, I am satisfied beyond a reasonable doubt that D.J. was incapable of understanding the nature and quality of the sexual act; and that she had no understanding that she could agree or disagree to engage in or continue the sexual activity. It is questionable whether she even knew someone was having sex with her, and if so, who it was.

56 D.J. was virtually incapacitated at the point where Vanessa Cairns and Adam Chaumont dealt with her. She couldn't walk, she was slurring her words, and she had urinated herself. Mr. Ricchio himself testified that D.J. was incapacitated, although he disputes the timing. The important question is whether D.J. was incapacitated such that she could not consent at the time Mr. Ricchio engaged in sexual activity with her. While D.J.'s lack of memory at the time of the sexual encounter is not determinative, it is some evidence that she lacked an operating mind capable of appreciating the nature and quality of the sexual activity.

57 The timing of D.J.'s intoxication and incapacity depends to a large degree (although not exclusively) on A.S.'s evidence.

58 A trier of fact can believe some, none, or all of a witness's evidence. I find that I believe

some parts of A.S.'s evidence and disbelieve other parts. Defence counsel argues -- and the Crown does not dispute -- that I must approach A.S.'s evidence with caution. Although A.S. is not a classic *Vetrovec* witness, I agree that I must approach her evidence with caution, given all of the warning signs about her evidence: *R. v. Vetrovec*, [\[1982\] 1 S.C.R. 811](#).

59 A.S. lied to D.J. about what happened during the time when D.J. had no memory of events. She was untruthful both to the 911 dispatcher and R., D.J.'s mother, about the identity of the boys. A.S. admitted in cross-examination that she did not want her parents to know of the incident that night.

60 A.S. told the police that she had not been in a relationship with Mr. Beyo. She admitted in cross-examination that she was untruthful with the police on that point. She told the police that she did not know Mr. Beyo's real name. However, just before attending the police station on May 27, A.S. and Mr. Beyo were in touch by text. Mr. Beyo stated:

Tell me if my real name gets brought up don't be scared to ask and tell them.

61 The obvious implication is that A.S. well knew Mr. Beyo's name. In cross-examination, A.S. continued to deny that she knew Mr. Beyo's real name. I find that very difficult to accept.

62 I also agree that A.S. was influenced by Mr. Beyo, although not perhaps as much as the defence contended. Mr. Beyo's statements to A.S. are hearsay, but they are admissible to show that A.S. heard them, and they may be circumstantial evidence that they affected A.S.'s state of mind. Mr. Beyo wanted A.S. to protect him, and A.S. was receptive. It is also true that A.S. showed poor judgment throughout this entire incident. That judgment that was poor even by the low standards of teenaged judgment. On her own evidence she saw D.J. semi-naked and lying on the floor of the bathroom and did nothing to prevent further sexual abuse. Although it is true that A.S. told Mr. Beyo she wanted to protect him, A.S. was more interested in protecting herself

63 Where there is reason to approach the credibility of a witness with caution, it is dangerous to convict solely on the basis of the evidence of that witness, although I am entitled to do so: *R. v. Khela*, [2009 SCC 4](#), [\[2009\] 1 S.C.R. 104](#) at para. 37. I must look for confirmatory evidence that is capable of restoring my faith that the witness is telling the truth about relevant matters. The confirmatory evidence need not implicate the accused: *Khela* at paras. 41-43.

64 Even after casting a very jaundiced eye on A.S. and her evidence, I find that she can be believed on the key points of D.J.'s incapacity and Mr. Ricchio's presence with her in the bathroom. There is extrinsic, real evidence capable of confirming her evidence; and some of D.J.'s evidence confirms A.S.'s evidence. As well, it is important to point out that I do not rely solely on A.S.'s evidence.

65 There is no question that sexual activity occurred at the hotel between D.J. and both Mr. Beyo and Mr. Ricchio. A forensic biologist from the Centre of Forensic Sciences analyzed substances obtained from D.J.'s underwear and body. The biologist made the following findings:

- * Mr. Beyo's semen was found on the front panel of D.J.'s underwear;
- * Mr. Ricchio's saliva was found on D.J.'s neck, cheek, and right breast;

- * The bodily fluid amylase was found in the front crotch area of D.J.'s underwear. The amylase had the profiles of both Mr. Beyo and Mr. Ricchio. The forensic biologist could not determine whether the amylase was derived from semen or saliva.

