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(Brandon Centre)
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COURT OF KING'S BENCH OF MANITOBA
(CRIMINAL DIVISION)

B E T W E E N:

HIS MAJESTY THE KING,	)	Sarah Kok
	)	for the Crown
-and-	)	
	)	
CJ,	)	Robert D. Harrison
accused.	)	for the accused
	)	
	)	
	)	Judgment delivered:
	)	January 21, 2026

LEVEN J.

SUMMARY

[1] The accused was charged under the ***Criminal Code***, R.S.C., 1985, c. C-46 (the "***Code***") with sexual assault. The adult complainant testified that the accused began to insert his penis into her vagina (without a condom) while she was asleep. The defence argued that the vaginal sex without a condom was consensual. For the reasons explained below, I find the accused guilty.

FACTS

[2] This is not a comprehensive recitation of all evidence and argument; it is a concise summary of certain important matters.

[3] The trial took place on December 9, 2025.

[4] Jurisdiction, date (June 18, 2023) and identity were admitted.

The complainant

[5] The parties knew each other for about two months before the incident. They had a pleasant friendship. The complainant had children, and the accused had met them. On one occasion, the accused brought ice cream to the complainant's home for the children.

[6] As of June 18, 2023, the complainant was 43 years old. She lived in Brandon, Manitoba.

[7] At about 5:00 a.m., the complainant was watching TV. The accused phoned the complainant and asked if he could come over to her place to crash for the night. She agreed, and he arrived about 10 minutes later. The accused said he'd been out drinking. He brought some cans of beer with him. The complainant saw him drink one beer. The accused seemed intoxicated. The complainant had seen him intoxicated before. She smelled alcohol on his breath. He was not slurring his words.

[8] The complainant's bedroom was upstairs. The accused and the complainant went upstairs. The accused led.

[9] They entered the complainant's bedroom and shut the door. The accused said he was upset because his grandfather had recently passed away. They talked for about 20 minutes.

[10] The accused tried to kiss the complainant, but she said "no". He tried again, but she pushed him away. She said she wanted to sleep.

[11] The accused fell asleep. The complainant watched him for a few minutes to be sure that he was asleep. Then she fell asleep herself.

[12] When she awoke, the accused was on top of her, and his penis was inside her vagina. He was not wearing a condom. The accused was thrusting very hard. The complainant was startled. The accused grabbed her by the throat and started choking her. She was unable to speak. The accused said, "take it". The choking lasted for roughly a minute. The accused ejaculated inside of her. The accused got up and went to get his clothes, which were off. The complainant quickly went into the bathroom. She stayed in there until she heard the accused walk down the stairs, and then she heard his truck start and drive off. His truck was loud. There was no conversation before the accused left.

[13] The complainant takes prescription medication to help her sleep. She had been taking it for about six years. She generally takes one tablet. If that is not enough, she sometimes takes another half tablet. The night of the incident, she took one tablet at about 2:30 a.m. and another half tablet about an hour and a half later.

[14] The parties exchanged some text message (see below). They never spoke on the phone.

[15] At some later date, the complainant went to a doctor to get checked for sexually transmitted diseases. She had none.

[16] On June 30, 2023, the complainant went to the police and reported the incident.

The text messages

[17] The parties exchanged text messages on June 18, 2023. (All errors are in originals). The complainant began by texting at 8:33 a.m.: "I literally don't even know what to say…"

[18] At 8:34 a.m., the accused replied: "Only reason I left is cause I have something now my dick is on fire so I don't even know what the fuck to say but thanks I guess". (There were no further texts from the accused).

[19] At 8:38 a.m., the complainant replied: "Are u fuckin kidding me…I don't have anything!" She then added: "I was SLEEPING!"

[20] At 8:44 a.m., she added: "I guess the fact that I said NO..I took my sleeping pills meant nothing to u, just waits till I fall asleep…"

The accused

[21] The accused agreed that he knew the complainant for about two months. He agreed that he once brought ice cream for the complainant's children.

