

CITATION: *O'Brien v AK* [2006] NTMC 096

PARTIES: JAMIE THOMAS O'BRIEN

v

A.K.

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act; Criminal Code

FILE NO(s): 20529741

DELIVERED ON: 11 December 2006

DELIVERED AT: Darwin

HEARING DATE(s): 28, 29 August 2006, 17, 24 November 2006

JUDGMENT OF: Jenny Blokland CM

**CATCHWORDS:**

CRIMINAL LAW – ATTEMPT SEXUAL INTERCOURSE WITHOUT CONSENT –  
EVIDENCE – OATH ON OATH

*R v Calides* (1983) 34 SASR 355; Tilmouth, *Trial Directions*

**REPRESENTATION:**

*Counsel:*

Informant/Complainant: Mr Bryant

Defendant: Mr Maley

*Solicitors:*

Informant/Complainant: ODPP

Defendant: Maleys Solicitors

Judgment category classification: C

Judgment ID number: [2006] NTMC 096

Number of paragraphs: 36

IN THE COURT OF SUMMARY JURISDICTION  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20529741

[2006] NTMC 096

BETWEEN:

**JAMIE THOMAS O'BRIEN**  
Informant/Complainant

AND:

**A.K**  
Defendant

REASONS FOR DECISION

(Delivered 11 December 2006)

JENNY BLOKLAND CM:

1. The defendant is charged with one count of attempt to have sexual intercourse with the complainant "EKT" without her consent contrary to s192(3)(5) *Criminal Code*. The charge of aggravated assault is also laid relating to the same alleged incident and one count of offensive behaviour in or about a dwelling house is charged on complaint as a further alternative covering the same. In a somewhat unusual course both the prosecution and defence consented to summary jurisdiction rather than the matter proceeding by way of committal as originally anticipated. I agreed to hear the matter summarily. The offences are alleged to have occurred on 12 October 2005. Throughout these reasons the defendant is referred to variously as "AK" or "Steve" or "the defendant".

## **Prosecution Evidence**

### **The complainant**

2. The complainant's evidence was that she was at her home at Woodleigh Gardens where she was living in the house of the father of a school friend of hers. She said she was working at that time as a receptionist, and has since commenced work for the Air Force.
3. At her home at about 7.00pm she told the Court she received a message from RL and MH. She described RL as a friend at that time but said she didn't know MH very well. RL and MH wanted to have some drinks so they came and visited her and brought a bottle of vodka. EKT said she had two vodka drinks but they did not have any effect on her. As well as RL and MH, other persons attended, namely SL and a person identified as "Chris". The complainant said a guy (who turns out to be the defendant), who she knew as "Steve" (AK) came as well. She said she had met him once before at RL's twenty first party. She regarded him as an acquaintance, she said she had no idea they were coming; she said another guy, BJ turned up as well. She was angry at the presence of BJ. She went and sat in her bedroom for a while; she said Steve (AK) and RL came to her bedroom; she was angry that people she didn't know had been invited to her house when she needed to work the next day. RL and AK sat on her bed for a while. She said another friend (SL) kept coming in as well; she said she didn't want them there in her bedroom sitting on the bed; they kept asking her to have another drink that she said she didn't want. She said they wanted her to be drunk with them.
4. She went to bed and about fifteen minutes later heard a knock at the door or window; she thought it was Steve's voice and she didn't know why he was there; she wrapped a towel around her and went to the back door; Steve said he wanted to get his drinks from the fridge and she told him he could get his drinks and leave. She said he started to pull the towel off of her; she asked him to get his drinks and leave; he said he didn't want to leave and just

wanted to have a quick root; she told him to leave; he asked her if he could come back later and she told him “no”. When he left she put her pyjamas on, made sure the doors were locked and went to sleep. She was woken when RL and Chris came back at about 3.00am because RL had forgotten her keys; she let them sleep in her spare room but they made too much noise and she asked them to leave. She said heard the door slam after she and RL had an argument.

5. The complainant told the court that after she heard the door slam she went to sleep; she woke up and her bedroom light was on and Steve was standing in the doorway; she recognised him; she asked him “why the hell he was in my house at all”, she realised RL may not have locked the door as she left.
6. The complainant described the incident saying she was still in bed, AK sat on the left hand side of the bed, put his feet on the bed and she asked him why he was there; he told her he had come back to have sex with her; he told her that she told him he could come later and she told him she didn’t; she said she was abrupt with him; he said she needed to have sex with him because she’d been cranky all night and some sex might cheer her up; she told him it wouldn’t and she wanted him to leave; he started trying to pull the quilt down and she was trying to keep herself covered with it and was also wearing her pyjamas; he grabbed the quilt and pulled it down; she was trying to hold it up; she asked him several times to leave her alone, get away from her and not touch her; he kept telling her he was going to have sex with her; she told him if he had sex it would be forced and she would report it; he told her it wouldn’t be forced. He put his leg on top of hers; she was on her side and he put his arm across her chest and arm; gripping her arm so she couldn’t move; he was behind her and started blowing her ears; rubbing his head up and down her neck trying to kiss her and she told him to get off her; she said she was angry but she started to cry as well; he continued to say he was going to have sex with her and made similar remarks; he rubbed his lips against her neck; she said she could feel the stubble of his face on

