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R. v. Lee, 2025 ONCJ 25

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

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

> **486.4 Order restricting publication — sexual offences.**— (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (*a*) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
>
> (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
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> (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or
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> (*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (*a*)(i) to (iii).
>
> (2) *Mandatory order on application.*— In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall
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> (*a*) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and
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> (*b*) on application made by the complainant, the prosecutor or any such witness, make the order.
>
> **. . .**
>
> **486.6 Offence.**—(1) Every person who fails to comply with an

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order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

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CITATION: *R. v. Lee*, 2025 ONCJ 25
DATE: 2025-01-10
Toronto

ONTARIO COURT OF JUSTICE

B E T W E E N :

HIS MAJESTY THE KING

— AND —

SEUNGJIN LEE

2025 ONCJ 25 (CanLII)

Before Justice Mara Greene
Reasons for Judgment released January 10, 2025

J. Lee…… for the Crown
L. Afolabi……..……..……..……..for Seungjin Lee

[1] Mr. Seungjin Lee is charged with sexual assault, forcible confinement and criminal harassment in relation to S.K. It is alleged that on December 11, 2022, Mr. Lee and S.K went on date. At the conclusion of the date, Mr. Lee took S.K. to a hotel room and had nonconsensual vaginal sex with her. It is further alleged that in the days that followed, Mr. Lee sent a series of unwanted text messages to S.K. Most of the texts were ignored by S.K., but after Mr. Lee continued to text her, S.K. finally wrote back that she did not want to communicate with Mr. Lee anymore. Mr. Lee ignored S.K.'s wishes and continued to text her and even sent her a basket after S.K. specifically told him not to. After a number of failed attempts to get Mr. lee to stop calling, S.K. called the police.

[2] At the beginning of the trial, Mr. Lee admitted that he criminally harassed S.K, but denied any sexual assault. According to Mr. Lee, all the sexual contact was consensual. At the close of the trial the Crown conceded that there was no evidence of

forcible confinement. As such, the only remaining issue is whether or not the Crown has proven beyond a reasonable doubt that S.K. did not consent to having sexual intercourse or any other sexual contact with Mr. Lee.

Summary of the evidence

[3] Much of what occurred on the night in question is not in dispute. Both S.K. and Mr. Lee agree that they met on a dating site and that after some discussions online decided to meet in person. They met at the Chase restaurant where they had dinner and drinks. After dinner, Mr. Lee asked S.K. if she wanted to join him for cocktails. S.K. agreed and they went to 1 King West hotel where they had a few cocktails. This is where the versions of events start to deviate. Both S.K. and Mr. Lee agree that Mr. Lee attempted to book a hotel room at the 1 King West Hotel but was unable to do so as he left his identification in his vehicle. They diverge on whether or not S.K. agreed to stay at a hotel with Mr. Lee. S.K. testified that Mr. Lee mentioned something about getting a hotel room to which she responded that she was not staying in a hotel room with him. Mr. Lee, however, testified that when he mentioned getting a hotel room, S.K. nodded.

[4] Both S.K. and Mr. Lee testified that they then left the bar and went to Mr. Lee's vehicle. S.K. testified that in her mind, Mr. Lee was going to drive her home. Mr. Lee testified that his intention was to find another hotel to stay at. Mr. Lee testified that he went on his phone and searched for nearby hotels. He found a hotel and drove to it, but it ended up being an Air BnB. S.K. looked disappointed with the hotel choice, so Mr. lee decided to find a better hotel. He then went to the Ritz Carleton Hotel.

[5] S.K.'s evidence about what took place prior to going to the Ritz was different. According to S.K., within a few minutes of entering the car, Mr. Lee stopped the vehicle in the middle of a small intersection and said that there was a hotel here. S.K. repeated that she was not going with him to a hotel room. S.K. testified that she was agitated and took out her phone with the intention of ordering an uber. Mr. Lee took S.K.'s phone away and only returned it when S.K. demanded it back. Mr. Lee then made some comment about not staying at a "shitty" hotel and then drove them to the Ritz Hotel.