[22] The accused said he doesn't drink beer. On the evening of the incident, he drank two whiskies around dinner time. He drank no other alcohol. When cross-examined, he insisted that it was impossible that he might have had more than two whiskies.

[23] On the night of the incident, late at night the accused phoned the complainant. His brother (not his grandfather) had recently passed away, and he wanted to talk. He guessed it might have been about 2:00 a.m. Later he said it might have been between 2:00 a.m. and 6:00 a.m.

[24] The accused came to the complainant's house. They went upstairs. She led.

[25] The accused was asked about the date of the incident. He said he didn't remember the date. Then he said that it happened in November. Then he said it was in the fall of 2023. Then he said that he was "confused". He confirmed that there never was a second incident.

[26] They entered her bedroom and shut the door. They talked for about half an hour. The accused started kissing her. She kissed back. She never pushed him away. There was no conversation about kissing.

[27] The complainant was wearing a sort of nightshirt, with no underwear underneath.

[28] The accused said that the complainant's "top came off".

[29] The accused inserted his penis into her vagina. She was awake. He did not use a condom. The accused said that he was on top, and that they never changed positions. When confronted with his police statement, in which he mentioned the complainant being on top at some point, he replied that he was just a little "confused". When pressed, he said "my bad".

[30] The accused ejaculated onto the complainant's stomach. When asked if the complainant had an orgasm, he said he thought she did, but he wasn't sure.

[31] The accused denied ever choking the complainant. He never said, "take it".

[32] The complainant made moaning noises during sex. There was some post-sex conversation, but the accused doesn't remember what was said.

[33] The accused never fell asleep.

[34] After leaving the complainant's place, the accused felt an itch. He thought it might be chlamydia. The itch eventually went away.

[35] When asked about the text messages, the accused said he believed there was more to the text exchange than the texts entered into evidence by the Crown. He didn't say what words or topics were allegedly omitted.

[36] The accused said he phoned the complainant the next day because he was concerned about possibly having chlamydia. The complainant yelled at him and hung up. No one asked him about his understanding about the symptoms of chlamydia.

[37] When asked about consent, the accused said that there was no "no" and no "stop".

[38] At some later date, the accused was tested for sexually transmitted diseases, but he had none.

[39] The accused said he was surprised when he was eventually contacted by the police.

[40] When asked about the text messages, the accused said he did not reply to the complainant's later messages (after replying to the first one) because he went to sleep. When questioned further, he said he put his phone on its charger after the first reply.

He insisted that this was not just what he normally did. He insisted that he specifically remembered doing this on this occasion.

[41] The accused said he wrote everything down after talking to the police. He didn't say what he did with these writings.

LAW

[42] ***R. v. W.(D.),*** 1991 CanLII 93 ["***W(D)***"] was a sexual assault trial in which the accused testified. The Supreme Court of Canada (SCC) outlined a useful approach for analyzing the credibility of an accused and the principle of reasonable doubt. At page 758, the majority set out the framework for instructing a jury:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[43] Later cases have elaborated upon ***W(D). R. v. Menow***, 2013 MBCA 72 ("***Menow***") was also a sexual assault case involving a ***W(D)*** analysis. At the appeal stage, the accused argued that the trial judge had erred by considering the evidence of the complainant and of a witness in concluding that the accused was not credible. At paragraph 23, the appeal court observed:

> To assess the evidence of the accused in a vacuum ignores the fact that the whole purpose of the trial is to determine whether or not the accused is guilty…It is impossible for an accused's evidence to be considered without a factual or contextual backdrop for the charge itself.

[44] In ***R. v. Vuradin***, 2013 SCC 38, the court considered the ***W(D)*** framework. At paragraph 21, the court pointed out: "The order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration."

[45] In ***R. v. J.A.***, 2011 SCC 28 ("***J.A.***"), the majority ruled that participants cannot consent in advance to a course of sexual activity in which they will lose consciousness (by choking in this case). Participants must remain conscious so that they have the option of saying "stop" at any point.

