

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Al-Rawi*, 2019 NSPC 37

Date: 20190904

Docket: 2866665

Registry: Halifax

BETWEEN:

HER MAJESTY THE QUEEN

v.

BASSAM AL-RAWI

Restriction on Publication:

s. 486.4: Bans under this section direct that any information that will likely identify the complainant shall not be published in any document or broadcast or transmitted in any way.

Editorial Notice: The electronic version of this judgment has been modified to remove identifying information.

Judge: The Honourable Judge Ann Marie Simmons

Heard: January 7, 8, 9, 10, 11, 2019
April 15, 16, 17, 18, 2019
May 23, 30, 31, 2019

Location: Halifax, Nova Scotia

Oral Decision: September 4, 2019

Written Decision: September 19, 2019

Charge: Section 271 of the Criminal Code

Counsel: Carla Ball and Jennifer A. MacLellan, QC, for the Crown
Ian Hutchison, for the Defence

BY THE COURT:

INTRODUCTION

[1] Bassam Al-Rawi is charged that he did, on May 23, 2015, commit the offence of sexual assault on the person of Ms. L.W., an offence contrary to s. 271 of the *Criminal Code*. The offence is alleged to have occurred during the early morning hours, in the back seat of a taxicab operated by Mr. Al-Rawi. Police came upon the taxicab stopped on Atlantic Street in the south end of Halifax. Ms. L.W. was found in the back seat, partially naked, and meaningfully impaired by the consumption of alcohol. Mr. Al-Rawi was immediately arrested for the offence of sexual assault.

[2] Over four years have passed since that moment in time. Much has transpired, including a prior trial, an appeal resulting in an order for a new trial, and substantial public interest in these proceedings. Today, following ten days of evidence heard between January and May of this year, I will render my decision. Given the substantial public interest in these proceedings, it may be helpful for me to be clear that my decision is based solely upon the evidence called during the course of this trial.

[3] Briefly, the theory of the Crown is that Mr. Al-Rawi drove his taxi to a secluded location and committed a sexual assault upon Ms. L.W. who was at the time incapacitated by alcohol to the extent that she was ‘unconscious’. While in that state, it is alleged that Mr. Al-Rawi removed her jeans and underwear, thereby committing a sexual assault. Further, the Crown alleges that Mr. Al-Rawi touched Ms. L.W. with his mouth in sexualized circumstances. Ms. L.W. has no memory of the events. The Crown argues that whatever form of sexual assault occurred,

Ms. L.W. did not have the capacity to consent to sexual activity. In the alternative the Crown urges me to find that the evidence supports the conclusion that Mr. Al-Rawi attempted to commit a sexual assault.

[4] Mr. Al-Rawi chose to testify in his own defence. He recounted the events of May 23, 2015 in some detail. He readily acknowledges that Ms. L.W. was intoxicated, emotionally upset and behaving in a way which demonstrated the very substantial impact of alcohol on her conduct. He steadfastly denies that he had any sexual contact with Ms. L.W. He described erratic behaviour on her part and testified that Ms. L.W. removed her own clothing. For what reason, he cannot say, but not as a result of any sexual interaction between he and Ms. L.W. To be clear, the theory of the defence rests squarely on the argument that the Crown has failed to prove the *actus reus* of the offence beyond a reasonable doubt.

THE ELEMENTS OF THE OFFENCE OF SEXUAL ASSAULT

[5] The essential elements of the offence of sexual assault were clearly defined by the Supreme Court of Canada's 1999 decision in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

23 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.

...

25 The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of

the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 SCR 333, and *R. v. Chase*, 1987 CanLII 23 (SCC), [1987] 2 SCR 293.

26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 1996 CanLII 1237 (ON CA), 106 CCC (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd 1997 CanLII 368 (SCC), [1997] 1 SCR 304, *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 SCR 836, at p. 850, *per* L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

[6] In *R. v. Al-Rawi*, 2018 NSCA 10, the Nova Scotia Court of Appeal set out the applicable law with respect to the *mens rea* element of the offence and, specifically, with respect to the question of capacity to consent:

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

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

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

[7] Further, as the Supreme Court of Canada made clear in the recent decision in *R. v. Barton*, 2019 SCC 33, (at para 90) relying on the Court's earlier pronouncement in *Ewanchuk*, for the purposes of the *mens rea*, consent means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused".

ESSENTIAL LEGAL PRINCIPLES

[8] Before I commence my review of the evidence, it is helpful to remind ourselves of the fundamental principles relevant to any trial. Every person charged with an offence is presumed to be innocent, unless, and until, the Crown proves guilt beyond a reasonable doubt. The burden rests with the Crown. There is no burden on Mr. Al-Rawi to prove that he is innocent.

[9] In *R. v. Lifchus*, [1997] 3 SCR 320, the Supreme Court of Canada explained the components of the phrase proof ‘beyond a reasonable doubt’. I am guided by this decision, including the following aspects of the Court’s direction.

[10] A reasonable doubt is not an imaginary or frivolous doubt. It is not a doubt based upon sympathy for or prejudice against anyone involved in this trial. It is a doubt that logically arises from the evidence, or the absence of evidence.

[11] I must decide, taking into consideration the evidence as a whole, whether the Crown has proven Mr. Al-Rawi’s guilt beyond a reasonable doubt. Proof beyond a reasonable doubt does not involve proof to an absolute certainty and should not be equated with proof beyond any doubt. Equally, more is required than proof that the accused is probably guilty. In such a case the Court must give the benefit of the doubt to Mr. Al-Rawi.

[12] As I said, Mr. Al-Rawi has chosen to testify in his own defence. His evidence is a complete denial of the allegations of any sexual interaction with Ms. L.W. Accordingly, I am guided by the Supreme Court of Canada’s direction in *R. v. W.D.*, [1991] 1 SCR 742.

[13] I must determine whether the evidence, arising principally, but not solely, from the testimony of Mr. Al-Rawi, is capable of preventing the Crown from proving the offence of sexual assault beyond a reasonable doubt. Put another way, the evidence before me which is inconsistent with guilt may, if I accept it as true, result in acquittal, OR, it may leave me unable to resolve the conflicting evidence and cause me to conclude that I am left with a reasonable doubt as to the guilt of the accused.

[14] However, even if I entirely reject Mr. Al-Rawi's evidence, I must then assess the remaining admissible evidence in order to determine whether the Crown has proven the offence beyond a reasonable doubt.

[15] The task of assessing evidence is not one which should devolve to a credibility contest. It is not a comparative exercise. I instruct myself not to simply decide whether I prefer the defence evidence or the Crown evidence. I must carefully analyse all of the admissible evidence and draw conclusions as to what evidence I accept and what evidence I do not accept. Then, in the context of the whole, determine whether I have a reasonable doubt as to an essential element of the offence charged.

[16] Assessing the *viva voce* evidence of the witnesses who were called during this trial requires that I consider both credibility and reliability. Credibility refers to truthfulness or veracity. Reliability refers to the witnesses' ability to accurately recall and recount their observations and interactions with others. Civilian, police and expert evidence was adduced at trial. With the exception of the two expert witnesses, the passage of time has, as one would expect, had an impact upon the recollection of virtually all the witnesses. This reality may impact the reliability of

a witness' testimony and the weight I should give to the evidence. I may accept some, all or none of the testimony given by a witness. I must assess all of the evidence and consider that which may tend to support or undermine the reliability, or credibility of each witness' testimony.

[17] Outside the self-evident fact that the events giving rise to this prosecution occurred just short of four years before trial, there is little challenge as to the reliability of the evidence tendered. The only exception is the consumption of alcohol by certain of the witnesses. From the defence perspective there is little challenge as to the credibility of the witnesses called by the Crown. However, from the Crown perspective the question of credibility looms large. The Crown argues that I should reject Mr. Al-Rawi's evidence as incredible and implausible.

[18] The jurisprudence provides me guidance in terms of the factors I should consider in making findings of credibility. For instance, the oft-cited case of *Faryna v. Chorny*, [1952] 2 DLR 354 (B.C.C.A.) at paras. 9 and 10) instructs that I should consider opportunities for knowledge, powers of observation, judgment, memory, and the ability to describe clearly what has been seen and heard.

[19] I am also guided by the insights of Justice Paciocco in his 2017 article *Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment* ((2017) 22 Cdn Criminal LR, 31). In particular, the discussion concerning assessment of the indicia of credibility in terms of the evidentiary content of a witness' evidence. I am mindful of the following considerations in my assessment of the evidence tendered on this trial: Is the testimony of the witness plausible, or does it lack an air of reality? Is there admissible evidence that materially supports or contradicts the testimony of the witness? Is the evidence "externally consistent" in the sense that

it fits with other evidence in the case? Are there “internal inconsistencies” that, by their nature, could reasonably be attributed to dishonesty? Finally, was the evidence presented in a “balanced way” or was the evidence presented strategically?

CIRCUMSTANTIAL EVIDENCE

[20] The Crown’s case relies upon both direct and circumstantial evidence. Circumstantial evidence is defined as any item of evidence, whether testimonial or real, other than the evidence of an eyewitness to a material fact. It is any fact from the existence of which I may infer the existence of a fact in issue. It is critical that I distinguish between inference and speculation, as the latter is impermissible. In simplistic terms, an inference is a deduction of fact that may logically and reasonably be drawn from another proven fact(s).

[21] The Supreme Court of Canada’s decision in *R. v. Villaroman*, [2016] 1 SCR 1000, is the leading authority in this area of the law. The decision holds that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits. The Crown’s heavy reliance upon circumstantial evidence in this case causes me to caution myself against the risk of “filling in the blanks” by too quickly overlooking reasonable alternative inferences, that is, inferences other than guilt.

[22] In *Villaroman*, the Court settled the question as to whether an inference must be based on proven facts. The decision holds that inferences consistent with innocence do not have to arise from proven facts. To do otherwise wrongly puts

an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence.

[23] Further, *Villaroman* instructs me that in order to draw an inference, it must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. Put another way, I must consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. It may be that the Crown will be required to negate a reasonable possibility in order to prove an essential element of the offence, however, the Crown is not required to negate every possible conjecture no matter how irrational or fanciful which might be inconsistent with the innocence of the accused. Other plausible theories must be based on logic and experience applied to the evidence or the absence of evidence, and not on speculation.

[24] Writing for the Court, Justice Cromwell framed the very difficult question before me in this way (at para. 38): “whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty”?

[25] I recognize that I am not to assess each piece of evidence individually on a standard of proof beyond a reasonable doubt. (*R. v. Al-Rawi, supra*, at para. 73 citing *R. v. Morin*, [1988] 2 SCR 345). My task is to take into consideration all of the evidence, direct and circumstantial, relevant to each element of the offence.

THE EVIDENCE

[26] In assessing the evidence as I must, I find it helpful to first consider the evidence called by the Crown as a means of assessing the defence case and

determining whether the Crown has proven the offence beyond a reasonable doubt. I will also consider the content of Exhibit 31, Admissions made between Crown and Defence, in relation to various issues.

MS. L.W.'S ACTIVITY THE EVENING OF MAY 22, 2015, PRIOR TO ENTERING THE TAXI

[27] Ms. L.W. was 26 years of age in May of 2015. In 2011 she completed a bachelor's degree at Saint Mary's University. She has held a responsible position with a financial administration company in Halifax for over seven years. In May of 2015 she lived with her then long-time best friend, Ms. L.I., at an address not far from the Armdale Rotary in Halifax. They had moved to that address in October of 2014.

[28] During the first two years of her university education Ms. L.W. lived on campus in residence in south end Halifax. During the third and fourth years of her studies at Saint Mary's she lived at two different places off campus. She lived at three other Halifax addresses before moving with Ms. L.I to the address near the Rotary.