her; he touched her on the outside of her clothes rubbing up and down on her stomach; he got on top of her, pinned her down – she was struggling hard and she couldn't get away when he pinned her down; he was stronger than she was. She told the court he touched her on both breasts; he put his hand up her shirt and grabbed her breast – he was quite rough and it hurt; she screamed at him, she kept telling him to stop, he got off her. She said she had flipped over, she was on her stomach still trying to fight him away and he was still on top of her; she said he put his hand down the back of her shorts and touched her bum and then put his hand between her legs and touched her vagina. She said he was making groaning noises. His hand was underneath her clothing and he was very rough. She said he tried to pull her shorts down several times and she pulled them back up; she said she was screaming, telling him to stop and at one point scratched his chest; she was on her stomach and he started to rub his penis up and down on her back; she said she was screaming and struggling trying to throw him off but he wouldn't listen. She said he was playing with his penis at the end of the bed. She kicked him hard in the stomach; he stumbled back and told her she was being frigid and she wouldn't have to see him tomorrow if she didn't want to. He left, and she didn't hear the door close.

7. The complainant said she then started to call AXK, her ex-boyfriend, leaving him a text message saying "I'd just been attacked and I didn't know what to do". She said he called her back at about nine o'clock. She said she sent a text message to RL telling her that "Steve had just tried to rape me"; she said she was in shock and heard nothing from her until police had spoken to her; she said she lay in bed and cried because she was so shocked. She did not go to work the next day; she messaged her mother who came to her place at about 4.00pm. She told her mother she'd been attacked and her mother persuaded her to report it. She said she suffered a little bit of bruising around her wrists; that it was minor bruising – under the skin – a

tightness in her wrists from being held so tightly. She said police told her she didn't need a medical examination because she had not been penetrated.

8. In cross-examination she said she knew the defendant from a previous party; she said she was polite to him when he first came around; she said she didn't want the other people – apart from her girlfriends to be there; she said they would have been able to tell that from her body language; she agreed she went to her room for a while because she was cranky; she said RL and AK came down to her room when she went there because she was feeling cranky. She said RL was trying to get her to go to the beach at about midnight. She said she didn't know the neighbours; she agreed if there was screaming or shouting or loud music the neighbours would have heard.
9. In relation to the defendant returning at about 1.00am – she was asked whether SL came back as well; she agreed she may have come in and then gone out; she agreed she may have spoken to SL. She said the defendant said he wanted to get his drinks from the fridge and started grabbing at her towel; she couldn't recall that SL walked past them. It was put to her that she said “thanks for doing the dishes.....”; she said she didn't recall him doing the dishes; she denied saying to the defendant “come back later”; she said he asked her if he could come back later and she told him he definitely could not; she was asked whether the defendant had said “no thanks”, that he was dating MH; she said she didn't know the terms of their relationship; she said she couldn't recall SL being there.
10. The complainant told the court she didn't seek any medical attention for the bruise on her wrist as it was minor and she didn't see it was relevant. It was put to her that the defendant denied going back to her home at 3.45am. She said she was telling the truth. It was put to her that she propositioned him and in response he said he was with MH. The complainant said he was lying. She said she was not emotional and upset at the time; she was “pissed off” as she had just broken up with her boyfriend and her friends were going

to console her but they decided to have a party in her house. She disagreed that she was the odd person out on that night by virtue of not being in a couple. She agreed she had a screaming match with RL because she had been rude and shown no respect. She agreed it was 4.30 or 5.00am that she texted her ex-boyfriend; she said she couldn't remember the exact wording but she told him a guy had just tried to rape her and she didn't know what to do. She also sent a text message to RL; she said RL did not get back to her until the police contacted her; she said she told RL what happened but didn't give her the details.

### **Recent Complaint Evidence**

#### **RKT**

11. Two witnesses were called in the proceeding who gave evidence solely in the nature of fresh complaint. The complainant's mother, RKT gave evidence that she received a message while she was at work from her daughter at about 4.00pm that said something like "do you want to talk" and she contacted her daughter and went around to see her. She said she couldn't remember if she phoned her but she knew she went around straight away as it was on the way home. She said that on the phone her daughter had said she had been home through the day and she was upset; she said she sounded upset. She said she did not tell her why she was upset. She said her daughter was in a little ball on the settee cuddled up with her legs up. RKT asked "what's wrong"; she said her daughter told her someone had tried to rape her. She said she did not tell her who and said it was someone who had come back to the house but she didn't know his name. RKT asked if she wanted to go to the Sexual Assault Referral Centre and she said "yes". RKT took the complainant to SARC and the complainant saw a counsellor and two police officers arrived. After seeing the police RKT accompanied them back to the complainant's house where police took the bedding off the bed and put it into packages.