[46] In ***R v Ewanchuk,*** 1999 SCC 711 ("***Ewanchuk***") at paragraph 23, the majority of the SCC explained:

> A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea.* The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched."

[47] At paragraph 27, the majority added:

> Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. Some of this confusion has been caused by the word "consent" itself. A number of commentators have observed that the notion of consent connotes active behaviour: see, for example, N. Brett, "Sexual Offenses and Consent" (1998), 11 *Can. J. Law & Jur.* 69, at p. 73. While this may be true in the general use of the word, for the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective.

[48] At paragraph 31, the majority observed:

> Counsel for the respondent submitted that the trier of fact may believe the complainant when she says she did not consent, but still acquit the accused on the basis that her conduct raised a reasonable doubt. Both he and the trial judge refer to this as "implied consent". It follows from the foregoing, however, that the trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. <u>There is no defence of implied consent to sexual assault</u> in Canadian law.
>
> [underlining added]

[49] At paragraph 46, the majority added:

> In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant <u>communicated consent to engage in the sexual activity in question</u>. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

[50] In ***R. v. Barton,*** 2019 SCC 33 ("***Barton***"), the court emphasized that "consent' in the context of sexual assault means "communicated" consent. At paragraph 107, the majority observed that "an accused cannot point to his reliance on the complainant's silence, passivity or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law." The majority added that "an accused's attempt to 'test the waters' by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step".

[51] At paragraph 118, the majority commented:

> …First of all, a belief that the absence of signs of disagreement could be substituted for affirmative communication of consent is a mistake of law. As already explained, "implied consent" does not exist under Canadian sexual assault law. Further, a belief that prior "similar" sexual activities between the accused and the complainant…or the accused's own speculation about what was going through the complainant's mind could be substituted for communicated consent to the sexual activity in question at the time is a mistake of law. As a matter of law, consent must be specifically renewed — and communicated — for each sexual act. Moreover, a belief that the complainant could give broad advance consent to whatever the accused wanted to do to her is a mistake of law…

Criminal Code

[52] Relevant sections of the ***Code*** include:

Assault	**Voies de fait**
265 (1) A person commits an assault when	265 (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas :
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;	a) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement;
(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or	b) tente ou menace, par un acte ou un geste, d'employer la force contre une autre personne, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est alors en mesure actuelle d'accomplir son dessein;
(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.	c) en portant ostensiblement une arme ou une imitation, aborde ou importune une autre personne ou mendie
Application	**Application**
(2) This section applies to all forms of assault, including	2) Le présent article s'applique à toutes les espèces de voies de fait, y compris les

sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Sexual assault

271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year…

Meaning of *consent*

273.1 (1) Subject to subsection (2) and subsection 265(3), *consent* means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

Consent

(1.1) Consent must be present at the time the sexual activity in question takes place.

Question of law

(1.2) The question of whether no consent is obtained under subsection 265(3) or

agressions sexuelles, les agressions sexuelles armées, menaces à une tierce personne ou infliction de lésions corporelles et les agressions sexuelles graves.

Agression sexuelle

271 Quiconque commet une agression sexuelle est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans ou, si le plaignant est âgé de moins de seize ans, d'un emprisonnement maximal de quatorze ans, la peine minimale étant de un an …

Définition de consentement

273.1 (1) Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l'application des articles 271, 272 et 273, en l'accord volontaire du plaignant à l'activité sexuelle.

Consentement

(1.1) Le consentement doit être concomitant à l'activité sexuelle

Question de droit

(1.2) La question de savoir s'il n'y a pas de consentement aux termes du paragraphe

subsection (2) or (3) is a question of law.

No consent obtained

(2) For the purpose of subsection (1), no consent is obtained if

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(a.1) the complainant is unconscious;

(b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (2) not limiting

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no

265(3) ou des paragraphes (2) ou (3) est une question de droit.