[29] On May 22, 2015, Ms. L.W. and Ms. L.I attended a charity event at Keith's Brewery. The event was coordinated by Mr. K.O. who was then Ms. L.I.'s fairly recent boyfriend, now husband. The two women met up at home after work and made their way to the event. Ms. L.W. was running late, got ready quickly and left with Ms. L.I who drove to the event. Due to the fact that she was in a hurry, Ms. L.W. did not eat supper that night.

[30] Ms. L.W. testified that five beverages were part of the ticket cost. She recalls that between 8:00 and 10:00 p.m., she drank five tap beer, served in a regular sized, likely pint, glass. She had nothing to eat at the event. Ms. L.W. believes that she left not long after 10:00 p.m. with Ms. L.I, Mr. K.O., and a few of his friends. They walked to the Midtown Tavern, which is known as Boomers in the evening hours. The walk to Boomers was by a direct route, meaning they likely arrived at 10:20 p.m. Ms. L.W. recalls that during the walk to Boomers she felt quite intoxicated.

[31] Ms. L.W. testified that her memory becomes hazy at the point in the evening that she arrived at Boomers. She believes that they entered and ordered drinks immediately. Her overall memory of being at Boomers is that she drank two tequila shots, a mixed drink containing vodka and likely cranberry juice.

[32] Ms. L.W. has very little memory of the events of the evening following her arrival at Boomers. She felt that she became intoxicated fairly quickly, as a result of not having eaten any food before, or during, the evening. To be clear, she has no memory of interacting with staff at Boomers, being outside the bar with Ms. L.I or Mr. K.O. , or being in the taxi with Mr. Al-Rawi. Her next memory is of interacting with a uniformed female police officer. She recalls being in the back of an ambulance and interacting with staff at the hospital, including signing a consent form, and that her mother came to the hospital with a change of clothes. She described feeling emotionally numb as the physical examination occurred at the hospital.

[33] Ms. L.W. testified that in 2015 she did not frequently consume alcohol. She thought the fall of 2014 was the last time she had been downtown with her friends

and consuming alcohol. In the early years of her university studies consuming alcohol was a more frequent occurrence. Ms. L.W. acknowledged that she has previously experienced memory loss after drinking.

[34] Having attended Saint Mary's University, Ms. L.W. is familiar generally with the south end of Halifax. She is not familiar with Atlantic or Brussels Streets. She did not have any friends who had lived on those streets. Ms. L.W. could not think of any reason that she would have had to visit those streets in May of 2015.

[35] Ms. L.W. was asked to discuss Exhibit 16, photocopied pictures of text messages sent and received on her iPhone just after midnight on May 22, 2015. The phone is depicted in Exhibit 3, photograph 17. The pictures were taken by a police officer, with her consent, shortly after May 23rd.

[36] There are two short conversations captured in Exhibit 16. The first is with her friend, D. Ms. L.W. used to work with D, and she made him a contact in her phone meaning that his name appears at the top of the message in the conversation. Having a contact means that she would have been able to open the phone, go to the last conversation with D and simply click on that conversation in order to type a new message. Ms. L.W. has no memory of the following exchange:

12:06am	D	The same as girls
12:32am	D	Are you ok?
12:41am	Ms. L.W.	No
12:42am	Ms. L.W.	I am not got
12:42am	D	What's up girl ?
12:52am	Ms. L.W.	Come down here
12:52am	D	Where?
12:53am	Ms. L.W.	Alehouse
12:53am	D	Oh lord lol
2:57am	D	:(?????
4:42pm	D	:(Good Morning

[37] The second conversation depicted in Exhibit 16 is a conversation with another contact, A. Ms. L.W. agreed with the suggestion put to her in cross-examination that the police may not have captured all of the conversation involved with the first message sent by A. Ms. L.W. has no memory of the following text communication with A:

Not noted	A	Because I work tomorrow. Hope you have a goodnight!
Friday, 10:52pm	Ms. L.W.	You too
12:39am	Ms. L.W.	I am so drunk nobody will let me anyway
12:41am	Ms. L.W.	Have fun
12:52am	Ms. L.W.	Can you get me to ela houseb
Saturday, 1:15pm	A	Hahah what ?!

[38] As I have said, Ms. L.W. has no recollection of hailing a taxi, or having contact or conversation with Mr. Al-Rawi in the taxi. In cross-examination she testified that she has no recollection of telling him about A. She testified that she and A were friends since high school, and in the months prior to May of 2015 they had spent some time together, on and off, as they had in prior years. Ms. L.W. agreed that on the night of May 23, 2015 one of the emotions she was feeling was sadness, attributable to A being present at the Brewery with another young lady.

[39] Ms. L.W. identified her clothing and all of her belongings found in the front of the taxi and depicted in Exhibit 3. She testified that she does not recognize either of the ball caps depicted in Exhibit 3.

[40] Ms. L.W. was asked a series of questions by Crown counsel relating to what she “would have” done or how she “would have” acted in May of 2015. Specifically: she would have not done a very good job typing on her phone when

drinking, likely rushing and misspelling things; she would have sat in the back of a taxi on the passenger side, entering from whatever side the sidewalk was on; she would never have sat in the front seat of a taxi; when using a taxi and paying by cash she would have readied herself to pay the fare by getting her money ready during the course of the trip; if travelling from downtown Halifax to her home she would have paid \$20.00 which would include the fare and tip; the \$20.00 bill seen in the exhibits would have been in her wallet; she would have carried her purse closed, not open; she would not have consented to having her clothing removed by Mr. Al-Rawi, nor would she have consented to engage in sexual activity with Mr. Al-Rawi.

[41] In cross-examination Ms. L.W. agreed that in terms of her evidence in relation to what she would have done in relation to a taxi ride, that evidence was based upon her usual practices when sober.

[42] As Ms. L.W. fairly agreed in cross-examination, the fact that she has so little memory of the events of the night of May 22nd and 23rd means that she has no recollection of what transpired between she and Ms. L.I or Mr. K.O. after leaving Boomers, nor of her emotional state during the key time period. Further, she is not able to disagree with the defence theory that she flagged down Mr. Al-Rawi's taxi near Pizza Corner, sat in the front seat wearing a New York Yankees ball cap and directed Mr. Al-Rawi to take her to the south end of Halifax. Ms. L.W. conceded that she was not in a position to recount how she was acting in terms of her emotions, nor what she did or did not say to Mr. Al-Rawi, how it was that she urinated in her pants, nor how she came to be partially naked in the rear of the taxi cab.

[43] Ms. L.W. also fairly conceded the suggestion that consuming alcohol in the quantity she had on that night would have impaired her judgement. She agreed that the quantity of alcohol she consumed that night would make her less cautious, possibly giving her liquid courage. She agreed that when under the influence of alcohol, she may behave in a way she would not if sober.

[44] Ms. L.W. was responsive to all of the questions put to her, to the best of her ability. Overall Ms. L.W.'s evidence is very limited in terms of my analysis of the critical time period after 1:00 a.m. I have no doubt that she did her best to recount what memories she possesses. I have no doubt that it would have been extremely difficult to appear in a public courtroom and give evidence as she did. My task is to consider the evidence she was able to give, assess its reliability and determine what weight I should give to her evidence taking into account all of the evidence adduced at this trial.

[45] The Crown called Ms. L.W.'s room-mate and long-time friend, Ms. L.I., as well as Ms. L.I.'s husband, Mr. K.O. Their evidence is in some senses consistent with, but in other senses inconsistent with, the evidence given by Ms. L.W. And of course, they both gave evidence concerning their observations of and interaction with Ms. L.W. in relation to a time period for which Ms. L.W. has no memory.

[46] Ms. L.I. described getting ready to attend the fundraiser at Keith's Brewery, hosted by her then boyfriend Mr. K.O. She confirmed Ms. L.W.'s evidence that she had been rushed getting ready to go out and, unlike Ms. L.I., did not eat any food. At the fundraiser Ms. L.I. consumed half a beer. She recalls that Ms. L.W. consumed two or three pint size glasses of beer. Ms. L.I. testified that she was with Ms. L.W. throughout the fundraiser and that they left the event together after

helping Mr. K.O. pack up. According to Ms. L.I., when they left the fundraiser Ms. L.W. 'wasn't drunk'.

[47] In cross-examination Ms. L.I. was asked about Ms. L.W.'s emotional state while they were at the Brewery. She testified that Ms. L.W.'s friend, A, was at the fundraiser in the company of another young lady. She described Ms. L.W. as 'nervous' but not upset.

[48] Ms. L.I., Ms. L.W., Mr. K.O., and a few of his friends left together and made their way to Boomers. Ms. L.I. observed Ms. L.W. as she walked ahead with others and had no concerns about her ability to walk. Ms. L.I. and her boyfriend made a brief stop at his office and upon arrival at Boomers, at approximately 11:00 p.m., met up with Ms. L.W. again. Ms. L.I. testified that they stayed at Boomers over an hour and during that time she had two mixed drinks, doubles. Over the same time period Ms. L.W. consumed two mixed drinks and two tequila shots. She did not see her eat any food.

[49] Some time before midnight Ms. L.I. lost track of Ms. L.W. and eventually found her outside just past the lineup to the bar. They sat by the window as Ms. L.I. tried to determine what was happening. Ms. L.W. was very upset, crying, saying that she didn't understand why she could not re-enter the bar. Ms. L.I. observed that her friend was 'drunker than she was earlier' and was able to determine that the bouncer would not permit Ms. L.W. to re-enter. As a result, Ms. L.I. went back into the bar herself, grabbed their belongings and told Mr. K.O. they needed to leave. That took about 15 minutes.

[50] At some point while Ms. L.I. and Ms. L.W. spoke outside Boomers, Ms. L.W. said that she had to use the washroom. Ms. L.I. did not see her use the washroom at any point after that conversation.

[51] When Ms. L.I. returned to Ms. L.W. outside the bar she observed her level of sobriety had changed, for the worse. She described Ms. L.W. as ‘kind of slumped over and staring off.’ She sat with Ms. L.W. while the others discussed the possibility of going to get some food. Ms. L.I. made the same suggestion to Ms. L.W. who did not agree and was persistent in saying that she wanted to continue drinking and go to a bar. Ms. L.I. described Ms. L.W.’s speech as slurred at this time. The others left and Ms. L.I. and Mr. K.O. told Ms. L.W. that they wanted to go get some food and that if she did not want to join them, they would get a cab for her to go home. Eventually they started walking along Grafton Street towards Freeman’s and the Metro Centre. At they passed Freeman’s, Ms. L.W. squatted down on the sidewalk with her back against a brick wall. As Ms. L.I. continued to try to persuade Ms. L.W. to take a cab home, Ms. L.W. became very angry with her friend. Mr. K.O. tried to intervene by speaking with Ms. L.W. himself. When he did so, Ms. L.I. stepped away as she felt that Ms. L.W.’s choice not to take a cab home was related to her upset and anger towards Ms. L.I.

[52] Not long afterwards Mr. K.O. ran across the street towards a series of taxis outside Cheers. While he did so, Ms. L.I. approached Ms. L.W. again to try to figure out why she was mad. This caused Ms. L.W. to become more angry and by the time Mr. K.O. returned, to say that there was a cab ready to take her home, Ms. L.W. had changed her mind. Ms. L.W. left her friends, walked along Grafton Street to Prince Street and turned the corner. Ms. L.W. walked away with speed, and Ms. L.I. inferred that she must have essentially run up the hill on Prince Street

because by the time she got to Prince Street Ms. L.W. was out of sight. Ms. L.I. estimates that this was about 12:40 a.m. When she last saw Ms. L.W. she was very drunk, very emotional and in her view not capable of making good decisions.