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[6] Upon arriving at the Ritz Hotel, Mr. Lee went to the reception area to book a room and S.K. sat on a nearby sofa. After a few minutes, S.K. decided to leave and walked towards the front door. Both parties agree that Mr. Lee saw her walk to the front door, followed her and convinced S.K. not to leave. S.K. testified that Mr. Lee grabbed her arm and said something to calm her down. Not wanting to make a scene, S.K. followed Mr. Lee back into the hotel and up to the hotel room. Mr. Lee testified that after he saw S.K. start to leave, he went up to her, grabbed her hand and put his own hand around S.K.'s waist. He told her "since we are here already lets go. It is cold outside". S.K. did not respond verbally but did go back with Mr. Lee inside the hotel.

[7] According to S.K., once they were in the hotel room, she sat on the sofa, keeping her jacket on. S.K.'s intention was to only stay for a few minutes. S.K. testified that while she sat down, Mr. Lee walked into the other areas of the hotel room. He then went up to S.K. and picked her up. S.K. told Mr. Lee to put her down, but he did not. Instead, he took her to the bed and threw S.K. onto it. According to Mr. Lee, while he did not ask S.K. if she wanted to be picked up, it was his impression that she liked it. This is because when he initially went to pick her up, he was unable to do so. They both giggled as Mr. Lee continued to try and lift S.K. S.K. then put her arms around Mr. Lee's neck which enabled him to pick S.K. up and carry her to the bed.

[8] S.K. testified that once on the bed, Mr. Lee proceeded to sexually assault her. Her memory of the sexual assault was vague at times as S.K. blacked out at times from the combined effect of the trauma and the alcohol she consumed that night. S.K. testified that it started with Mr. Lee ripping her stockings. He then proceeded to have vaginal intercourse with her without her consent. S.K. testified that she told Mr. Lee to stop and tried to push him away but was unsuccessful. S.K. removed her own clothing including her boots, jacket, and dress. She did so because the clothing was causing her pain. She removed the boots early on in the attack. She removed the rest of the clothing later on as it was starting to choke her.

[9] According to S.K., during this sexual assault she not only told Mr. Lee "no", she also pushed him away. S.K. testified that at one point she pushed Mr. Lee hard enough

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that he stopped having intercourse with her for a few seconds. The sexual intercourse lasted approximately twenty seconds.

[10] After this first sexual assault, S.K. turned on her side and went into the fetal position. Mr. Lee came over and hugged.

[11] According to S.K., Mr. Lee sexually assaulted her one or two more times that night. She recalled that at one point Mr. Lee flipped her over and vaginally penetrated her for a second time. S.K. told him to stop. After approximately thirty seconds, Mr. Lee stopped. During this latter assault, Mr. Lee asked S.K. to say his name and she complied. Mr. Lee then called her names like “bitch” or “cunt” in Korean.

[12] When this sexual assault ended, S.K. fell asleep. When she woke up, it was morning. S.K. told Mr. Lee that she had to go home. Mr. Lee suggested they leave at 10:30 or 11:30 a.m. She remained in the room while Mr. Lee showered. S.K. then showered. At approximately 11:00 am, they left the hotel and Mr. Lee drove S.K. home.

[13] Mr. Lee’s evidence about what took place in the hotel differs significantly from S.K.’s evidence. According to Mr. Lee, once they were on the bed, they started to kiss, and he started to touch S.K. sexually. He then asked her if he could rip her stockings and S.K. said he could and then spread her legs for him.

[14] According to Mr. Lee, at one point when Mr. Lee was touching her, S.K. commented that he was clumsy. S.K. then removed her own clothing. Mr. Lee did not ask S.K. what she meant by this comment but assumed she was teasing him about the clumsy way he was trying to remove her clothing.

[15] Once S.K.’s clothes were removed, Mr. Lee removed his as well. According to Mr. Lee, they did not have sex at this time because Mr. Lee did not have a condom with him. According to Mr. Lee, they jointly decided not to have sex and to just sleep instead.