Restriction de la notion de consentement

(2) Pour l'application du paragraphe (1), il n'y a pas de consentement du plaignant dans les circonstances suivantes :

a) l'accord est manifesté par des paroles ou par le comportement d'un tiers;

a.1) il est inconscient;

b) il est incapable de le former pour tout autre motif que celui visé à l'alinéa a.1);

c) l'accusé l'incite à l'activité par abus de confiance ou de pouvoir;

d) il manifeste, par ses paroles ou son comportement, l'absence d'accord à l'activité;

e) après avoir consenti à l'activité, il manifeste, par ses paroles ou son comportement, l'absence d'accord à la poursuite de celle-ci.

Précision

3) Le paragraphe (2) n'a pas pour effet de limiter les circonstances dans lesquelles il n'y a pas de consentement

consent is obtained.	de la part du plaignant.

ARGUMENT

Defence

[53] The defence argued that the accused was credible and reliable. He should be believed. At least his evidence raises a reasonable doubt. At the very least, the evidence as a whole raises a reasonable doubt.

[54] The accused was nervous while testifying, which is understandable.

[55] It is also understandable that he answered questions put to him by police, but didn't provide answers to questions he was never asked. For example, the police did not ask him if he ejaculated on the complainant's stomach, so he never told them.

[56] Regarding the issue of consent, defence counsel argued that "people give consent by participating". Therefore, if the accused's version of events is believed, there was consent, and the accused should be acquitted.

[57] The defence argument was not "honest but mistaken belief in consent". The argument was a purely factual one. The argument was that the intercourse did not begin while the complainant was sleeping, and that the accused never choked the complainant at all. (Therefore, there was actual consent).

Crown

[58] The Crown urged the court to accept the complainant's version of events, rather than that of the accused. The complainant testified that the accused inserted his penis into her vagina while she was still asleep. That fact obviously negates consent. Also,

she could not possibly have given consent to being choked because she was unable to speak while being choked.

[59] The text messages support the complainant, rather than the accused.

[60] Consent requires a clear and unequivocal "yes". Nothing less than positive affirmation will do. The Crown referred to ***Ewanchuk*** and ***Barton***.

[61] The accused lacked credibility. His police statement was not consistent with his courtroom testimony. When confronted by his contradictions, he would dismiss the contradictions by claiming to be "confused" and saying "my bad". The accused should be convicted.

DECISION

[62] To start, defence counsel was mistaken when he said that "people give consent by participating". Case law (including ***Barton*** and ***Ewanchuk***) makes it crystal clear that, in the context of sexual assault, there is no such thing as "implied consent".

[63] Mere silence does not amount to consent. Mere physical passivity does not amount to consent (see ***Barton***). There are many reasons why a non-consenting complainant might be silent and/or passive (including fear and/or shock).

[64] The ***Code*** explicitly says that consent is not obtained if the complainant is unconscious. That obviously includes a sleeping complainant.

[65] Section 273.1(2)(b) of the ***Code*** says that there is no consent when the complainant is "incapable of consenting to the activity". That would include cases where the complainant is being choked in a way that makes it impossible to speak.

[66] I did not find the accused to be a generally credible witness. Some witnesses do not remember small details from years ago, and they honestly say so. Few people have photographic memories. There is nothing surprising about a person not remembering a minor detail from long ago.

[67] The accused told the police that the complainant was on top during part of their vaginal intercourse. When asked at trial, if he had said that he didn't remember, that would not have been surprising. The police statement was closer in time to the events in question. In general, memories often fade over time.

[68] However, at trial, the accused did not say that he didn't remember who was on top. Instead, the accused confidently asserted that only he was on top. When confronted by the obvious contradiction with his police statement, he claimed to be "confused" and then dismissed the whole thing by saying "my bad". This damaged his general credibility.

[69] Similarly, the accused testified that the events in question happened in November 2023 or in the fall of 2023. It was an agreed fact that the events happened in June 2023. Again, if the accused had simply said he didn't remember exactly when the events happened, or that they happened roughly two years ago, that would not have been surprising. No one expects him to have a photographic memory. That would not have damaged his credibility.