[53] Exhibit 25 is CCTV footage of Grafton Street on May 23, 2015 obtained from the video maintained by Cheers Bar. Ms. L.I. identified three people who had been with them getting into a cab on Grafton Street at 12:24:36 a.m. and at 12:25:14 a.m., she identified herself, Ms. L.W. and Mr. K.O. walking along the sidewalk towards, and past, the doors to Freeman's. Ms. L.I. described Ms. L.W. as walking slightly hunched but keeping up with them, that is, slower and not as erect as her normal pace. The place where Ms. L.W. squatted down on the sidewalk cannot be seen on the footage. However, at 12:28:44 a.m., Mr. K.O. is seen running across the street and apparently speaking with the driver of a cab. At 12:28:55 a.m. Mr. K.O. is seen running back across the street to where Ms. L.I. and Ms. L.W. were located. Ms. L.I. testified that it was shortly after this that Ms. L.W. ran off from them, to the stop sign, and turned up Prince Street.

[54] In cross-examination Ms. L.I. testified that on May 23, she planned to stay at Mr. K.O.'s home that night, and Ms. L.W. was aware of this. Mr. K.O. lived on South Street at that time, but Ms. L.I. does not think that Ms. L.W. knew where he lived.

[55] Ms. L.I. testified that Ms. L.W. is normally a friendly person. Outside Boomers she did take Ms. L.W. away from a gentleman with whom she was interacting. At that time Ms. L.W. was capable of walking, talking, and was coherent of thought. She felt that throughout the time between leaving Boomers and Ms. L.W. walking away from them, her friend understood what was being said

to her, but simply did not agree. She described Ms. L.W.'s behaviour as frustrating, and agreed she was at that time somewhat irrational and difficult to deal with.

[56] Ms. L.I. testified that Ms. L.W. was not happy with Ms. L.I.'s new relationship. Before leaving, Ms. L.W. yelled at Ms. L.I. and said to her, amongst other things, "Go and be happy by yourself." This was very much out of character and not something Ms. L.W. would have done when sober. Ms. L.I. has seen Ms. L.W. at this same level of intoxication during their days together at university, and Ms. L.W. has previously run off from her in the past, but only when she had been drinking. Further, it is not unusual for Ms. L.W. to cry after having consumed alcohol. Finally, Ms. L.I. agreed that as she saw her friend walking away from her with speed, she was not concerned about her friend's physical or mental well-being or she would have called the police.

[57] Mr. K.O. testified that he had minimal contact with Ms. L.W. and Ms. L.I. at the fundraiser. He was responsible for the event in every sense and although he interacted with them, it was not until they left the Brewery that he had sustained contact with the two. He described cleaning up after the event, leaving with the group of friends, stopping briefly with Ms. L.I. at his office en route to Boomers. He estimated their time of arrival at Boomers as 10:30 p.m. Like Ms. L.I., he recalled Ms. L.W. as not having consumed alcohol heavily at the Brewery, saying she seemed very coherent at that time.

[58] Mr. K.O. recalled that at Boomers the group of friends sat together, drank, talked and danced. Mr. K.O. likely consumed beer and a couple of rum and coke. He saw Ms. L.W. and Ms. L.I. consume mixed drinks but could not be certain what

they consumed. Between approximately 10:30 p.m. and 12:30 a.m., he observed that Ms. L.W. became quite intoxicated. By the time he saw her outside Boomers, as they were leaving, Ms. L.W. was intoxicated, her speech was slurred and slow, she was argumentative with Ms. L.I. and having some trouble walking. He thought it would be best for them to call it a night and went across the street to a line of cabs in order to ask a driver to take their friend home. The cab driver agreed, however, by the time he returned to Ms. L.W. she had become argumentative again and stormed off.

[59] Mr. K.O. commented upon a portion of the CCTV footage in Exhibit 25. He too identified Ms. L.W., Ms. L.I. and himself walking on the sidewalk along Grafton Street. He also identified himself in Exhibit 26, a still image taken from the CCTV footage at the point that he crossed the street in search of a cab at 12:28:39 a.m.

MR. AL RAWI'S ACTIVITY PRIOR TO MS. L.W. ENTERING THE TAXI

[60] Neils Jensen has worked for Bob's Taxi in an administrative capacity for 22 years. In May of 2015, Mr. Al-Rawi worked for Bob's Taxi and, on May 22nd, he was operating a car with roof light 147.

[61] When a taxi is in service the administrative system generates an 'Activity Log' recording each call taken. Exhibit 17 was tendered through Mr. Jensen. The document establishes the activity of the taxi driven by Mr. Al-Rawi between 9:08:34 p.m. on May 22 and the last fare which commenced at 1:08:56 a.m. on May 23. The Activity Log records when a call is sent to the driver through dispatch, when the driver picks up a fare who has flagged down the taxi, the start

and end time of the trip, as well as the location of the commencement of the fare. The driver uses a Mobile Data Terminal (“MDT”) in the taxi to record the commencement of a fare. When the taxi reaches the passenger’s destination the driver inputs the arrival on the MDT and the unit records ‘Drop off’. Mr. Jensen identified the MDT in Exhibit 3, photograph 9 just to the right of the steering wheel. The driver communicates with dispatch through a radio, seen in photograph 8 just to the right of the driver’s footwell. Should a driver need to communicate with dispatch, he or she would simply click the radio to speak.

[62] The last fare recorded on May 23, 2015, commenced at 1:08:56 a.m. The “from” address is recorded via GPS as 1531 Grafton Street as the location where Mr. Al-Rawi recorded picking up a passenger who was a ‘flag’. In relation to this fare, there is no “To address” recorded in the system via GPS when a trip is completed and the driver presses ‘Drop off’ on the MDT. Exhibit 17 establishes that the fare which commenced at 1:08:56 a.m. did not end as far as the MDT data is concerned. The data records the last entry as May 24, 2015, at 7:28:53 a.m.

[63] Mr. Jensen testified that a taxi driver will carry a float, that is, a certain amount of cash in order to provide change to a fare who pays in cash. He testified that the By-Laws require only that a driver be in a position to provide change for a \$20.00 bill. In his experience there are various practices in terms of the amount of cash an individual driver will carry – ranging from \$50.00 to \$100.00 or even as much as \$500.00.

THE TAXI IS LOCATED ON ATLANTIC STREET

[64] Cst. Monia Thibault is a member of Halifax Regional Police. On May 22, 2015, she was working the night shift in a general patrol capacity. She was in uniform, working alone in a patrol car. While she normally worked in Dartmouth, she was working an over-time shift commencing 6:00 p.m. on Friday, May 22. As a result of a completely unrelated investigation, coincidentally involving a taxicab, she was patrolling Atlantic Street at Brussels Street and at approximately 1:19 a.m. she came across a taxicab on Atlantic Street. The cab was facing west towards Saint Mary's University. She observed that the car was idling.

[65] The reference to 1:19 a.m. as time of arrival on scene, is contained in Cst. Thibault's notebook. She was not entirely certain when she made that notation, probably when she was in the ambulance. Cst. Thibault conceded in cross-examination that the time reference was approximate and could have been a minute or two earlier.

[66] The area where the vehicle was located is a residential area. There are houses on both sides of the street and the front doors of the houses are approximately 20 feet from the street. There is a sidewalk on the side of the road where the taxicab was located. Cst. Thibault was aware that students live in this part of Halifax. Given the time of night, the area was quiet and dark. The area is lit by streetlights and Cst. Thibault would have had her flashlight in hand as she approached the taxi. Cst. Thibault testified there was no traffic during the time that she was on scene.

[67] Cst. Thibault recalled that the taxicab, a four door Honda Civic, was not parked curbside. The vehicle was parked approximately one metre away from the

curb. In cross-examination, Cst. Thibault agreed that the position of the taxicab was different from all of the other vehicles parked on Atlantic Street. The vehicle was not hidden and was not hard to find.

[68] In direct examination Cst. Thibault was asked to mark on Exhibit 5, a map of Halifax, the nearby area she identified as the grain elevators.

[69] Cst. Thibault parked her patrol vehicle about a car length behind the taxicab and exited her vehicle to approach the driver who we now know to be Mr. Al-Rawi. Cst. Thibault did not immediately exit her vehicle. She contacted dispatch to advise that she had stopped, and to ask that she be 'mapped' as she was not familiar with the location. Given the lighting, she left the head lights of the police vehicle on as she approached the taxi. Cst. Thibault recalled that the taxi was idling but could not recall whether the lights of the taxi were on.

[70] As Cst. Thibault walked towards the cab she observed that the driver had initially been turned facing the back of the cab, and then turned around. As she approached, she took a quick look in the back window before speaking with the driver and observed a woman laying in the back seat. Cst. Thibault observed that the rear window was fogged up.

[71] The following sequence of events is critical. Cst. Thibault asked Mr. Al-Rawi for his identification. As she did so, she noticed that he was fumbling with something between his side and the centre console. After Mr. Al-Rawi turned over his identification, Cst. Thibault took another look at the passenger and then observed that she was naked from the waist down and her legs were up over the back of the seats. She told Mr. Al-Rawi to turn the car off and get out. She saw that he was fumbling with something in front of his body. She asked, what are you

doing, get the fuck out of the car. The significance of this evidence is self-evident. I will deal with the key aspects of this evidence in more detail. It is this evidence which the Crown argues supports the contention that Mr. Al-Rawi was found 'between the legs' of Ms. L.W.

[72] In direct examination Crown counsel asked Cst. Thibault to draw Ms. L.W.'s position in the taxi using a copy of photograph 15 of Exhibit 3. In red ink she drew Ms. L.W.'s calves resting on each of the front driver and passenger seats. The diagram shows two 90-degree red lines which represent the legs, that is, above and below the knee. The diagram shows the calf area of the legs extending straight ahead towards the front of the car. This became Exhibit 6. Cst. Thibault was later asked to describe the part of Ms. L.W.'s body that was touching the front seats of the vehicle. She said, "Between her ankle – it would be her calves that were on the front seats but on the insides of the headrests."

[73] After creating Exhibit 6, Cst. Thibault gave the following evidence in direct examination:

Q. How far apart were her legs?

A. Far apart enough for him to be between them.

Q. Did you see Mr. Al-Rawi between them?

A. Yes.

Q. Okay.

A. He was -- when I initially approached the cab, he was turned in his seat, facing the back of the seat, excuse me, between her legs.

Q. Okay. And he was-- okay. When he was turned in the back of his seat, can you tell the court on what part of his body was his body supported? What was -- what was -- on his body, can you describe what was supporting him?

A. I -- he -- I don't -- he was turned so he was -- his butt wasn't in his seat completely.

[74] In cross examination, this area of the evidence was explored in some detail, including the following exchange:

Q. Okay. Now, it's also correct to say that you did not physically -- you did not witness, rather, sorry, Mr. Al-Rawi physically touch [Ms. L.W.], did you?

A. No. He was between her legs when I approached the vehicle.

Q. Okay. But you did not see physical contact between Mr. Al-Rawi and [Ms. L.W.], did you?

A. He would have been touching her legs when I saw them.

Q. Okay. Okay. But outside touching to the leg, you saw no other touching to part of -- any part of her body?

A. No.

Q. And when you talk about touching to her -- touching to her legs, do you mean that his shoulder was touching her legs?

A. A part of his body where he was turned. So it could have been somewhere up here.

...

Q. Right upper arm, shoulder area?

A. Yes.

Q. Okay. So Mr. Al-Rawi's hands, where are they when you first approach the vehicle then?

A. I don't know.

Q. Okay. Is it possible that when you first approach the vehicle that Mr. Al-Rawi's hands, in fact, are actually on the gearshift and on the steering wheel?

A. When I first approached?

Q. Yes.

A. No.

Q. Okay. But you don't know where his hands were at that time?

A. No.

Q. Okay. And you say that, as you approach the vehicle, Mr. Al-Rawi was positioned so he was looking into the back of the vehicle itself?