## **AXK**

12. AXK gave evidence that he had dated the complainant for several months until the start of October 2005; he said sometime in October before 6.00am one morning he received about five messages but he deleted them. He said he could not recall the substance of the messages. He told the court they were “along the lines of someone tried to touch me last night and tried to hurt me and yeah that’s about it”. He said he didn’t know what to make of it and he ended up sending a message back and she called him and explained that one of her friends, (he thought it was RL) had come over for drinks with a couple of other people and they were either going out or had come back from the pub and that the complainant said she went to bed and that after they left “some fellow came back and tried to force himself on her”. He said she was beside herself in tears and obviously distraught. He said he thought the conversation was mid-morning. As a result of the conversation he said he went around to her place and stayed there overnight as she was scared.

## **Phone Records**

13. Before the Court (Exhibit P3) are the telephone records that indicate calls from the complainant’s phone to AXK at 4.21 and to RL at 4.21 and 4.22.

## **Further Witnesses called on behalf of the Prosecution**

### **MH**

14. MH gave evidence she was born in Darwin but has lived most of her life in Greece, coming back to Darwin in 2003. It was evident listening to her evidence and looking through the transcript since her giving evidence that her English is not at a high level. She said that on 11 October 2005 and into 12 October 2005 she went to the party with RL; she and RL are close friends and she has also known AK, (the defendant), for one and a half years; she went to the complainant’s house with RL; she said she knew SL who

attended as well. She said she drank vodka and remembered drinking alcohol that night but could not remember how much; she said she couldn't remember if she felt drunk. She said she was with AK as his girlfriend at that time; she said she was no longer his girlfriend; she said they went out together for one month. She said Chris was also there that night. She said she couldn't remember what time she left the house but it was night time; she went to the beach with some of the group, namely RL, the defendant, SL, Chris and another guy "BJ". She agreed the complainant did not go to the beach. She said she didn't know what happened to the complainant at that time. She said she didn't know how long she stayed at the beach. On whether she drank alcohol at the beach she said "I don't know, yes". From the beach she said she went back to EKT's house; she said she saw EKT in the house. She said she couldn't remember what EKT was wearing; she said she was washing dishes and cleaning EKT's house; she said Steve (the defendant) was also washing the glass and helping her. She said she went back to the beach with the defendant in his car; she said she couldn't remember what happened to the rest of the group. She told the court they were talking and kissing and had sex at the beach. She said after that they drove into town checking and looking around and the defendant dropped her home; she said she had no idea what the time was when he dropped her home; she said she couldn't remember talking to him the next day.

15. In cross-examination she agreed with the proposition that she stayed at the beach until "a little bit of light just came". She also agreed with the proposition that as soon as she saw the light they drove into town and had a look and he dropped her home. She agreed she had said that when they went back to the complainant's house she did some dishes. She the defendant, RL, SL, Chris and another person were there. She saw RL and SL go inside; she agreed the defendant got his beers from the fridge. She said she couldn't remember how long they were there that time and that Steve cleaned some glasses. She said she couldn't remember what the

complainant was wearing; she said she couldn't remember the complainant having an argument with RL; apart from the first two hours when it was only girls, MH said she was with the defendant all night.

16. In re-examination Mr Bryant made an application to have MH declared hostile on the basis of two material pieces of evidence that were inconsistent with a previous statement. Mr Bryant wanted to cross-examination on this. After a brief voir dire I allowed cross-examination by the prosecutor. The inconsistencies were significant and MH gave rather evasive answers on the voir dire. Firstly it was alleged that in the previous statement that she had made to police she had said that RL and the defendant went inside the house of the complainant to retrieve the beer and MH placed herself outside the house. The submission of the prosecutor was that the evidence she gave indicating that she too had gone inside the house was evidence made in an endeavour to protect the defendant from the allegation that he tried to pull the towel off of the complainant. The second aspect was that in her evidence in chief she was very vague about the timing of events, in cross-examination when it was suggested to her that she got dropped off when the sun was rising, she agreed with that. This was compared with her statement where it was alleged that she had said that after she had sex with the defendant he drove her home to 2 East Point Road at 3.30am. On the voir dire MH accepted that she had made the statement, she said she couldn't remember where the police had told them to tell her the truth. She said her memory was better when she gave evidence (in August of this year) than when she made her statement. She said the reason her memory was better was that she was angry about her brother dying in Greece in September 2003. She said friends of her brother killed him in 2003 and she was close to her brother. She referred to "the police in Greece, they go to my house and ask my mum questions and after looking for me too and the police will want to come in here and pick me up, drop me in Greece". She said the police wanted to talk to her brother. She said when police spoke to her

about this matter she said that “because of the crisis and they were staring at me, I say yes yes yes. I don’t know”. She said she answered yes because she didn’t understand English. She said she was scared of the police although she agreed the sorts of things she told police about having sex with the defendant was not the type of thing you would tell someone you were scared of. She said she couldn’t remember if she told police that everyone went inside and cleaned up on the second occasion they went to the complainant’s house. When she was asked about the part of her statement concerning being driven home by the defendant at about three o’clock she was asked whether she understood what 3.30am is. She said she didn’t know. She said she didn’t know if it was the afternoon, morning or night time. She said she didn’t learn the times in English; she said the times given in her statement were not true. She said she got the time 3.30 by first talking to another girl. She said she understood the sun came up at about six. She said she didn’t tell the police 6.00am because she didn’t know too much English. She said she couldn’t remember if police read her statement to her. Under questioning on the voir dire from Mr Maley she agreed she had trouble reading in English; it was her second language; that in the last year her English has improved. She said when she gave her statement her English was not all that good. She agreed the police were suggesting answers. She said it was her evidence in court that was the truth. After argument I came to the conclusion that on the whole of the evidence thus far MH should be declared a hostile witness and the prosecutor should have the right to cross-examination her.