[70] However, he did not merely say "roughly two years ago". Instead he stated that they happened in November or in fall. When confronted, he said he was "confused".

[71] The pattern appears to be that the accused asserts "memories" with a false confidence. When caught in a blatant contradiction, he claims to be "confused". This does not bolster his general credibility.

[72] I note the fact the accused insisted that he consumed exactly two whiskies (not one, not three) with dinner on the day in question, over two years ago. At the very least, it is odd that he would remember such an unimportant detail with such complete confidence. It is more likely that he accurately remembered drinking some whisky, but that he asserted that it was precisely two drinks, with a false confidence.

[73] Even more significant are the text messages. A couple hours after the events in question, the complainant began the exchange by texting, "I literally don't even know what to say…" Those words in themselves do not explicitly refer to sexual assault. They obviously indicate strong feelings, either positive or negative. The parties agree that sexual intercourse did happen. Therefore, the first text might mean that the complainant found the sex to be extremely pleasant or extremely unpleasant.

[74] The reply of the accused is significant: "Only reason I left is cause I have something now my dick is on fire so I don't even know what the fuck to say but thanks I guess".

[75] The accused was not closely questioned about his choice of words. The first part of the text does not seem to fit well with second part. It is not clear why the accused referred to the fact that he left the home of the complainant. The second part appears to suggest that the complainant gave the accused a sexually transmitted disease which caused a burning sensation in his penis, and that he was angry or annoyed with the

complainant because of this. Perhaps the message was meant to suggest that the accused noticed a burning sensation immediately, while he was still at the complainant's home, and that he left because of the burning sensation.

[76] There was no expert evidence about symptoms of chlamydia or of other diseases. I cannot simply take judicial notice about symptoms and/or about how soon symptoms manifest. No one questioned the accused about his understanding about the symptoms of chlamydia.

[77] The complainant's next messages changed the tenor of the conversation. Firstly, the complainant said that she didn't have anything (i.e. any sexual diseases).

[78] Then she asserted: "I was SLEEPING!" (note the all-caps and the exclamation point). This text is perfectly consistent with the complainant's testimony that the accused began the sexual intercourse while she was still asleep. While she did not use the phrase "sexual assault", it was obvious that she was very upset by the fact that she was sleeping.

[79] The next message raised additional concerns: "I guess the fact that I said NO..I took my sleeping pills meant nothing to u, just waits till I fall asleep…" This message was consistent with the complainant's testimony that she said "no" when the accused tried to kiss her. It was also consistent with her testimony that she took her sleeping pills on the night in question. It was also consistent with her testimony that she fell asleep and that the accused began the intercourse while she was asleep.

[80] Although the complainant never used the term "sexual assault", the gist of the texts was that the accused sexually assaulted her. This upset her, and the fact that the accused charged her with giving him a sexual disease just added insult to injury.

[81] At first, when asked about the texts, the accused never explained why he never replied to the later texts, if only to deny that the complainant said "no".

[82] When asked point blank, the accused alleged that he put his phone on a charger and went to sleep just after he sent his one reply ("…my dick is on fire…") and just before the complainant alleged that he started the intercourse while she was asleep. The accused insisted that he was not just assuming that is what happened; he had a distinct memory of putting his phone on the charger at precisely that moment in time. I do not find the accused credible on this point. This appears to be part of the accused's pattern of "remembering" things with a false confidence.

[83] Even if the accused were telling the truth, he must have seen the later text messages at some later time (i.e. after waking up). One would have expected him to send some sort of reply at that time, if only to deny what the complainant said. He never did reply.

[84] The accused alleged that the text message exchange tendered by the Crown was missing something. He never said exactly what he thought it was missing. I do not find the accused to be credible on this point. He would have received a copy of the Crown's exhibits long before the trial started. If any texts were really missing, he would have had ample time to think about them. I accept the credible evidence of the complainant that the text exchange was complete.

[85] I find that the text message exchange bolsters the credibility of the complainant and damages the credibility of the accused.