A. Yes.

Q. Okay. And you said in testimony that his buttocks were lifted off the seat?

A. He would have been turned, so, yes, not his full buttocks would have been in the seat.

...

Q. How far are you away from the vehicle when you make that observation, please?

A. I'm standing beside the vehicle. Like...

Q. Beside the -- beside the driver's window?

A. Literally, I'm, like, at the back -- the back window, passenger -- driver's side back window, and right to the driver. It was just one fluid motion.

...

Q. And as you're walking towards the vehicle, that's when you see the driver looking into the back?

A. Yes.

Q. Turned towards the back?

A. Yes.

Q. Okay. You didn't actually physically see the person's buttocks lifted off the seat, did you?

A. No, I didn't. No.

Q. No. That's an assumption on your part?

A. Correct.

...

Q. As you're walking from your patrol vehicle towards the cab, when do you first see Mr. Al-Rawi turning his body as you've described earlier this morning - as you previously described this morning, sorry?

A. When did I?

Q. Yes.

A. I wasn't right directly at the side of the cab. It was as I walking up. So when I -- as soon as I could see inside the cab, so I...

...

A. So the car would be at an angle to me, beside -- like, on my right side as I'm walking forward, and I would be looking in through the side, back driver's side window. Does that make sense?

...

Q. Okay. And you walk towards the vehicle, you're looking into the rear passenger window?

A. Yes.

...

Q. And you see a person twisted?

A. Yes.

Q. Okay, And they're twisted whereby that their face is turned towards...

A. The back of the vehicle.

Q. The back of the vehicle. Okay. And would it be fair to say that, as you saw this person, this person isn't -- is not leaning into the back of the car, are they?

A. No.

[75] I make the following summary of this evidence:

- As Cst. Thibault walked from her police vehicle, parked about one car length away from the taxi, her ability to observe inside the vehicle would have been at least somewhat impaired by the fact that, as she says, the rear window was fogged up.
- As Cst. Thibault approached the taxi, meaning by the time she reached the taxi and was able to look in through the rear passenger window, the driver was in his seat, turned to his right, looking into the back of the taxi.
- The woman was lying with her legs up and calves over the sides of the seats beside the head rests. According to Exhibit 6, sketched by Cst. Thibault, the woman's calves rested on the side of the seats beside the head rests and the shins and feet were in a forward direction.
- The driver was still in his seat, his butt was in the seat, but because he was turned facing the rear, his butt was not in his seat completely.
- Cst. Thibault testified that the driver 'would have' been touching Ms. L.W.'s legs with a part of his body, which 'could have' been his right upper arm and shoulder area. The use of 'would have' is a term of inference or assumption, not an account of an actual observation.
- Cst. Thibault saw no other touching.
- The driver was not leaning into the back seat.

[76] Cst. Thibault testified that she saw Mr. Al-Rawi 'between her legs'. The literal meaning of the word 'between' is that Cst. Thibault saw Mr. Al-Rawi's body between the right and left calf to foot area of Ms. L.W.'s body. That is, Mr. Al-Rawi's head and shoulder area would have been on the inside of Ms. L.W.'s left leg. This raises two questions. When Mr. Al-Rawi turned around to face the front of the car and speak with Cst. Thibault, would his head or shoulder have come into contact with Ms. L.W.'s shins? As Cst. Thibault looked into the car to speak with Mr. Al-Rawi, should she have seen a portion of Ms. L.W.'s shins or feet to the right of Mr. Al-Rawi's head, neck, or right shoulder?

[77] To the extent that the Crown argues that Cst. Thibault's evidence supports a finding of fact that she saw Mr. Al-Rawi 'between her legs' in the sexualized sense of that phrase, the evidence does not bear out that statement.

[78] Cst. Thibault testified that as she approached the taxi the rear window was fogged up. Her evidence is that no other window was foggy. Logically, her ability to see through the rear window would have been somewhat reduced.

[79] When Cst. Thibault reached the driver's door she asked Mr. Al-Rawi to produce his identification and he did so. In cross-examination she testified that what she received was Mr. Al-Rawi's driver's licence. No follow up questions were asked in terms of what was done with the identification and I observe that the licence was not with the items seized and photographed by police.

[80] In cross examination, Cst. Thibault was advised that Mr. Al-Rawi would testify that as she approached his left arm was resting against the driver's side window. She said: "I can't agree or disagree. I don't remember. ... It wouldn't have been if he – because he was turned, so his left arm would have been on the

passenger side.” Further, she was advised that Mr. Al-Rawi would testify that his right hand was on the steering wheel or on the gear shift, and she was asked whether in her view it was possible that Mr. Al-Rawi was turned and his hands were still in front of him? She answered, “No ... The position that he -- I can’t imagine somebody being like this... I don’t see how that’s physically possible.” Again, the answer appears to be framed in inference.

[81] On two significant occasions, Cst. Thibault’s evidence seemed to blend observations with facts she acquired at a later time. Firstly, when Cst. Thibault asked Mr. Al-Rawi to provide identification that (a) she noticed him fumbling with something, versus (b) she noticed him fumbling with the jeans, with bright blue panties and the belt in place, trying to push them in between the console at the side of him.

[82] Secondly, after Cst. Thibault told Mr. Al-Rawi to turn the car off and get out, (a) “he was fumbling with something with his hands and I said what are you doing? Get the fuck out of the car”, versus Q: “Fumbling with?” A: “The shoes that were down ... Q: “Okay, did you actually see the shoes in Mr. Al-Rawi’s hands?” A: “No.” Cst. Thibault then explained that she “did not know what he was going for, fumbling with, his hands were fumbling with something.” To be clear, Cst. Thibault clarified in this exchange that she did not mean to suggest she saw Mr. Al-Rawi fumbling with the shoes. These are two examples of an aspect of this evidence which requires careful scrutiny.

[83] After Mr. Al-Rawi turned over his licence, Cst. Thibault took another look at the female passenger and this was when she realized that the female in the back seat of the taxicab was naked from the waist down, wearing only what was

described as a tank top which pulled up leaving her breasts partially exposed. Although Cst. Thibault said that Ms. L.W. was wearing only a tank top, she later testified that she could not remember whether Ms. L.W. was wearing a bra.

[84] Cst. Thibault observed Ms. L.W. laying on the back seat of the vehicle. Her head to her waist were lying on the seat. Her buttocks were in the space just past the seat such that her buttocks were not supported. Her legs were up over the back of the front seats such that her calves were on the seats on the inside of the head rests. During this time the woman in the back seat of the car was not moving or speaking and her eyes were closed.

[85] Cst. Thibault called for back up just before placing Mr. Al-Rawi under arrest for sexual assault. Cst. Marriott was on scene quickly. Cst. Thibault was unable to say whether she or Cst. Marriott placed the handcuffs on Mr. Al-Rawi. Cst. Marriott took custody of Mr. Al Rawi.

[86] As Mr. Al Rawi got out of the vehicle, Cst. Thibault observed that his pants were undone. She testified that the back of his pants were halfway down his back side, the zipper was undone and she could see his butt crack.

[87] In cross examination, Cst. Thibault agreed that Exhibit 1, photo 1, is a fair depiction of Mr. Al-Rawi. Specifically, “in terms of the button to the jeans being undone and the zipper being down,” she confirmed, that is what she recalls Mr. Al-Rawi’s clothing looking like when he was arrested.

[88] In cross-examination, Cst. Thibault was also asked about the length of Mr. Al-Rawi’s black jacket, which would ordinarily cover Mr. Al-Rawi’s buttocks.

She testified that the black jacket was not hanging down when she cuffed him to the rear as he turned to face the car.

[89] Cst. Thibault then went to the rear passenger door in order to deal with the woman. Once the door was opened Cst. Thibault could smell alcohol coming from the back seat and as she dealt with Ms. L.W. she could smell alcohol coming from her breath when she spoke. She observed that Ms. L.W. was 'passed out' but started to 'come to' as Cst. Thibault placed a hand on Ms. L.W.'s shoulder and shook her a little bit.

[90] She described Ms. L.W. as initially being very confused, seemingly not aware of where she was. Cst. Thibault asked for her name and Ms. L.W. told her that her name was L. Ms. L.W., realizing her state of undress, became upset and attempted to cover herself up. When asked to provide her last name and address she did so. As she interacted with Cst. Thibault, Ms. L.W. spoke in a quiet and slow manner, with a high-pitched voice that Cst. Thibault described as sounding like a little girl. Her eyes were described as glassy and bloodshot

[91] As they spoke Cst. Thibault was able to determine Ms. L.W.'s name, her complete civic address, where she had been much earlier in the evening, who she had been with and that she remembered getting picked up by a cab at Boomers. Ms. L.W. said she did not remember anything after that. Cst. Thibault called for Emergency Health Services (EHS) to attend and attempted to calm Ms. L.W. by telling her that she was okay, that she did nothing wrong.

[92] Ms. L.W. was upset and crying, and embarrassed that she was in a state of undress. Cst. Thibault permitted Ms. L.W. to reach for her pants and put them back on. Cst. Thibault observed that Ms. L.W. was having difficulty as the pants

had been inside out, so she turned them right side out and in so doing observed that the blue underwear and belt were in place on the pants and the pants were noticeably wet in the crotch area. Cst. Thibault concluded that Ms. L.W. had urinated herself.

[93] EHS arrived on scene. Cst. Thibault does not remember how Ms. L.W. got from the taxi to the ambulance. She recalls that she rode with her in the ambulance to the QEII hospital. Prior to leaving the scene, Cst. Thibault located and opened Ms. L.W.'s wallet to retrieve identification and a health card, returning the wallet to the place where she found it.

[94] Overall, Cst. Thibault was responsive to all of the questions posed to her. It was clear, and not surprising, that the passage of time had an impact on the reliability of her evidence. The challenge to her evidence did not relate to her credibility. With this in mind, I must carefully consider the weight to be given to Cst. Thibault's evidence.

[95] Cst. Jason Marriott was working in the south end when he heard Cst. Thibault advise over the air that she was with a taxi at Atlantic and Brussels. He testified that her call aired at approximately 1:20 a.m. and he responded within a minute or two as he was only a few blocks away. He arrived and parked behind Cst. Thibault's vehicle. He described the taxi as having been parked curb side 'just up from the actual intersection' of Atlantic and Brussels Streets. He described the taxi as in plain view. He confirmed Cst. Thibault's evidence that the houses on the residential street looked over Atlantic Street, and that if one were upstairs in one of these homes you would be able to see down to the street.

[96] As he approached the taxi, he saw a male exit the taxi. Cst. Thibault advised him that the male was under arrest for sexual assault. He assisted her with handcuffing the male and he performed the search incidental to arrest and an officer safety pat down search. In doing so, he observed that Mr. Al-Rawi's zipper was down two to three inches and that his pants were probably down three to four inches such that Mr. Al-Rawi's bare buttocks were exposed.

[97] In cross-examination, Cst. Marriott was asked whether he could remember the condition of Mr. Al-Rawi's black jacket. Cst. Marriott could not recall whether the zipper on the jacket was open or closed, but he conceded that it was possible that he may have opened the zipper in order to conduct the search incidental to arrest. He agreed that he would have searched the waist band of the jeans during the pat down. Cst. Marriott identified Exhibit 1, photographs 1 and 2, as being similar to the condition in which he found Mr. Al-Rawi.

[98] As he first approached the taxi, Cst. Marriott observed a set of bare-skinned legs between the front driver and passenger seats. As he looked further, he noted a female, half naked from the torso down, with her shirt pulled up towards her upper body. He described the woman's upper torso in the rear of the taxi with her head near the rear passenger door. He testified that her body was turned towards the centre console with buttocks suspended between the rear seat and the centre console, and her legs towards the front between the front driver and passenger seats. He believed that she was wearing a dark coloured T-shirt which was pulled up towards her neck. Cst. Marriott testified that he did not see any movement, nor did he hear the woman speak. He could not recall whether her eyes were open or closed.