17. When cross-examined by the prosecutor she said she couldn’t remember if she had told the defendant that she made a statement to police; she couldn’t remember if the defendant told her that a complaint about him trying to rape the complainant had been made; she said she did not speak to the defendant on any occasion since the night at Casuarina beach; she said they were no longer boyfriend and girlfriend but she was rather evasive of how she knew

she and the defendant had broken up if she hadn't spoken to him since this particular night. She said she "was liking" another guy and said that someone else rang to tell AK that she was with another man. She then said that she saw him the next day after the incident; that he came to pick her up. She said he did not tell her he was in trouble with the police but her friends told her. It is unclear on her evidence whether the defendant did ever tell her as at one point she was asked when the defendant told her and she said she couldn't remember. She said the defendant told her after her friends told her but she couldn't remember what he had said. She was asked directly whether it was dark when he dropped her off; she said "I don't think, the suns coming. The suns coming up". She was then asked "the sun was coming up, about 6.00am?" and she answered "I don't know". Under further questioning about the time issue she said "I was drunk, I was drunk, can't remember". She said her grandmother saw her coming home that morning; she did not tell the police that. She said her grandmother was getting ready for church. She said she didn't tell police because she didn't speak proper English. She said she could explain it at the time she gave evidence because her English was getting better. She said her English was not good enough to speak to police; she said she didn't know that she could ask for an interpreter. Later she said that she did speak to the defendant but that she couldn't remember if he had told her he was in trouble because of these allegations. She said in relation to the dispute over the times, she couldn't remember if someone had told her that sex between the complainant and the defendant had occurred and that happened probably before 6.00am. She said she remembered the sun coming up when she was taken home. When further examined by Mr Maley she said she wasn't wearing a watch at this time, her battery was down on her mobile phone but she did have a mobile phone. She said she knew what time it was because of her grandmother being up.

## SL

18. SL gave evidence she was twenty one years of age and knew the complainant through her cousin RL. She said she was in a relationship with BJ. She was at the complainant's home at around 9.30. She didn't drink at the complainant's home; she said she was there for twenty minutes and then picked up BJ and went back to the complainant's home. She stayed outside the complainant's home with BJ who didn't like the complainant. The defendant was with them outside talking to them for about an hour. She said that she is good friends with the defendant. She said she only went inside the house briefly for about five minutes. She left with one group to go to the beach for about an hour or an hour and a half. She said she recalled MH only having two shots. She said MH did not appear to be intoxicated. She said they converse in English and she has the impression that MH understands her. She says she has to repeat herself to MH on occasions to ensure she understands. She said at Casuarina beach MH and the defendant were cuddling; she thought they had been together for about three - four months. She recalls going back to the complainant's home and only herself and the defendant went inside, she said she used the toilet. She saw the complainant in a towel and lingerie but she can't remember how it was worn. She said when she came out she saw the defendant and MH talking at the doorway but she didn't see MH inside; she said she saw the defendant talking to the complainant at the fridge; she said she didn't pay much attention to what they were talking about but they were standing quite close. She then went back to the beach and said she was there for another hour and a half or two hours. She said the defendant was pretty drunk because he was outgoing and telling a lot of jokes and making them all laugh. She said after she had left the beach and was back at her house she did not hear any messages or the phone being answered by RL. She said the first time she was aware any complaint had been made was that afternoon when she was at RL's place and she said she was shocked and didn't believe it because she had seen the defendant leave with MH. She said she was shown the message

but she couldn't really remember the message. She thought it said something like the defendant "tried to rape me or something like that".

19. In cross-examination she said that when she observed the defendant and the complainant when she went back to the complainant's house, they weren't talking loud enough for her to hear what they were saying. She saw the defendant get into his car with MH.