66 Thus, A.S.'s evidence that Mr. Ricchio had a sexual encounter with D.J. is confirmed by the presence of Mr. Ricchio's DNA on D.J.'s breast, neck, cheek, and in her underwear. I find that is very significant. On Mr. Ricchio's evidence, A.S. could not possibly have seen him having a sexual encounter with D.J., because the encounter ended when he went to open the door.

67 On Mr. Ricchio's evidence, A.S. must have concocted the bathroom encounter between Mr. Ricchio and D.J. In my view, it makes no sense that A.S. would have concocted the bathroom story to the police. If her goal was to make Mr. Ricchio look bad, she simply could have pointed out that Mr. Ricchio had the opportunity to have a sexual encounter with D.J. before A.S. and Mr. Beyo came into the room. That also would have protected Mr. Beyo. On A.S.'s evidence, Mr. Ricchio left the door open a crack. If she was making things up, why not tell D.J. (or the police for that matter) that Mr. Beyo pulled Mr. Ricchio off D.J. while they were on the bed and that she saw that? Why, instead, the elaborate bathroom story?

68 By asking these rhetorical questions about A.S.'s story, I am not shifting the burden of proof to ask the defence to explain why she would lie. I am simply pointing out that there is no reason that I can see why A.S. would make up a story about Mr. Ricchio being in the bathroom alone with D.J., and then adjusting his pants and his chains as he left her there on the floor wearing only her bra and underwear. I am not persuaded she did it to somehow protect Mr. Beyo, when she told the police that she also thought Mr. Beyo had sex with D.J.

69 More importantly, when A.S. told the police that she thought that Mr. Ricchio and Mr. Beyo had had sex with D.J. she could not have known that their DNA would be found on her body or in her underwear. The presence of Mr. Ricchio's and Mr. Beyo's DNA confirms A.S.'s evidence in the most critical way.

70 I am aware that A.S. told slightly different versions of events surrounding the bathroom, as I have recounted. I do not have to resolve these differences. I find that these were minor discrepancies. I am satisfied that the main points of A.S.'s evidence -- that Mr. Ricchio and Mr. Beyo were both alone in the bathroom with D.J. at different times, and that D.J. was on the floor of the bathroom in her underwear -- are accurate and truthful.

71 A.S. agreed in cross-examination that she was not the best reporter of events because she had had a lot to drink. She also agreed that her view of things was coloured by the fact that the boys took off and left her and D.J. in the park. In fact, A.S. was a more accurate historian than portrayed in cross-examination. For example, A.S. told the police that Mr. Ricchio went into an LCBO but came out empty-handed. She said there were police around, so they did not try to buy alcohol. The LCBO video confirms her description. There was a police officer visible in the video. A.S. also testified that Mr. Beyo poured the alcohol into an empty bottle of Vitamin Water, so that they could each drink. D.J. told the police that Mr. Beyo poured the alcohol into either a

Gatorade or Vitamin Water bottle. Moreover, the basketball video is certainly some evidence confirming A.S.'s evidence that D.J. was already drunk in the car.

72 I have already summarized Betty Chow's evidence. In my view, it is confirmatory of D.J.'s state as described by A.S. I realize, as I pointed out earlier, that it does not confirm the timing but it certainly confirms the effects of the alcohol and the flubromazolam. It is also evidence tending to show that D.J. was likely showing significant signs of impairment when the full effects of the substances started to show.

73 Finally, I take into account that D.J. has no memory of the sexual activity. Lack of memory in and of itself cannot be taken as evidence of non-consent. It may be some circumstantial evidence upon which a court -- along with other evidence -- could draw an inference of non-consent: *R. v. R.(J.)*, [2006 CarswellOnt 4051](#), [\[2006\] O.J. No. 2698](#) (Sup.Ct.) at para. 20. See also: *R v. Kishayinew*, [2020 SCC 34](#), where the majority of the Supreme Court of Canada adopted the dissenting reasons of Tholl J.A. at [2019 SKCA 127](#), paras. 74-75. D.J.'s lack of memory, standing alone, is not enough to prove beyond a reasonable doubt that she did not consent. It is, however, another piece of circumstantial evidence on that point.