[99] In cross-examination Cst. Marriott was provided with a copy of photograph 9 of Exhibit 3 and asked to draw the position of Ms. L.W.'s legs when he looked into the taxi. This photograph became Exhibit 9. It depicts Ms. L.W.'s legs on the console between the front driver and passenger seats.

[100] After assisting Cst. Thibault with the arrest and pat down search, Cst. Marriott took Mr. Al-Rawi back to his marked police vehicle. He placed him in the rear of the vehicle, read the standard Charter and police caution to Mr. Al-Rawi. He was present when an ambulance arrived and remained on scene with Mr. Al-Rawi until the towing company arrived to take Mr. Al-Rawi's vehicle to Halifax Regional Police lockup.

[101] Cst. Marriott testified that Mr. Al-Rawi was at all times handcuffed to the rear. Once arriving at Halifax Regional Police Headquarters, he took Mr. Al-Rawi to an interview room. He remained in control of Mr. Al-Rawi until 4:30 a.m. when D/Cst. Hewitt of the Forensic Ident team arrived. Cst. Marriott was present while D/Cst. Hewitt conducted his forensic examination and photographed Mr. Al-Rawi. Not long afterwards, officers from Major Crime arrived and Cst. Marriott's involvement ended. Throughout, in order to preserve any potential evidence, Mr. Al-Rawi was not permitted to drink or eat anything, nor was he permitted to use the washroom. On two occasions, for a few seconds each time, Cst. Marriott added a second set of handcuffs to allow Mr. Al-Rawi to move his arms and reduce the strain on his shoulders.

MS. L.W. IS TAKEN TO THE HOSPITAL

[102] Cst. Thibault testified that the ambulance trip was just a few minutes. She recalled Ms. L.W.'s emotional state continued to be 'up and down', meaning at times calm, at times crying. Her manner of speech remained the same. Ms. L.W. was awake during this trip. Ms. L.W. was brought into the hospital on a stretcher. They spoke off and on.

[103] During the time at the hospital Cst. Thibault observed that Ms. L.W. would every now and then close her eyes, rest, then wake up. Cst. Thibault became aware that Ms. L.W. urinated in her pants again while on the stretcher in a hall at the hospital. She was not certain how she learned that fact. Cst. Thibault recalled that Ms. L.W. was placed in a room and that two Sexual Assault Nurse Examiners arrived at hospital at 2:55 a.m.

[104] Ruth Campbell is a nurse who worked as a Sexual Assault Nurse Examiner for about two years commencing in April of 2014. In May of 2015 her full-time position was at the IWK, and she worked on-call as a Sexual Assault Nurse Examiner. The role of a nurse working in this capacity is to meet with individuals who report having been sexually assaulted in order to provide information as to options, and when requested, perform an examination and forensic evidence collection. Ms. Campbell described the forensic protocol used to collect evidence and turn it over to police.

[105] On May 23, 2015, Ms. Campbell was called shortly before 2:00 a.m., travelled to the QEII hospital where she met with the second on-call Sexual Assault Nurse Examiner, Annette MacDonald, before meeting with Ms. L.W. and Cst. Mews at 2:45 a.m. Between that time and approximately 6:00 a.m., Ms. L.W.

was examined, and evidence gathered. Ms. L.W.'s clothing was seized; she was physically examined from head-to-toe and blood samples were taken. No injuries were observed. The physical examination included using a forensically designed comb on the pubic hair, and swabs were taken from Ms. L.W.'s lips, vagina, anus and rectum, all of which were intended to capture DNA and/or semen present on Ms. L.W.'s body.

[106] Ms. Campbell testified that she noted Ms. L.W. to be calm, but teary-eyed at times. She recorded times in relation to the taking of samples. In relation to the blood sample she recorded the sample as having been taken at 3:50 a.m. Ms. Campbell also noted that the clothing they seized was damp. In terms of examining Ms. L.W., she confirmed that the examination was done head to toe looking for any injuries, bruising, or scratches. No injuries were noted. An alternate light source was used to examine the body in search of any biological fluids that cannot be seen by the naked eye. No other foreign material was found on Ms. L.W.'s body, meaning no fibres, loose hairs, or semen-like material.

[107] In direct examination, Ms. Campbell's evidence appeared somewhat stilted and vague. Rather than specifically accounting for the events of May 23rd, she placed great reliance upon a review she had made of certain notes and the presence of her handwriting on certain of the labels found on exhibits seized. The final question put to her in direct examination informs the tenor of her evidence. She was asked whether she had any independent recollection of Ms. L.W. on May 23, 2015. The answer was no. Having said that, there is no suggestions that the process followed by nurses Campbell and MacDonald was in any way faulty. It is simply that the evidence is very limited in terms of detail.

[108] In all of the circumstances it would seem reasonable to infer that Ms. Campbell executed her functions in accord with the standard expected of a reasonably competent nurse trained in this specialized field. What flows is that Ms. Campbell felt that Ms. L.W. was sufficiently sober and communicative to conduct the examination as described.

[109] Cst. Shelly-Lee Mews is a member of the RCMP. On May 23, 2015, she was a member of the Integrated Sexual Assault Team. She was present when nurses Campbell and MacDonald examined Ms. L.W. Cst. Mews seized the clothing, blood samples and swabs for further examination. In relation to the clothing, Cst. Mews understood that the clothing was damp and therefore would require that she alert the Ident section that the clothing would need to be dried before being stored. She subsequently met with Cst. Furlong of the Ident Section and turned the clothing over to him at 9:23 a.m. Cst. Mews did not alter or manipulate the evidence received in any way.

[110] On January 3, 2019, D/Cst. Randy Wood of the Forensic Identification Section first became involved in this matter. He was asked to photograph the clothing seized from Ms. L.W. on May 23, 2015. Those photographs are found in Exhibit 7. D/Cst. Wood received a plastic bag containing black jeans with a black belt in the belt loops. The jeans were inside out. He photographed them as received and then turned them right side out, again photographing the pants. He also photographed a front clasp bra, and a coral top, which was also inside out.

[111] On January 4, 2019, D/Cst. Wood was asked to photograph another piece of property: a pair of blue underwear. The underwear bore markings familiar to him

as those which result from RCMP lab examination. He was also asked to take more photographs of the black jeans, specifically the belt and the belt loops.

[112] Through D/Cst. Wood the Crown tendered Exhibits 11 through 14, Ms. L.W.'s clothing. The clothing had been stored in plastic bags. As he completed his work, D/Cst. Wood transferred the items to paper bags in accord with his view of best practices in storing items of dry clothing. In cross-examination D/Cst. Wood confirmed that there was no damage to the belt loops on the jeans, nor to the button or zipper on the jeans. Similarly, there was no damage to the clasp of the bra.

[113] In direct examination Ms. L.W. was asked to look at the belt. She described it as quite worn as of May 23, 2015. She recalled that the belt was worn where she would have customarily notched the belt.

MS. L.W.'S LEVEL OF IMPAIRMENT

[114] Dr. Tracy Cherlet is employed by the Royal Canadian Mounted Police as a forensic toxicologist. She is qualified to give expert evidence in four areas: the physiology of alcohol with respect to the absorption, distribution and elimination of alcohol from the body; the pharmacology of alcohol as it relates to the effects of alcohol on the human body; the retrograde and anterograde estimates of blood alcohol concentrations and the analysis of biological fluids for alcohol and drugs.

[115] Dr. Cherlet was tasked with analysis of the blood and urine samples collected from Ms. L.W. on May 23, 2015. The results of her analysis are found in Exhibit 19, her report dated December 7, 2015. Dr. Cherlet conducted a full drug analysis screen as well as blood alcohol concentration analysis. The drug screen

was negative for psychoactive drugs. The results of the urine sample in terms of blood alcohol concentration are not relied upon as the blood analysis is a more reliable measure.

[116] During the course of the trial, as is often the case, the sequence of witnesses did not unfold as predicted. Dr. Cherlet travelled to Halifax during the originally scheduled four-day trial in January, that is, in advance of the evidence of nurse Campbell as to when the blood samples were taken. Due to uncertainty as to the handwriting on the exhibit, Crown counsel framed questions to Dr. Cherlet in relation to both 3:30 and 3:50 a.m. Ruth Campbell's evidence establishes that the blood sample was taken at 3:50 a.m. I rely upon Dr. Cherlet's evidence accordingly.

[117] Dr. Cherlet testified generally as to the effects of alcohol on the human body. Alcohol is a central nervous system depressant, meaning that it slows down the activity of the brain and motor coordination. The effects of alcohol are progressive as the blood alcohol concentration rises.

[118] A low blood alcohol concentration, meaning up to 150 milligrams percent, is associated with talkativeness, sociability, euphoria, and muscle relaxation. There is deterioration in mental functioning such as judgement, attention, perception and comprehension. There is an increase in risk-taking behaviour and in self-confidence.

[119] At a blood alcohol concentration of 150 milligrams percent, the effects of alcohol become more numerous and pronounced. The signs of intoxication become apparent. The individual may display gross motor incoordination, meaning slurred speech, staggering gait, motor incoordination and emotional

disturbances. Intoxication is an advanced state of impairment such that the outward physical signs of the deteriorating effects of alcohol become apparent.

[120] A blood alcohol concentration of 250 milligrams percent is associated with severe intoxication, meaning marked muscular incoordination, an inability to stand or walk, as well as feelings of apathy and ataxia, meaning loss of motor control. There may also be exaggerated emotional states as well as incontinence or loss of consciousness.

[121] Dr. Cherlet testified that the interaction between alcohol consumption and memory deficit is complex. The term blackout refers to a period of time in which an individual cannot recall events that occurred while that individual was intoxicated. An individual who is experiencing a blackout may not have any observable signs that they are experiencing a blackout. The individual will be conscious and cognitively aware, responding appropriately to others. Outwardly they would participate in activities and conversations, but later not recall what they said or did.

[122] There are two types of blackouts, en bloc and fragmentary. An en bloc blackout refers to the fact that the individual cannot recall any events that occurred while they were intoxicated. Fragmentary blackouts refer to the fact that the individual can remember parts of an event but they are not able to recall the entire event. Fragmentary blackouts are more commonly associated with alcohol consumption than en bloc blackouts.

[123] While more commonly associated with higher blood alcohol concentration, meaning greater than 200 mgs percent, and with individuals who experience a rapidly rising blood alcohol concentration, there is no blood alcohol concentration

that can be firmly associated with a blackout occurring. It is not possible to predict when a blackout will occur.

[124] Dr. Cherlet also explained that tolerance can develop not only across a pattern of drinking alcohol, but also there is a tolerance that develops in a single drinking session, referred to as acute tolerance or the Mellanby effect.

[125] Analysis of the blood sample establishes Ms. L.W.'s blood alcohol concentration as 201 milligrams of alcohol in 100 millilitres of blood. Dr. Cherlet was asked to extrapolate that reading back to 1:19 a.m. and opine as to Ms. L.W.'s blood alcohol concentration at that time. She performed this calculation by considering the time lapse from the time the sample was taken back to 1:19 a.m. and applying the accepted elimination rate of between 10 and 20 milligrams percent per hour. Dr. Cherlet calculated Ms. L.W.'s estimated blood alcohol concentration as between 226 and 251. The calculation is based upon certain assumptions including that the peak blood alcohol concentration was achieved before 1:19 a.m. and that no alcohol was consumed between 1:19 and 3:50 a.m.

[126] A range is used to reflect the variation between 10 and 20 percent elimination rates. This range is scientifically sound and it operates independent of age, gender, race, weight or height of the individual. In other words, the range encompasses the vast majority of the human population.