**RL**

20. RL is twenty one years of age and knew the complainant and they had become friends. When asked about the day in question RL said "I can't remember back then". She said she couldn't remember going to the complainant's house at that time. She said she would have gone there with MH at around nine o'clock that night and MH is a good friend of hers. She said she and MH speak English but previously she wasn't able to speak with her well but her English has improved. She said the complainant was upset at the time because she and her boyfriend broke up a few days before and she and MH had gone to her home to cheer her up. They took the bottle of vodka. She said they were all hanging out in the house but at one time she, the complainant, the defendant and SL were in the bedroom and they were sitting on the bed talking. She said the complainant cheered up at that time. She went to the beach with the group. She said they stayed for two or three hours and were drinking at the beach. She said they went back to the complainant's house to get some beers and she (RL) drove. She said the defendant and SL went inside the complainant's house and MH was in the car with them. They went back to the beach and then she (RL) and Chris went back to the complainant's place. She said she thought the complainant was all right but then she came out and was really angry and screaming; she said the complainant was saying "you don't spend any time with me" and was screaming and really angry. RL said she was trying to calm her down. She said they left via the front door but she couldn't remember if she locked

it. She said she thought the complainant was upset over boyfriend troubles. She said she was back at SL's place and she thinks she went home at about 6.00am. She said the sun was not up by that stage. She said she didn't get a text from the complainant as she couldn't find her phone at that stage. She said she couldn't recall whether she read any text messages while at SL's place. She said the text message from the complainant was "S tried to rape me". Then she recalled a message "what do I do if he comes back?" and another one "sorry for being grumpy". She said she thought those messages were sent at around 4.00am. She said she phoned the complainant at around 7.00 or 7.30 but she was with the police and couldn't talk.

21. In cross-examination she agreed she had no independent recollection of the messages but was referring to her police statement when she said "from my statement". In re-examination I allowed the prosecutor to put parts of the statement to the RL to see if she agreed they were true but she maintained she had no independent recollection.

### **Statutory Declarations Tendered**

22. By consent BJ's statutory declaration was tendered. He indicates he was at the complainant's home for part of that night as a result of being contacted by SL. He said "everyone was fairly tanked" including the defendant and the complainant. He heard the allegation concerning the complainant and defendant at about three o'clock the next afternoon. A further statement of "Chris" was tendered who was also present for some of the evening at the complainant's home. He thought the complainant was not drinking as she had to work in the morning. He said at about midnight they were all sitting out the front of the complainant's home and she started locking up. He went with the group to the beach. He was also with the group that went back to the complainant's house to get the drinks but did not go inside. He said the defendant walked up to the house and around the back gate and came back about one minute later. He and RL went back to the complainant's house

and went to a spare bedroom but the complainant came out yelling at them as she said she had to go to work in the morning and needed some sleep. He said it was on the way home, when he was dropped off at about 5.30am RL got a text message from the complainant saying “S had tried to rape her”. He said at about lunch time on the Wednesday he went over to the defendant’s house and asked what was going on and was told by the defendant that he didn’t know what the complainant was going on with; he said the complainant asked him if he was coming back later. He also said he received a text message from RL on Thursday 13 October 2005 saying “who said that? she is fucken mental. All I know is detectives rang me asking for Steven’s last name, M is pressing charges, saying Steve tried raping her. I don’t know she’s crazy”.

**Record of Conversation – 20 October 2005 between police and the Defendant (Exhibit P4)**

23. In this record of conversation the defendant gives an exculpatory account confirming he went to the party on 11 October 2005 after he picked up his friend Chris at about nine. He said they bought two beers and went to the address at Leanyer that RL had given him. He knew the complainant was RL’s friend. He said when he and Chris arrived MH and the complainant told them to come in; he said MH was a girl “that I have sort of seen a couple of times”; he said hello to MH and the complainant and “I introduced myself cause I didn’t want to be rude”. He spoke of the attendance of RL and SL. He spoke also of BJ attending; he said he would have been in the house drinking for a couple of hours.
24. He said he didn’t remember what the complainant was wearing on that night as “I wasn’t taking any notice of her, just said hello to her”. He said he didn’t have much to do with her during the whole night. He said he had three or four beers in the first hour and probably one every hour after that. He said that when he went outside the complainant’s house she didn’t go outside and she was not being very sociable. He also said she was lonely

that night. He said outside they were all “paired up” and they all decided to go to Casuarina beach. He left his car at the complainant’s home and RL drove them to Casuarina beach. He said they had a couple of drinks and were talking for a couple of hours; he said a couple of them wanted to go home and RL drove them back to the complainant’s home. He said MH came with him in the car and he said they went back to the complainant’s home briefly to get some beers; that he and SL went in and he got some beers from the fridge and SL used the bathroom; he said the complainant came to answer the door and she asked him if he could go back to visit her and he told her “no that I couldn’t cause I was with Maria”. He said they had been at the beach for about an hour before they went back to the complainant’s to get the beers but he couldn’t be sure and that was between 1.00am and 2.00am. He said the complainant asked him if he could go back; he told her that he couldn’t because he was with Maria and also because he didn’t really take much interest in her. He said he was pretty sure the complainant answered the door in the towel. He said he and MH went back to Casuarina beach and spoke for a couple of hours, did some other things and had sex. He said they were at the beach for two more hours and after that and they were both pretty tired. He drove her back to her house in Fannie Bay and he was tired and just went home for sleep. He said it was probably 6.30 or 7 o’clock and it was starting to get daylight by the time he dropped MH off. He said his parents saw him come home. He said he did not go back to the complainant’s house after he dropped MH home; that he had had no contact with the complainant since leaving her home earlier in that evening. He was asked about MH’s statement that said she believed she was dropped off at about 3.30am. The defendant states “nah that’s what time we got back to Emmas place to pick up the car. That’s what time we went to pick up our cars then we went to Casuarina beach”. He said it was later than 3.30. He said at one time when he was at the complainant’s home he was in the spare room with Rachel who wanted to talk to him. He said it just had a bed in it and it was just one of the rooms because he just knows it