[16] Mr. Lee testified that when they woke up in the morning, he started to touch S.K. sexually. He asked S.K. if she as agreeable to have sex without a condom because he

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could avoid ejaculating inside her. Mr. Lee testified that S.K. agreed to this. They then had intercourse for the first time.

[17] Mr. Lee testified that S.K. never told him that she did not want to have sex with him. He further testified that through the night, S.K. appeared to be enjoying herself as she was giggling and actively engaging with him sexually.

[18] After that night, Mr. Lee sent S.K. a series of text messages, most of which S.K. did not respond to. Approximately two weeks later, when Mr. Lee continued to contact her against her wishes. S.K. told Mr Lee that she did not want any further contact with him, but Mr. Lee ignored this and continued to message her. This led S.K. to block Mr. Lee on her Korean App, “Kaka”, and on imessage. Mr. Lee still managed to text her on “kaka”, using a different phone number. He then advised S.K. that he would be sending her a gift basket. S.K. instructed Mr. Lee to not do this but Mr. Lee ignored this as well and dropped off the basket. When S.K. received a message from Mr. Lee stating that he had been at her house daily, S.K. decided to call the police.

General Legal Principles

[19] The starting point in understanding any decision in a criminal court is understanding the burden of proof. The burden lies on the Crown to prove each essential element of the offence beyond a reasonable doubt. This is a high standard. Reasonable doubt is based upon reason and common sense. It is logically connected to the evidence or the lack of evidence. It is not enough for me to believe that Mr. Lee is possibly or even probably guilty. Reasonable doubt requires more. As a standard, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities. In order to convict, a trial judge must be sure that every essential element of the offence has been made out.

The Offence of Sexual Assault

[20] The offence of sexual assault must be considered in the context in which the offence was created. McLachlin C.J. wrote in *R. v. J.A.* [2011] S.C.J. No. 28 “It is a fundamental principle of Canadian law that a person is entitled to refuse sexual

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contact." Major J., speaking for the majority of the court in *R. v. Ewanchuck* [1999] S.C.J. No. 10 stated at paragraph 28,

> …Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every mans' person being sacred, and no other having a right to meddle with it in any the slightest manner": See Blackstone's Commentaries on the Laws of England (4th ed. 1770). Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.

[21] All offences in the Canadian Criminal Justice System have both an *actus reus* and a *mens rea*. The same is true for the offence of sexual assault. The *actus reus* of a sexual assault is made out where the Crown has proven beyond a reasonable doubt that: the defendant touched someone; where the contact was sexual in nature; and the person did not consent. The Crown must prove all three of these essential elements beyond a reasonable doubt. In other words, the test is not whether the victim consented. The test is whether the Crown has proven beyond a reasonable doubt that the victim did not consent.

[22] The *mens rea* for sexual assault is made out where the Crown proves beyond a reasonable doubt that the defendant intended to touch the complainant in a sexual manner and knew or was reckless or willfully blind to the complainant's lack of consent. Once the *actus reus* is established, the defendant can only rely on his lack of knowledge about the absence of consent if the defendant took reasonable steps to confirm that the victim was consenting.

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[23] In the case at bar, it is conceded that Mr. Lee touched S.K. in a sexual manner and that he intended to touch S.K. in a sexual manner. The only issue is whether I am left in a reasonable doubt about whether S.K. consented to the sexual touching. It is important to remind myself that when assessing the issue of consent, the test is not whether Mr. Lee believed S.K. was consenting. The issue is whether S.K. did in fact consent. It is only the complainant's state of mind that is relevant.

Analysis

[24] In many respects this is a standard credibility case. Crown counsel argued that Mr. Lee was not a believable witness, that S.K. was credible and urged me to convict Mr. Lee of sexual assault. Counsel for Mr. Lee argued that Mr. Lee was credible and S.K. was not. He urged me to find that S.K. did in fact consent to the sexual touching and find Mr. Lee not guilty.