[127] I have some concern that one of the underlying assumptions was not proven. The evidence clearly establishes that no alcohol was consumed after 1:19 a.m. The question relates to the issue of whether the peak blood alcohol concentration had been achieved at, or prior to, 1:19 a.m. has been established given the absence of evidence as to Ms. L.W.'s activity between 12:30 a.m. and 1:09 a.m.

[128] As a qualified expert witness, Dr. Cherlet was asked to give opinion evidence concerning a very lengthy and detailed hypothetical scenario. This is of course permissible, and so long as the foundation of the hypothetical scenario is proven in evidence, I may rely upon Dr. Cherlet's opinion as to Ms. L.W.'s level of impairment during the time she was in Mr. Al-Rawi's presence.

[129] Briefly, the hypothetical framed by Crown counsel related to Ms. L.W.'s age and size; drinking history five to six years prior to the event; lack of food and quantum of alcohol consumed; and her condition when discovered by Cst. Thibault in the taxi. Dr. Cherlet opined that the hypothetical person described by Crown counsel was severely intoxicated. Again, I have some question as to whether the underlying facts in the scenario were proven. For instance, that five beer were consumed between 8:00 p.m. and 10:00 p.m.; that the evidence establishes "unconscious" and "loss of bladder control" in the way in which Dr. Cherlet defined those terms; and the impact upon the opinion of the possibility that more alcohol was consumed between 12:30 a.m. and 1:09 a.m.

[130] Dr. Cherlet's evidence is helpful in understanding the effects of alcohol on the human body, in assessing the evidence as to Ms. L.W.'s physical and emotional condition over the course of the evening and understanding her inability to recall most of the evening. My reluctance to place unquestioned weight upon the evidence concerning the hypothetical has in my view, little consequence.

[131] Dr. Cherlet's evidence explains why it is that Ms. L.W.'s interaction with her friends was so out of character and why she does not recall that interaction, or how she came to be in the taxi. It explains the observations of others, including all of the signs of intoxication associated with readings above 150 milligrams percent.

Further, Dr. Cherlet's evidence, anchored in the results of the analysis of blood alcohol content, which I observe was not challenged, and her ability to extrapolate that reading to the critical events around 1:19 a.m., provide a basis to assess the likely state of Ms. L.W.'s physical, emotional and cognitive abilities at that time. This is relevant to my assessment of proof of the *mens rea*, but it also assists me in assessing the direct evidence in relation to Ms. L.W.'s behaviour and comportment throughout the events. Of course, this includes my assessment of Mr. Al-Rawi's evidence.

THE DNA EVIDENCE

[132] Martin Westecott is a forensic biologist who was qualified to give opinion evidence in the field of body fluid identification, DNA analysis, and the use of statistics as they apply to forensics. He is employed as a Supervisor and Forensic Biologist with Maxxam, a company used by the RCMP Forensic Lab Service to perform forensic work as the need arises. Mr. Westecott received certain exhibits seized from or in relation to Ms. L.W., and others from Mr. Al-Rawi. He was tasked with looking for body fluid, blood, semen, saliva and, if present, to have the sample(s) sent for DNA analysis. In fact, he was asked to analyze certain exhibits on three occasions – those results are contained in Exhibits 21, 22 and 23.

[133] The method by which the DNA analysis was conducted and the calculations in relation to the DNA discovered, are not in issue. It is readily understood that a DNA profile can be generated from a suitable sample of bodily fluid or biological material. Mr. Westecott offers his opinion in relation to the DNA profiles belonging to Ms. L.W. and Mr. Al-Rawi as follows:

- A known sample from Ms. L.W. was used to generate a DNA profile.
- A sample taken from the penile swab was used to develop a DNA profile of Mr. Al-Rawi. Further, a blood sample taken from Mr. Al-Rawi on January 21, 2016, confirmed the former as Mr. Al-Rawi's DNA.
- Ms. L.W.'s underwear were examined for the presence of semen – none identified.
- Swabs taken from the sexual assault kit, specifically the oral swab, vaginal swab and a rectal swab were examined for the presence of semen – none identified.
- The swabs taken from Mr. Al-Rawi's right and left fingers contain DNA profiles from at least three and four individuals respectively. These complex mixtures of DNA are not suitable for comparison purposes. Speaking plainly, Mr. Westecott cannot say whether any of the DNA profiles from the swabs are from Ms. L.W.
- The swab taken from the area around Mr. Al-Rawi's lips generated DNA profiles from Mr. Al-Rawi and Ms. L.W. There was approximately two times more female DNA than male DNA. The probability of randomly selecting an individual from the Caucasian population who is unrelated to Ms. L.W. is estimated to be 1 in 210 billion.

[134] In cross-examination Mr. Westecott was asked to clarify the latter finding. He testified that his findings establish the presence of the DNA profile only. He cannot say how or when the DNA was deposited to the lip area. He cannot identify the source of the DNA, other than to say that it was not blood.

[135] Mr. Westecott testified that DNA can be found in urine. It is a difficult fluid to use for DNA purposes as there is a large volume of fluid with usually very little cellular material, barring things like blood or white blood cells from an infection. White blood cells are the source of DNA in our blood, and, when one has an infection white blood cells are present, it is easier to generate a DNA profile.

[136] Mr. Westecott also testified as to the means by which DNA may be transferred from one person to another. He explained that the transfer of an individual's DNA to an item or a person is called primary transfer. Secondary transfer occurs where a second individual comes into contact with the DNA deposited on that item or person. Transfer can occur by spitting, sneezing, coughing or kissing as saliva is a bodily fluid in which DNA can be present. DNA is also present in human tears, but in a very limited quantity. DNA is present in human skin cells. Accordingly, DNA can be transferred when shaking hands, or by hugging where two faces come in contact with each other. Further, DNA can be transferred to clothing worn by an individual or to footwear such as sandals. However, with respect to the latter he opined that the presence of dirt could negatively impact the process.

[137] In cross-examination Mr. Westecott was asked a series of questions directly relevant to Mr. Al-Rawi's testimony. If an individual kisses another person, DNA may transfer from one to the other individual by way of saliva. If the recipient were to wipe their face with the back of their hand it is possible that, with enough DNA deposited during the initial transfer, the donor DNA could spread across the recipient's face. If the donor also transferred tears to the recipient, it is possible that DNA from the tears could transfer across the recipient's face. This latter possibility is impacted by the fact that tears are not a great source of DNA. If the

donor's face rubbed against the face of the recipient during a kiss, DNA in the skin cells could transfer from donor to recipient. Finally, if the donor touches an item which is then touched by the recipient, DNA from the donor can be transferred to the recipient. The possibility of transfer in the latter scenario depends upon the quantity of DNA transferred by the donor in the first instance.

MR. AL-RAWI'S CONDITION UPON POLICE ARRIVAL

[138] On May 23, 2015, D/Cst. Marshall Hewitt was the Halifax Regional Police on-call Forensic Ident Officer called in to assist in the investigation. He arrived at headquarters at approximately 4:30 a.m. and was briefed by Cst. Marriott who led him to Mr. Al-Rawi who was alone in a locked interview room, his hands cuffed behind his back. D/Cst. Hewitt's forensic examination involved photographing Mr. Al-Rawi and conducting a forensic examination of Mr. Al-Rawi's person and clothing.

[139] Exhibit 1 contains two photographs, at pages 1 and 2, the only images of Mr. Al-Rawi on the night in question depicting his clothing and deportment. These photographs were taken at approximately 4:40 a.m. D/Cst. Hewitt also seized all of Mr. Al-Rawi's clothing – his jacket, t-shirt, jeans and underwear. Much later, on July 9, 2015, he photographed the clothing seen in Exhibit 1, at photographs 3-8.

[140] Exhibit 1, photograph 1, depicts Mr. Al-Rawi's clothing. In particular, the button of his jeans, his t-shirt which is seen tucked into his jeans, and the black sweater, or fleece, which is not zippered up and is somewhat pulled back as a result of the fact that Mr. Al-Rawi's hands are cuffed behind his back. Photograph 2 is a

close up of the waist band, button and zipper to the jeans. In direct examination, D/Cst. Hewitt testified that he did not touch Mr. Al-Rawi's clothing in advance of taking these two photographs. D/Cst. Hewitt conceded that he did not inspect Mr. Al-Rawi's clothing, rather he directed him to stand in the corner of the interview room where the full body photograph was taken. He conceded that the photograph makes it difficult to see how Mr. Al-Rawi's black jacket falls as it appears to be pulled back by his arms cuffed to the rear.

[141] Mr. Al-Rawi was not wearing a belt in his jeans. D/Cst. Hewitt testified that the jeans seemed to be holding themselves up on Mr. Al-Rawi's waist. In pulling down the jeans to take the penile swab, D/Cst. Hewitt observed that the jeans appeared to fit Mr. Al-Rawi properly, however when pressed he conceded that he could not actually remember whether he had trouble pulling them down.

[142] Given the nature of the investigation D/Cst. Hewitt determined that he should conduct a search for foreign DNA on Mr. Al-Rawi's person. He swabbed the fingers on both of Mr. Al-Rawi's hands, his penis and the area outside the lips. Mr. Al-Rawi's hands, still cuffed behind his back, were swabbed individually. Similarly, Mr. Al-Rawi remained handcuffed while the penile swab was taken. The lip swab involved applying a single swab all the way around the outer part of the lips. D/Cst. Hewitt testified that he found nothing remarkable about Mr. Al-Rawi's clothing, it was seized as a best practice. That clothing is Exhibit 2 in these proceedings.

[143] Later the same day, at approximately 3:30 p.m., D/Cst. Hewitt was called back to work in order to conduct a forensic examination of Mr. Al-Rawi's taxi which had been seized. During the course of his forensic examination of the taxi,

he took a series of 59 photographs which make up Exhibit 3. He took overall photographs of the exterior and interior of the vehicle, its condition and contents. He documented the apparatus relating to the operation of the taxi, Ms. L.W.'s belongings in the front of the car, the contents of the center console, the back seat as well as the contents of the trunk. He seized certain items as his investigation unfolded.

[144] D/Cst. Hewitt then searched the car for potential DNA evidence. To do so he used a white light and a forensic light. He located certain areas of interest on the upholstery which were cut out using a sterile scalpel so that they could be sent for forensic analysis. In addition, he seized a number of hairs from various locations in the vehicle. The items were forwarded to Cst. Sharp as lead investigator. None of this evidence was tendered at trial.

[145] On May 26, 2015, D/Cst. Hewitt photographed the contents of Mr. Al-Rawi's wallet, found with a condom in the centre console. He also photographed Mr. Al-Rawi's cell phone and the contents of an envelope, containing primarily receipts from fares, which was located in the storage compartment in the driver's door. These photographs make up Exhibit 4.

MR. AL-RAWI'S TESTIMONY

[146] Mr. Al-Rawi made the decision to testify in his own defence. He was born in Bagdad, Iraq where he attended university and was granted a degree in biomedical engineering. He is now 43 years of age. His first language is Arabic, although he speaks three other languages, including of course English. He first came to Canada on July 1, 2008 and is now a Canadian citizen. He currently

resides in Germany with his wife of three years. He operates a company with 30 employees.

[147] In May of 2015 he was living in Bedford and was attending flight school on a full-time basis, with the intention of becoming a commercial pilot. He was one semester away from graduating when he was arrested and charged with this offence.

[148] Mr. Al-Rawi obtained his taxi licence in 2009. He studied the taxi By-laws, customer service and familiarized himself with main traffic arteries, shortcuts and landmarks and attractions. In 2015 Mr. Al-Rawi owned four taxi cabs and he worked as a taxi driver on the weekends, attending school throughout the week. In accord with the By-laws, one car was registered in his name and he would rent licences from other taxi drivers and purchase vehicles as permitted by the rules. Mr. Al-Rawi demonstrated a sound knowledge of the rules and By-laws which govern the conduct of taxi drivers.