as one of the rooms because it was the first time he had been to the house. He said RL was telling him that MH likes him and was asking him if he liked MH and he told her he did. He said he couldn't remember the subject of other conversations. He said he thought SL came in for two seconds. He denied going back to the complainant's house; denied saying things like "you've been cranky tonight some sex may make you feel better"; he denied the allegations that were put to him by police. He stated the complainant was not in the bedroom when he was in there speaking to RL.

25. The defendant gave evidence in his own case. As background evidence he explained he is a builder, working in his father's business, having lived in Darwin all of his life. He completed his schooling and training in Darwin. He said of the 11<sup>th</sup> and 12<sup>th</sup> October 2005 that RL, SL and MH were all at the complainant's place, (who he said he didn't know) but he confirmed that he had received a call to join them; he picked up two six packs with his friend Chris on the way and got there just after 10.00pm. He said they put their drinks in the freezer and had a conversation with MH and the complainant. He said his relationship with MH was a casual relationship and they had "hooked up a couple of times and that was all it was". He said he had a stubby or two when he first arrived and he made observations about some of the other drinking, noting that the girls were drinking vodka.
26. He said after BJ arrived they all decided to go to Casuarina beach for some drinks and they were there for an hour or an hour and a half and they went back to the complainants to obtain some of the drinks that they had left. The complainant opened the door and he said that he and SL said "sorry to interrupt you. Can we grab our drinks from the fridge or the freezer" and she had said "yeah, no worries". He said both he and SL went inside briefly and the complainant said "thanks for doing the dishes early before you left"; he said that she asked him to go back to her house again and he declined. He said she had said "if you are not doing anything later", he could come back and visit. He said his response was that he was spending the night with

MH and he probably wouldn't be going back there. He said the complainant was not happy about it and she put her head down and they all said goodnight. He said she was wearing a towel. He said he was just a bit affected by alcohol, not drunk. He said he is not a drinker and he only drank because the girls invited him to have a couple of drinks. When they went back down to the beach he said they were there for another hour or two and he said he had another one or two beers. He said MH and he went back to Casuarina beach; they spoke for a while and had sex. He said he was at the beach with MH for two hours. He said he left the beach with MH when daylight was breaking at about 6.00am or 6.30am. He said he couldn't see exactly the sun but he could see daylight. It was early hours of the morning. He said he knows it was after six for sure that he dropped MH back at East Point. He said he had the park lights on when he drove and he didn't need his headlights. He said when he was back at the complainant's house he did go into another room because RL wanted to talk to him. He said it was one of the bedrooms. He said he didn't know whose room it was, and it could have been the complainant's room. He said he couldn't recall anyone else there. He said SL and the complainant could have come into the room for a moment. He said he couldn't recall as everyone was in and out of the house and the rooms all night. He denied the allegations that were made against him.

27. The defendant was asked if it was a complete surprise to him when police arrived at his doorstep on 20 October 2005. He said "someone may have mentioned that the police had gone to visit them or something I am not sure". He agreed that it was a surprise that the complainant had made serious allegations. He said he was shocked, he couldn't believe it. On whether anyone had told him prior to police arriving that the complainant had made the complaint he said no-one had said the complainant had made a complaint against him but Chris who was his friend had said the police had gone to visit him about that night at the complainant's and he said

something had happened at her house. He said he wasn't told it involved him. He said as far as he knew it had nothing to do with him. He was asked if he spoke to MH between the 13<sup>th</sup> October when he was with her on the beach at Casuarina beach until 20<sup>th</sup> October when the police arrived and he said he didn't think that he did. He said that he was pretty sure that he did not speak to her. He agreed that his evidence was that he did not consider himself to be in a relationship with her and had no obligations towards her. He said he could have had a relationship with someone else and it wouldn't be a problem. He said he only spent one or two nights with MH before that particular night and had only met MH a couple of months earlier. He said MH's evidence that she was his girlfriend wasn't wrong but it was her interpretation of their casual relationship. He said it became apparent he would spend another night with MH on the night in question because RL had spoken to him in the room and asked him if he wanted to see MH that night and he obliged. He said he was actually asked if he was interested in "hooking up" with MH. He said he didn't know if it was going to happen or not. He said he wasn't going to pre-empt it. He said he had MH's mobile phone number; he said he didn't know MH had been interviewed by police until after he was interviewed by police. He said RL spoke to him after he was interviewed by police. He said he couldn't remember if RL told him she had made a statement to police on 13 October 2005. He said he could not recall if MH had told him that she made a statement to police on 13 October 2005. He said he couldn't remember if RL and MH phoned him or got a message to him before he was interviewed by police. He said "if they did, it wouldn't have been about what had happened because no-one knew what was going on. The police wouldn't say what was happening to me and they just asked them about what happened on the night, what was their version of events". He then said it was possible they contacted him but he couldn't remember.