[25] In relation to S.K.'s credibility, counsel for Mr. Lee argued that S.K.'s evidence was a reconstruction and reinterpretation of events that cannot be trusted. Counsel pointed to the following frailties in S.K.'s evidence to support his position:

a) S.K. testified that when she first entered Mr. Lee's vehicle, she thought he was going to drive her home, but she never provided her address to Mr. Lee, so he was never in a position to drive her home;

b) S.K. distanced herself from the amount of alcohol she consumed that night and minimized its effect on her;

c) S.K. made a number of poor decisions that night as a result of her consumption of alcohol including allowing Mr. Lee, who was intoxicated, to drive her around that night;

d) S.K. testified that she passed out a number of times during the night, but denied that it was caused by alcohol

e) S.K. was inconsistent about when she went "blank" about events from that night;

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f) S.K.'s evidence about Mr. Lee's actions – in particular that he grabbed her phone away from her in the vehicle and grabbed her arm outside the Ritz - is inconsistent with S.K.'s assertion that she was not fearful of Mr. Lee making is less likely that the events occurred as she described;

g) There were so many opportunities for S.K. to leave, that her failure to do so defies common sense. If S.K. did not want to be with Mr. Lee, she could have and would have left, and

h) S.K. was combative with counsel for Mr. Lee during the entire cross-examination, further supporting the defence position that S.K. was reconstructing events.

[26] Crown counsel argued that none of these alleged frailties should impact my assessment of S.K.'s credibility. When S.K.'s evidence is looked at in its totality it is reasonable, reliable, and credible. In relation to Mr. Lee's evidence, Crown counsel argued that there were two key aspects of his evidence that are particularly problematic. Firstly, Mr. Lee's evidence is filled with assumptions about S.K.'s consent as opposed to confirming S.K.'s consent. Moreover, at times Mr. Lee altered his evidence during the course of his testimony to bolster his evidence on S.K.'s consent. The clearest of which relates to S.K.'s response when Mr. Lee first raised the issue of securing a hotel room. During examination-in-chief, Mr. Lee stated that when he asked S.K. about a hotel room he could not recall S.K.'s response but thought she nodded in agreement. In cross-examination, Mr. Lee testified that S.K. did in fact nod in agreement. Secondly, when confronted about the text messages between himself and S.K., Mr. Lee's initial response was that the text messages could have been altered. This is absurd given the admission at the start of the trial that all the text messages filed with the court accurately reflected the conversation between Mr. Lee and S.K.

[27] I will first address the issues raised by counsel for Mr. Lee in relation to S.K.'s credibility. The essence of counsel's argument was that S.K. consumed a significant amount of alcohol on the night in question and that one reasonable explanation for her present allegations is that S.K. regrets her choices from that night and has reconstructed the events in light of her present regret. Counsel points to S.K.'s

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minimization of the effects of alcohol on her, S.K.'s combative stance with defence counsel during cross-examination and a host of inconsistencies in her evidence to support his argument. The biggest issue I have with defence counsel's position is that it is not supported by Mr. Lee's evidence. On Mr. Lee's evidence, while sexual activity occurred that night, the most significant sexual activity occurred the following morning. Mr. Lee testified about having a discussion with S.K. in the morning, after they had slept for some time, about having intercourse without the use of a condom. Given this evidence, there is no basis for me to find that S.K. was still affected by the alcohol she consumed the night before when she and Mr. Lee engaged in intercourse. Given the timing of the sexual intercourse on Mr. Lee's version of events, there is no basis to find that S.K made a drunken decision that she later regretted.

[28] I agree with counsel for Mr. Lee, however, that there were some frailties in S.K.'s evidence that I must consider. Firstly, S.K. was not able to explain at trial how she thought Mr. Lee was going to drive her home that night when she never provided him with her address, or even discussed this occurring. It is unclear why S.K. believed that Mr. Lee was driving her home when they walked to his vehicle after having drinks at 1 King West. I further agree that it is somewhat odd that S.K. did not feel at all threatened by Mr. Lee when on her evidence, on both occasions when S.K. tried to leave, Mr. Lee stopped her. First, in the car he grabbed her phone when she was trying to order an Uber and second when Mr. Lee grabbed S.K.'s arm when she tried to leave the Ritz. Having said that, everyone responds differently to events, and this is not a basis to reject S.K.'s evidence.