74 At the end of the day, I find as a fact, based on all the circumstances, that Mr. Beyo, A.S., and D.J. had already had several rounds of alcohol before stopping at the convenience store. I also find that D.J. had already taken the flubromazolam pill. D.J. testified that she took the alcohol first. In cross-examination she testified that she had no memory of taking the pill. She did not recall taking the basketball video either. She also had no memory of being at the hotel. I find that she was already very drunk by the time the four of them got to the hotel, which had to be some time after 10:06 pm, when Mr. Ricchio was captured on the convenience store video.

75 I therefore find beyond a reasonable doubt that D.J. did not communicate consent to sexual activity.

(c) Did Mr. Ricchio know that D.J. did not consent to the sexual activity in question?

76 The defence argues that even if D.J. did not consent, or was not capable of consenting, Mr. Ricchio still had an honest, but mistaken belief that D.J. had communicated consent. The defence points to the kiss prior to entering the hotel room, and D.J.'s response to Mr. Ricchio's advances -- kissing him back and touching his penis over his clothing.

77 Again, I must respectfully disagree.

78 The Crown must prove either that that Mr. Ricchio knew that D.J. did not consent; that Mr. Ricchio knew there was a risk that D.J. did not consent but proceeded anyway; or, that Mr. Ricchio knew there were indications that D.J. did not consent but proceeded anyway because he did not want to know the truth: *Barton* at para. 87.

79 I have already evaluated A.S.'s credibility and reliability. A.S. did tell the police that she heard D.J. tell Mr. Ricchio that she did not want to have sex with him when they were in the bathroom. I accept A.S.'s evidence on that point. It is consistent with D.J.'s attitude towards Mr.

Ricchio's touching of her legs in the car. It is also consistent with D.J.'s state of intoxication at that point -- she was lying on the bathroom floor, and both A.S. and Mr. Ricchio described her retching shortly afterwards. Thus, I find as a fact that the only communication Mr. Ricchio heard about consent was a negative communication.

80 Even if I am wrong about that I find that there is no air of reality to a defence of honest but mistaken belief in communicated consent. The accused must take reasonable steps to determine whether the complainant was consenting at the time: *Criminal Code*, s. 273.2(b). In order for the defence to succeed "the accused must have an honest but mistaken belief that the complainant actually *communicated* consent, whether by words or conduct": *Barton* at para. 91. Demonstrating reasonable steps is a pre-condition to raising the defence of honest but mistaken belief in communicated consent. As Moldaver J. stated in para. 104 of *Barton*, "... no reasonable steps, no defence."

81 Mr. Ricchio did not take any steps, let alone reasonable ones, to determine whether D.J. was consenting to the sexual activity in question. There were, at the very least, signs that D.J. was intoxicated. Under those circumstances, it was incumbent upon Mr. Ricchio to take reasonable steps to determine whether D.J. was consenting. He took none, even on his own evidence, because he thought she was "alright". It is abundantly clear that she was not "alright". If this were a jury trial, I would instruct the jury that they must not consider the defence: *Barton* at paras. 121-122.

82 I therefore find beyond a reasonable doubt that Mr. Ricchio knew that D.J. did not consent.

(d) Is guilt the only reasonable inference?

83 This is a circumstantial case. There is no direct evidence that Mr. Ricchio sexually assaulted D.J. In a circumstantial case a trier of fact must be satisfied that guilt is the only reasonable inference: *R. v. Villaroman*, [2016 SCC 33](#) at para. 30.

84 In my view, guilt is the only reasonable inference in this case. The question I must ask is whether there are reasonable inferences other than guilt. Mr. Ricchio and D.J. had a sexual encounter, of that there is no doubt. As I have already found no air of reality to the defence of honest but mistaken belief in communicated consent, it is axiomatic that there are no other reasonable inferences besides guilt.

DISPOSITION

85 I find Mr. Ricchio guilty of sexual assault.

R.F. GOLDSTEIN J.