28. It was suggested to him that his friends had informed him that the complainant had made a very serious allegation against him and he answered “I don’t think that’s what they talked about. They didn’t say it was against me. If they did say anything – when I did talk to them, which I can’t remember what day it was – after or before, they said that something happened at EKT’s place. No-one said that EKT made allegations against you, that’s why I didn’t know what was going on. When the police came to visit me and ask me, I thought they were just asking me as a witness to come along and they say EKT’s making allegations against me and I was shocked. I couldn’t believe it. I didn’t know why she would make things up like this”. The defendant said he had never read any of the statements nor had a discussion with MH about evidence. He said he didn’t see MH for some months after dropping her off on that night. He said he became aware of MH’s statement about the 3.30am time through the police telling him in the record of conversation. He reiterated that the complainant had said to come back and see him if he wanted to. He also reiterated that he told her that he wouldn’t be going back because he was spending the night with MH. It was suggested to him there was nothing preventing him from going back because he had no obligation to MH and he agreed with that. He was asked whether he asked his father if he remembered seeing him after he had come home that morning and he said he didn’t tell his parents about this for a few months later. It was suggested to the defendant that if he was concerned about his reputation he would remember his friends telling him about allegations prior to being interviewed by police. He then said he wasn’t concerned about his reputation but it was his family’s name. He said RL said the complainant’s making some allegations about someone but didn’t say who.
29. He said the complainant appeared anti-social although she was social earlier in the evening. He said everyone was doing their own thing and she didn’t have any attention and had just broken up with her boyfriend. He was

challenged a deal on the description of the amount of his drinking that he gave to police. He said he had no reason to understate how much he drank. He said his evidence of the complainant saying “come back later if you want” is a true statement. He said he did not think anything of it and thought it was just being polite and it was her way of saying goodbye. He denied trying to pull the towel off the complainant. He denied saying that he didn’t want to leave because he wanted to have a quick root. He denied being intoxicated or aroused and said he had only come back to get his beers on that occasion. He said after Casuarina beach he and MH drove past town on the way to her house. He rejected the suggestion that it was not a direct way to go to East Point from Casuarina beach. He said he didn’t take Dick Ward Drive but takes Stuart Highway through town back to East Point. He said he was influenced by the speed limits. He said when he dropped MH off he didn’t go inside and he didn’t see her grandmother. He said he had no motive to go back to the complainant’s home. He said he had already had sex with MH. He said he never spoke to MH about the issue of the time he dropped her off.

### **Assessment of the Evidence**

30. In my view the complainant was a credible witness. She didn’t seem to be prone to exaggeration and a significant degree of consistency can be seen through her recent complaints and conduct. By most accounts she was sober and her level of recall tends to bear this out. It will be recalled that she tried to call RL and her ex-boyfriend AXK as well as calling her mother later in the day. I was impressed by the level of detail given by the complainant concerning the incident. Her evidence was compelling and she was not overly emotional even though it must have been a difficult subject to speak to the Court about. Her demeanour was straight forward. I didn’t have any reason to disbelieve the complainant. I must however consider all of the evidence in the case.

31. Most of the witnesses for the Prosecution tend to give descriptions of the surrounding events in a way that is sympathetic to the defendant's case. This is particularly in the case of MH who gave evidence effectively contrary to her previous statement to police that effectively gave the defendant an alibi. Although I am highly suspicious of some of the Prosecution witnesses who were present on the night and in particular in relation to MH, there is not sufficient evidence before me to find collusion or contamination between the witnesses and the defendant. I believe they may favour the defendant because most of them were primarily his friends - the witness RL and the complainant, although friends, appear to have had a significant falling out at the time. Overall I found the evidence of MH to be particularly unreliable. As has been indicated in these reasons, she was declared hostile and this allowed the prosecutor to cross-examine her. The overall effect though was that the cross-examination showed how unreliable she was. In the end it remains unclear whether she told the truth or not about the drive home at daylight. Due to the issues surrounding her lack of English skills, particularly at the time of this alleged incident, it is very difficult to make any positive findings about how she did in fact come up with the original time of 3:30am that appears in her statement. She has given evidence she didn't know the time because she didn't have a watch and her mobile phone wasn't working. I have question marks in my mind about why she remembers those sorts of details and doesn't remember other details but still it is difficult to know why she originally gave the 3:30am time. Even though I have a view that MH is unreliable, I cannot privilege the 3.30am time over the 6.00am or "daylight" time. MH also seems to have gone out on a limb saying that she entered the complainant's home with the defendant and SL when they went back to get drinks. It is possible she was quite intoxicated on this evening - that tends to further complicate her evidence.