[29] I do not agree that S.K. attempted to minimize the effects of alcohol on her. S.K. testified that she was feeling the effects of alcohol and that it affected her decision making that night. She was more hesitant about making a scene in public and elected to enter a vehicle with someone she was knew was impaired by alcohol. I further do not find that the fact that S.K. had ample opportunity to leave and failed to do so is a basis to reject her evidence. S.K. testified about the stress of the night and impact this had on her. There is no reason to reject this aspect of her evidence.

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[30] When I look at S.K.'s evidence in its entirety, I found S.K. to be both credible and reliable.

[31] This leads me to Mr. Lee's evidence. Mr. Lee was not the perfect witness. I agree with Crown counsel that Mr. Lee's evidence was inconsistent about whether or not S.K. nodded when he first asked her if she wanted to go to a hotel with him. I further agree that Mr. Lee's evidence about the text messages being inaccurate is not believable. Both of these aspects of Mr. Lee's evidence suggest an attempt to make himself look better. Having said that, Mr. Lee's evidence otherwise seems reasonable and credible. While these two frailties in his evidence lead me to not fully accept his evidence, they do not cause me to reject Mr. Lee's evidence either.

[32] I am mindful that pursuant to R. v. J.J.R.D. [2006] O.J. No. 4749 (C.A.), it is permissible to reject an accused's evidence based solely on a considered and reasoned acceptance beyond a reasonable doubt of the complainant's evidence. While I do not reject S.K.'s evidence, her evidence is not so strong that it leads me to reject Mr. Lee's evidence.

[33] Crown counsel argued that even if I do not reject Mr. Lee's evidence, I should still find him guilty because on his own evidence he failed to take reasonable steps to ensure that S.K. was in fact consenting. This argument has some appeal. Firstly, on Mr. Lee's own evidence, he made assumptions based on ambiguous actions. For example, once in the hotel room, Mr. Lee picked S.K. up without first asking her if she wanted this to happen. When asked how he knew S.K. was interested in sexual activity, Mr. Lee replied that S.K. moved her hair in a particular way that suggested to him that she was interested but embarrassed. This is utterly absurd. This is exactly what the law of reasonable steps protects against. Consent must be expressed and cannot be ambiguous. Mr. Lee cannot rely on such ambiguous conduct to justify his belief that S.K. consented. Had this been the totality of Mr. Lee's belief that S.K. was consenting, it is my view that this would not be enough to support a defence of mistaken belief in communicated consent. This was not, however, the sole basis for Mr. Lee's belief that S.K. was consenting. Mr. Lee testified that during the sexual acts, S.K. was an active

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participant. She touched Mr. Lee and giggled with him during the sexual activity. He further testified that he asked S.K. if he could rip her stockings. S.K. said he could and parted her legs. Mr. Lee also testified about having a discussion with S.K. about not having sex because of the absence of a condom that night and then having a further discussion the next morning where S.K. expressly consented to having sex without a condom. In light of this evidence, I do not find that Mr. Lee failed to take reasonable steps to confirm that S.K. communicated consent and did in fact consent to the sexual acts on December 11, 2022.

[34] When I consider all the evidence, I am uncertain about what took place in that hotel room. I am therefore left in a reasonable doubt about whether S.K. consented to the sexual activity with Mr. Lee on the night in question. Mr. Lee is found not guilty of the offences of forcible confinement and sexual assault. Based on the admission by counsel for Mr. Lee, I need not address the law and facts on criminal harassment. The offence is clearly made out and I find him guilty of the offence of criminal harassment.

Released January 10, 2025 _____

Justice Mara Greene

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