[149] Mr. Al-Rawi operated a car with Bob's Taxi, registered in Dartmouth, meaning that he was required to drive in the Dartmouth area, except on the weekends when the downtown zone is open to all cars. He testified as to his experience working weekends in downtown Halifax. As to passenger traffic, Friday nights were very busy with students attending bars and night clubs. As to vehicular traffic, he testified that in May of 2015, at midnight the traffic light system in downtown Halifax transitioned from the usual green, yellow, red sequence to blinking red lights at main intersections. This converted the intersections to the equivalent of four-way stops. Cst. Marriott largely corroborated the evidence concerning the traffic lights.

[150] In May of 2015 Mr. Al-Rawi operated a Toyota Camry. However, on May 22nd he used the Honda Civic depicted in the Exhibits as his car had mechanical problems and he used the Honda so that he could work the weekend. Mr. Al-Rawi's Toyota Camry was equipped with a video camera. The Honda Civic was not. Although Mr. Al-Rawi was challenged with the suggestion that he either intentionally used a cab without a video camera or took advantage of the absence of video camera to commit the offence, his evidence concerning the mechanical problems with his personal car is uncontradicted.

[151] Mr. Al-Rawi is six foot two inches tall and he has long legs. In May of 2015 he weighed 220 pounds. He described himself as athletic at the time, due to his training at the flight school. Mr. Al-Rawi described the Honda Civic as a good car to operate as a taxi driver given that it is an economical and reliable car. The car is not spacious. Owing to the length of his legs, Mr. Al-Rawi needed to move the driver's seat and back to be comfortable. The positioning of the seat in Exhibit 3 reflects precisely how he adjusted the seat, for his comfort during a lengthy shift, and not for any criminal purpose.

[152] Mr. Al-Rawi identified all of the equipment connected to the operation of the taxi. The dispatch radio, the Mobile Data Terminal (MDT) which transfers data between the taxi and the company and the point of sale unit. He testified that the MDT captures the precise location of the taxi and the distance between points of travel. He understood that the MDT transmitted the driver's activity and driving history to dispatch at Bob's Taxi. Specifically, the exact location of the vehicle, the route taken, the quantum of the fare and the state of the driver's availability. Accordingly, when Ms. L.W. entered his taxi and he pressed the "flagged" button on the unit, he understood that the precise path of his taxi was captured by data

available to Bob's Taxi. The logical extension is that the same data would be available to the authorities should they take steps to acquire the data.

[153] Mr. Al-Rawi identified his cell phone in Exhibit 4, photograph 8. He pointed to the GPS symbol on his phone which he believes could have been used to track the location of his phone for the previous 48 hours.

[154] Mr. Al-Rawi identified his property found in the taxi and depicted in the photographic exhibits. His wallet is seen in the centre console of the car in Exhibit 3, photograph 29. He testified that the condom in the picture was his, it had been in the wallet where he has carried a condom since he was 23 years old.

[155] Mr. Al-Rawi observed that his driver's licence, which he had in his possession that night, does not appear in the photographs taken by police, and was not returned to him when he was released from custody. He testified that he collected his driver's licence, cell phone and other documentation when he attended police headquarters a week after his release.

[156] In direct examination, Mr. Al-Rawi identified the baseball cap with the rooster or cock as his. He testified in direct examination that the New York Yankees ball hat belongs to Ms. L.W. or at least she had it when she entered the taxi.

[157] Mr. Al-Rawi described the clothing he was wearing as depicted in the single photograph taken to capture his full appearance following his arrest. He testified that he wore the black jacket zippered up such that a passenger would not be able to see his waist band. The jeans were snug fitting and as seen in the second photograph in Exhibit 1, the button to the jeans was undone. Mr. Al-Rawi-s

evidence is that he opened the button at the beginning of his shift that day, approximately 3:00 p.m. The sole purpose for doing so was to allow him to be comfortable during the long shift. Mr. Al-Rawi's evidence is that the jacket would have been closed when he exited the taxi at Cst. Thibault's direction, and that the arresting officer opened the jacket in order to conduct the search of his person, including the t-shirt and jeans. Further, he testified that the photographer asked the police officer, Cst. Marriott I assume, to tuck in the t-shirt so that he could get a clear picture of the button and the open zipper of the jeans. There is no other photograph of the jacket, but I observe that D/Cst. Hewitt conceded that the black jacket appears to be pulled back and that he did not conduct a 360 degree view of Mr. Al-Rawi, nor did he consider taking a photograph from the rear or removing the handcuffs for the purpose of taking a photograph of the clothing without the impact of hands cuffed behind the back.

[158] Mr. Al-Rawi started work at 3:00 p.m. on May 22, 2015. He recalls the weather was cloudy with some rain.

[159] Mr. Al-Rawi picked up Ms. L.W. on Grafton Street near Spring Garden Road. As Ms. L.W. got into the front seat, he turned on the meter recording that a client had flagged down the taxi. Exhibit 17 shows that Mr. Al-Rawi did so at 1:08:56 a.m. Exhibit 17 also shows the pick-up location as 5131 Grafton Street and that Mr. Al-Rawi engaged the 'flagged' button on the unit. The Activity Log also demonstrates that the "to" address is blank because the fare did not end. That is, the meter was still running when he was removed from the taxi by police.

[160] The trip began on Grafton Street near what is known as Pizza Corner. Mr. Al-Rawi testified that Ms. L.W. had been walking on Grafton Street, heading

towards Spring Garden Road, when she flagged down his taxi. When Mr. Al-Rawi first observed Ms. L.W. he took no specific notice of her physical condition or attire. She entered the taxi by the front door passenger seat and as Mr. Al-Rawi turned on the meter, signalling to dispatch that he was occupied with a fare, he asked her where she would like to go. There was no answer. At Spring Garden Road Ms. L.W. used her right hand to signal a right turn. Mr. Al-Rawi saw that she had a cell phone in her hand as she did so, that she was looking at her phone and she was crying. It was obvious to Mr. Al-Rawi that she was drunk.

[161] There was silence for about 10 to 15 seconds as the taxi travelled to Spring Garden Road and Queen Street. The intersection had a red flashing light. Mr. Al-Rawi again asked Ms. L.W. for directions. Again Ms. L.W, using her hand holding the cell phone, signalled straight ahead. To be clear, Mr. Al-Rawi had not yet been provided with a final destination. He explained that this is not uncommon, especially at night, that a client would advise of the final destination when it is reached and direct the driver to stop. Mr. Al-Rawi was not concerned about the lack of final destination, especially given that the fare was a female client.

[162] Mr. Al-Rawi asked Ms. L.W. if she had “boys drama”? She answered “Very.” Mr. Al-Rawi told her that he was there to listen if she wished to speak. Ms. L.W. told him that she had seen her friend that she loves with another woman, and that her night was ruined. Throughout, Ms. L.W. was looking at her phone, text messages he believed. Ms. L.W. told him that she had not been allowed into Freeman’s, Boomers or to go to the Alehouse. Mr. Al-Rawi asked how long she had dated the friend and Ms. L.W. answered that she had known the person for a while but had feelings for only about seven to eight months. I pause to observe that

this evidence was adduced not for the truth of its content, but for the fact it was said.

[163] The taxi reached Spring Garden Road and South Park, again a four-way flashing red light. Ms. L.W. signalled a left-hand turn. As the taxi continued along South Park Street they continued to talk. Given Ms. L.W.'s dress and physical appearance, Mr. Al-Rawi assumed that she was a university student. He testified that the clientele in that part of Halifax was 80 to 90 percent students. Accordingly, the direction of travel made some sense to him.

[164] Next the taxi reached South Park Street and South Street. Again, a four-way flashing light. Ms. L.W. motioned with her hand to continue travelling straight ahead. Mr. Al-Rawi thought they were heading to either Dalhousie or St. Mary's University. As the conversation continued, and Ms. L.W. continued to look at her cell phone, Mr. Al-Rawi said to Ms. L.W. "Don't let anybody push you down, no matter how important is that person in your life." He told her that she was a beautiful young lady, she was smart, and she understands and knows how to talk. Mr. Al-Rawi's evidence is that he did so in order to try to boost Ms. L.W.'s morale, calm her down, and assist in getting her to direct him to her intended destination.

[165] Mr. Al-Rawi testified that Ms. L.W. then leaned over, kissed his right cheek and put her hand on the back of his neck. She asked him if he was in a relationship, if he had a friend, to which he said yes. She then asked if he would ever treat his friend in such a way. He answered no, that he would never treat his girlfriend the way she was treated.

[166] The vehicle proceeded to the intersection of South Park Street and Inglis Street, where Ms. L.W. directed him to turn left. Ms. L.W. then asked Mr. Al-Rawi to stop the taxi on Inglis Street. He asked if this was where she lived. She said no, but said she needed to stop to pee. Mr. Al-Rawi explained that he could not stop on Inglis Street as there is no parking on both sides of the street. Mr. Al-Rawi drew Exhibit 32 to illustrate the point. As Ms. L.W. repeated that she needed to pee, he continued driving and stopped the car at the corner of Inglis Street and MacLean Street. Mr. Al-Rawi testified that the taxi By-laws say that a driver must stop when a passenger asks to do so.

[167] At this location, Ms. L.W. said that she did not want to pee there because there were too many lights, so he drove a little further. Ms. L.W. said “stop here” at the corner of Inglis and Brussels Streets. He did so and she got out. Doing so engaged the interior overhead light. Mr. Al-Rawi testified that before getting out, Ms. L.W. placed the things that had been on her lap, on the floor, including her purse and jacket. With the overhead light on, Mr. Al-Rawi noticed a stain on the front passenger seat. He touched it with his thumb; it was wet. Mr. Al-Rawi initially wondered whether Ms. L.W. had sat in a place that was wet as it had been raining earlier in the evening. This was immediately problematic as the condition of the taxi was now compromised and Mr. Al-Rawi felt that he had to end his shift to clean the vehicle so that it would be fit for work the next day.

[168] After about a minute Ms. L.W. returned to the car. Mr. Al-Rawi asked her not to get in the car because of the wet seat. She responded saying “Everything’s fine.” She opened the front door to get in the car and Mr. Al-Rawi asked her not to get in because of the stain on the seat. He asked her to pay the fare, which was \$4.75, collect her things and leave. She ignored the request and got back into the

front seat of the car. Ms. L.W. gave him a five-dollar bill which he placed in the envelope seen in Exhibit 3, photograph 12, along with the other receipts for the shift.

[169] Mr. Al-Rawi testified that he attempted to explain to Ms. L.W. that he could not have her sit on the seat with the damp area. Ms. L.W. then ‘jumped’ into the back seat through the two front seats. She told him not to worry, everything is okay and took the ball cap that he had been wearing. Mr. Al-Rawi resumed driving, asking Ms. L.W. for directions again. At this point she said, “we’re going to cruise around.” He understood that to mean that she wanted to go to more than one place. Mr. Al-Rawi was asked to recount what he was thinking at this point. He said that Ms. L.W. was, in his view, drunk and it was difficult to determine from what she was saying where it was that she wanted to go. He had asked her on more than one occasion to provide a destination. At this point he was thinking of returning Ms. L.W. to the place where he had picked her up – that is, Spring Garden Road and Grafton Street – and he told her that if she did not get out of the cab he would do so. He explained to her that the meter was running and the fare would continue to rise.

[170] Mr. Al-Rawi testified that Ms. L.W. was at this point sitting in the middle of the back seat, and that it was difficult to see her clearly via the rear-view mirror as its positioning was impacted by the meter as seen in Exhibit 3, photograph 49. The placement of the unit is such that the direction of the rear-view mirror cannot be changed.