[86] I found the complainant to be both credible and reliable. She was never evasive, and she did not contradict herself. For what it is worth, her demeanor was consistent with sincerity.

[87] I don't know if the accused led the way upstairs or if the complainant did. Nothing turns on this frankly trivial detail.

[88] I believe that the accused was accurate when he mentioned that his brother had recently passed away. I believe that the complainant remembered this detail inaccurately (she said it was the accused's grandfather). The complainant would have had no reason or incentive to deliberately lie about this minor detail. I conclude that her memory about this small detail was just less accurate than the memory of the accused.

[89] Although academic sources have criticized ***W(D),*** it is still a useful framework for analyzing reasonable doubt.

[90] Applying ***W(D),*** I did not believe the accused. As noted above, his evidence about the text message exchange damaged his credibility. His explanation for his own contradictions undermined his credibility.

[91] I do not believe that the evidence of the accused raised a reasonable doubt.

[92] Finally, I do not find that the evidence as a whole raised a reasonable doubt. I accept the credible evidence of the complainant that she was asleep when the sex

started and that she could not speak at all while the accused was choking her. Those facts alone would negate any possible consent, as per section 273.1(2) of the ***Code***.

[93] I accept the credible evidence of the complainant that the accused inserted his penis into her vagina while she was sleeping. The ***Code*** makes it crystal clear that this fact negates consent. The fact that the complainant was asleep is consistent with the accused's testimony that she never said "no" before he began the sexual intercourse. The complainant's version of events is also consistent with the text message exchange. The complainant texted, "I was SLEEPING". The fact that she capitalized "sleeping" suggests that this fact was particularly troubling to her.

[94] Regarding the alleged choking, the two versions of events were irreconcilable. The accused did not try to allege that the complainant consented to some sort of simulated choking. He simply denied that he choked the complainant at all. On this point, I accept the credible evidence of the complainant over that of the accused. As noted above, I found the complainant more credible than the accused on all contentious issues. To be clear, I find that the accused began having vaginal sexual intercourse with the sleeping complainant, and then he choked the complainant while having non-consensual vaginal intercourse with her.

[95] The parties agreed that no condom was used. This fact adds an extra dimension of concern. The accused should have known that not using a condom added significant risks to his actions.

Honest but mistaken belief?

[96] Although the defence did not argue that the accused had an honest but mistaken belief in consent (even as an alternative argument), I will briefly explore how the facts might support or negate this type of argument.

[97] There can be no dispute that the complainant did not subjectively believe she was consenting to sex. Her credible testimony made this crystal clear. That speaks to the *actus reus* of the offence.

[98] As for the *mens rea* of the offence, we must look at ***Ewanchuk*** and ***Barton***.

[99] Firstly, as per ***Barton***, honest but mistaken belief in consent would require "communicated" consent. Even if I had a reasonable doubt that the sex began while the complainant was sleeping, and even if I had a reasonable doubt that the accused choked her in such a way that she could not talk, the undisputed fact is that the vaginal intercourse without a condom occurred. If the accused wanted to argue that he honestly believed that the complainant consented to this sex, he would have to establish that her consent was "communicated". As ***Barton*** makes it clear, silence or passivity does not equal consent.

[100] Even if the accused's version of events were accurate, he did not describe any "communicated" consent to vaginal sex, with or without a condom. He testified that there was no "no" and no "stop". This does not constitute "communicated" consent. As pointed out in ***Ewanchuk***, there is no such thing as "implied consent".

[101] The accused testified that the complainant "kissed back". Even if I were to accept that she consented to kissing, ***Barton*** and other case law is crystal clear that

consent to one type of sexual activity is not consent to all other types of sexual activity. Consent to kissing is not consent to vaginal sex with a condom and is certainly not consent to vaginal sex without a condom.

[102] In short, the facts could not possibly support a defence of honest but mistaken belief in communicated consent to vaginal sex without a condom.

[103] For these reasons, I find that the accused is guilty of sexual assault.

[104] I thank counsel for their agreements and for their courtesy.

_____J.