32. This is one of these difficult situations where in terms of the actual allegation, although there were many people at the complainant's house in the early part of the evening, there was no-one else present at the time that the offences are alleged. It is an oath against oath situation. I did not find the defendant to be as impressive a witness as the complainant, however that is not a proper basis to reject his testimony. I found his lack of recall about when he first knew there was an allegation against him as somewhat lacking in credibility, however I can't rule out his explanation that he knew there was an allegation that something had happened at the complainant's house but that his friends did not tell him it was about him. I also find it hard to believe that in the circumstances the complainant asked him if he would like to come back and I note that the complainant says that the defendant said words to that effect during the alleged sexual assault. The difficulty once again is it is two people on oath. The defendant may have understated his alcohol consumption on the evening in question but that does not really take the proof process very far. The fact that there are some issues of credit around the defendant's testimony does not allow me to reject it.
33. There are some minor inconsistencies in the recent complaint evidence from the complainant, for example her evidence that she left a text message with AXK saying "I've just been attacked and I didn't know what to do" when AXK said the message was "Someone tried to touch me last night and tried to hurt me". The complainant's mother told the Court the complainant had told her someone tried to rape her but that it was someone whose name the complainant did not know. That is a more significant inconsistency. Just as these inconsistencies are not grounds for me to reject the complainant's evidence, neither are the credibility issues arising from the defendant's testimony grounds in itself for rejecting the defendant's evidence.
34. It is regrettable but perhaps understandable that there is no other evidence in this case to enlighten the Court one way or the other. For example, the complainant gave evidence about bruising to her wrists. It is difficult to

know whether it could actually be seen at the time of the investigation; however there is no medical evidence confirming that injury. There is no evidence concerning the state of her pyjama pants and whether on inspection there was any damage to them after they were allegedly forcibly pulled down. There is no biological evidence produced that is alleged to be from the defendant – I do not know to what extent the bed clothes and pyjamas were examined. The defendant had admitted, of course, to being on a bed in the house (that was the complainant’s bed) so it is difficult to know whether presence of his DNA on the bed would have assisted in the proof process – it might be expected to be on the complainant’s pyjamas. The complainant gave evidence that she screamed during the resistance to the alleged attack. It is unknown whether Police made enquiries with neighbours or other persons in the vicinity but there was no evidence of that brought to the Court. There was no evidence from SL that supports the complainant’s version of events when SL and the defendant went back to the house to get some drinks. It may be that the prosecution witnesses see things in a particular light given their association with the defendant. There was also evidence that the complainant scratched the defendant’s chest but no separate evidence of that scratch or injury has been brought forward. When MH gave evidence in August she referred to her grandmother being present when she was dropped home. There was an indication from the prosecutor then that enquiries might be made during the adjournment but there was no evidence forthcoming about that matter. It is not a situation I would be prepared to draw an inference against the prosecution because if those enquiries were just being made now, it is conceivable that grandmother wouldn’t remember the morning of a particular day over a year ago.

35. The principle is of course that the prosecution must prove its case beyond reasonable doubt. As is well known and is acknowledged in this case this can be very difficult when it is primarily an oath against oath situation. It is an error to direct myself in terms of the question of “who is to be believed?”

It is not proper for me to ask myself , “why would the complainant make this up?”. It is not proper for me to reason that the Defendant has an obvious motive to lie because he is the accused. It is an error to attempt to simply try to choose “who’s telling the truth”. That is all a wrong approach. See *R v Calides* (1983) 34 SASR 355 at 358:

“ “*Here are two opposing bodies of evidence; they can’t both be true. I suppose we have to decide who’s telling the truth*”. That, I repeat is a perfectly natural and almost inevitable approach to begin with, at least for the man in the street. That may be a perfectly practical start, but, unfortunately, in my opinion, it suffers badly from a lack of proper guidance from the principles relating to onus and standard of proof. It has been said again and again in this court, and in the cases to which I invited counsel’s attention, which I do not propose to repeat, that where you have two opposing bodies of evidence on matters central to the case which will almost certainly lead, if properly considered and weighed, to a resolution of the case, it is wrong to treat them with the comment, “It is for you to decide where the truth lies”.

The onus of proof and the standard of proof must be correctly applied. It is not just for the jury to decide where the truth lies if that means, and it could well mean to a jury, that is for them to say whether there is some material which could give them an inclination of opinion in favour of one side or the other. It would be even worse if the jury were left with the impression that it was their task to decide, and to find, whether there is some material for providing a basis for an inclination of opinion one way or the other.”

36. Similarly, Tilmouth’s *Trial Directions* cites such directions as “you have to decide which evidence you accept in this case” and “you are the people who make the decision whether he is guilty or innocent” are misdirections. In this situation even if I prefer the evidence of the complainant over the defendant, that is not enough for me to find these charges proven beyond reasonable doubt. I have to be clear on a reason or reasons to reject the defendant’s testimony and if I disbelieve his testimony it cannot be for the reason that I prefer the complainant. In summary, although I find there are some areas of credibility that are lacking in relation to the defendant, it is not enough to reject his testimony. That being the case and there being no

other evidence supportive of the prosecution case, I must find there is a reasonable doubt and dismiss the counts.

Dated this 11<sup>th</sup> day of December 2006.

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**Jenny Blokland**  
CHIEF MAGISTRATE