[171] Mr. Al-Rawi continued to drive quite slowly along Brussels Street. As the taxi was about 300 metres from the corner of Brussels and Atlantic Street, Ms.

L.W. stretched her legs straight out between the two front seats onto the centre console. She was moving her feet and legs and as a result one of her shoes fell off in front of his seat, and the other in his lap. Mr. Al-Rawi's impression was that Ms. L.W. was not happy with the fact that he had told her he would return her to the place where he picked her up. Mr. Al-Rawi testified that he told Ms. L.W. that he could not continue to drive and would have to call the police. He explained that Ms. L.W. laughed at the suggestion, asking him what was wrong with him. He replied in kind saying that the problem was with her.

[172] As Ms. L.W. continued to move her legs Mr. Al-Rawi was not entirely sure what she was doing but he began to think she was in the process of removing her pants. The movement and position of her legs made it difficult to drive. He testified that he stopped the vehicle on Atlantic Street, just past the corner of Brussels Street, facing Young Avenue. Although he told Ms. L.W. that he was going to call police, he did not do so. He maintained that he intended to return her to her pick-up location near Pizza Corner, as there are usually police cars stationed there at that time of night. Mr. Al-Rawi said that he had been stopped for a very short period of time before he noticed that a police car had arrived.

[173] Mr. Al-Rawi testified that the taxi's position on the road made it difficult for another car to pass him. He estimated that the taxi was approximately six or seven feet from the right-hand curb. He recognized that it was a police car, saw an officer step out and approach the taxi holding a flashlight. He looked back towards Ms. L.W. and told her that there was a police car behind the taxi and she responded saying she didn't care.

[174] As the police officer approached Mr. Al-Rawi lowered his window. He testified that the police officer asked him “Are you okay?” to which he replied, “I don’t think so.” The officer said, “What the fuck is going on here?” He said, “Exactly what you are seeing.” The officer told him to turn off the fucking engine and give her the keys. Mr. Al-Rawi testified that his right foot was still on the brake pedal, the gear shift was still in drive and the roof light on. In order to take the keys from the ignition he had to put the car in park. The positioning of Ms. L.W.’s feet made that impossible, so he tried to move her feet to comply with the officer’s direction. The officer told him not to fucking touch anything. He said that he couldn’t give her the keys without touching the gear shift and asked if he could turn off the meter. The officer told him not to fucking touch anything and step out of the car. He did so. As this was happening, he moved one of Ms. L.W.’s shoes, which had been on his lap, to get it out of the way. He recalled that the officer had used her radio on her left shoulder. He believed she was asking for assistance. When asked to describe how he was feeling at that moment he replied, “to be honest with you, I was very afraid”.

[175] I observe that in cross-examination, Cst. Thibault was asked whether when she first approached the vehicle, she asked the driver if he was okay. Her answer was “Yeah. I probably did. Honestly, I don’t recall asking that. I remember asking for his ID.” She was asked whether it was likely such conversation took place. She said, “more than likely, yes.”

[176] Once out of the taxi, the officer directed him to turn his back to her and lean against the car. He was handcuffed to the rear. Mr. Al-Rawi testified that the male officer had arrived by this point and searched him. He described the officer checking his pockets, taking out the contents and then placing him in the police

SUV that was on scene. Mr. Al-Rawi testified that when he was searched, the officer wore searching gloves and inserted his hand in Mr. Al-Rawi's pocket and removed the float from his pocket. His evidence is that by putting his hand in the pocket the officer caused the pants to move down slightly.

[177] Mr. Al-Rawi's evidence is that the zipper on the black jacket seen in Exhibit 1, photograph 1, was fully closed as he stepped out of the taxi. The jacket falls below his hips. As he got out of the taxi, he did not touch the button of his pants which was open or adjust his pants by pulling them up. Although the button was undone, his evidence is that the jacket would have covered his waistband and the rear of his pants.

[178] Mr. Al-Rawi recalled that the male officer spoke to him about whether or not he wanted a lawyer. Eventually he was taken to police headquarters. He was required to stand for a very long time before the investigators eventually took photographs, DNA swabs and his clothing was seized. During this time, he asked to sit down and was told no. He told the officer that the handcuffs were causing pain in his shoulders. On two occasions he was uncuffed, for about 30 seconds and allowed to move his shoulders and hands. After his clothing was seized, Mr. Al-Rawi described being given a paper bag to wear – I take this to mean a disposable suit used by police when gathering evidence. Mr. Al-Rawi was asked to describe how he was feeling at this point and testified that he felt frustrated, depressed and he used the word 'injustice'. I observed that Mr. Al-Rawi's otherwise largely calm demeanour changed to emotional as he answered that question, and we took a short break as he composed himself.

[179] Mr. Al-Rawi remained in custody for a period of time and was interviewed by Cst. Berger later in the day. He testified that the investigators began to speak with him at 7:00 a.m. and continued, off and on, until he was released from custody at approximately 2:00 p.m. The defence conceded the voluntariness of the statement he provided. As I will discuss, Crown counsel used portions of that statement in cross-examination.

MR. AL-RAWI IS CHALLENGED IN CROSS-EXAMINATION

[180] Mr. Al-Rawi was cross-examined at length. He was the only witness whose credibility, in the sense of veracity or truthfulness, was meaningfully challenged. Virtually all of the witnesses, to a greater or lesser extent, experienced some issues in relation to their memory and the passage of time, that is, the reliability of their evidence. As cross-examination was quite lengthy, I have chosen to review some of the issues significant to the theory of the Crown and those which have a meaningful impact upon the theory of the Defence.

[181] Mr. Al-Rawi readily acknowledged that had Ms. L.W. instructed him to drive to her apartment near the Rotary, the route he took, turning left on South Park Street, would have been diametrically opposed to those instructions. Of course, it is his position that she did not do so.

[182] Mr. Al-Rawi was challenged with the suggestion that the route he took in south end Halifax was on the way to the Grainery which the Crown suggested is an isolated area in that part of town. Initially Mr. Al-Rawi had trouble understanding the reference, but once his attention was drawn to an apartment building on South Bland Street, he understood the import of the question. He disagreed with the

suggestion that the area was isolated. I am not persuaded that the taxi being near the Grainery adds to the Crown's circumstantial case.

[183] Crown counsel suggested to Mr. Al-Rawi that if he had truly been struggling to deal with Ms. L.W.'s behaviour as he described, he would have reached out for assistance before Cst. Thibault arrived on scene. He agreed that being a taxi driver can lead to finding oneself in risky situations. He also agreed with the various propositions concerning precautions a taxi driver might take to address the vulnerabilities of their profession. For instance, installing a video camera in the vehicle; recording the pick-up location by pressing 'flagged' so that dispatch will know when and where you most recently picked up a fare; obtaining the client's final destination early on in the trip; contacting dispatch or pressing the hidden panic button in the event of significant concerns, perhaps even contacting 911.

[184] Mr. Al-Rawi's uncontradicted evidence is that his personal vehicle in fact had a video camera, a recorder and a memory card installed, however, it had mechanical troubles on May 22, 2015 which led to him using the Honda Civic. He did press "flagged" when Ms. L.W. engaged his taxi. I observe that Exhibit 17 demonstrates that prior to Ms. L.W. entering the cab Mr. Al-Rawi had recorded five other fares between 11:03:57 p.m. and 1:08:56 a.m., each of which were pick-ups in the downtown Halifax area and recorded as 'flagged' fares.

[185] Mr. Al-Rawi was challenged concerning the circumstances under which it would be appropriate to contact dispatch or the Taxi Commission via 311, and that in case of concerns regarding his personal safety he would use either the panic button or call 911 directly himself. He responded to suggestions concerning when it would be appropriate to seek the assistance of others such as a hospital or a

commercial enterprise. He distinguished between dealing with a customer who is misbehaving or not listening to instructions, and a customer who poses safety concerns. His explanations were consistent and plausible. I accept his evidence that his personal safety concerns were not significant given that the client was female, and that she was directing travel to a part of town that he knew to be very safe.

[186] Mr. Al-Rawi agreed that he was relieved to see a police officer at Atlantic Street. When he saw the officer, he expected that the police would help him deal with the situation. He did not immediately jump out of the car and ask for assistance. Instead, he rolled down his window and waited to speak with the officer. Mr. Al-Rawi disagreed with the suggestion put to him that he did not get out of the vehicle as he needed time to hide Ms. L.W.'s pants, which were right beside him.

[187] It remains true that he 'could have' managed the situation he described differently. He could have interacted differently with Cst. Thibault when she first came upon his taxi. In assessing his evidence in relation to this issue, I must also take into consideration the reality of the very short time frame in which these events unfolded.

[188] Mr. Al-Rawi was cross-examined concerning his evidence that he had undone the button to his jeans for his comfort. Mr. Al-Rawi agreed that when operating a taxi, he wanted to appear put together. He said the By-law requires that clothing should be decent and long, and you should wear socks with shoes and not sandals. In terms of his evidence that the button was undone on his jeans he agreed that he owned comfortable clothes which would not have required that he

undo the button on his jeans. I am not persuaded to infer that Mr. Al-Rawi's clothing choice earlier in the day adds to the circumstantial case against him.

[189] The Crown urges that I consider the import of certain inconsistencies between Mr. Al-Rawi's trial testimony and the statement he gave to police on May 23rd as negatively impacting his credibility. The following issues were adduced in cross-examination.

[190] The Crown argues that Mr. Al-Rawi told police Ms. L.W. was sober, yet he told the court she was obviously drunk. Mr. Al-Rawi has previously dealt with many passengers who were intoxicated. In his experience, people who are drunk demonstrate several things. Some feel tired or fatigued, some emotional, some feel they are strong, more active, some looking for fun, and some looking for drama.

[191] Mr. Al-Rawi agreed with the suggestion that at 1:00 a.m. on a Friday night, that is, Saturday morning, the vast majority of people leaving the downtown area by taxi are likely drinking. He agreed that the cumulative observations of Ms. L.W.'s behaviour and comportment led him to believe that she was intoxicated, or drunk. He was challenged with a statement he made to Cst. Berger when interviewed. The transcript shows that he said, "And she was sober. She's not that drunk. She is talking. She knows what's going on."

[192] It is correct to say that as part of that answer Mr. Al-Rawi said "she was sober", however, it is not appropriate for me to consider that part of the statement out of context. It is fair to suggest that the statement in its entirety may have been an attempt to downplay Ms. L.W.'s state of intoxication when speaking with police. However, considering all components of the answer it cannot be said to be a direct contradiction of his trial testimony.

[193] The Crown suggests that Mr. Al-Rawi lied to the Court about the two ball caps. Mr. Al-Rawi testified that what he called the chicken ball cap was his and the New York Yankees ball cap was worn by Ms. L.W. When interviewed by police Mr. Al-Rawi said that he owned both of the hats. Crown counsel takes the position that Mr. Al-Rawi has lied to the court on this point. When confronted with the contradiction Mr. Al-Rawi maintained that the trial testimony is correct. It has not been established that this was a lie. It is an inconsistency, one that has not been explained. The question is what weight should be given to this issue.

[194] Mr. Al-Rawi was challenged with what Crown counsel refers to as a ‘strange question’ he put to Cst. Berger in relation to Ms. L.W. being under age. Crown counsel established that when speaking with Cst. Berger, Mr. Al-Rawi asked the officer “She is – she is under age?” With reference to other parts of the transcript, and an earlier exchange between the officer and himself, Mr. Al-Rawi explained that the question highlighted by the Crown related to an earlier exchange. That is, from his perspective, Ms. L.W. could not be under age given that she had been drinking and given what she had said to him about attending various bars. His answer was not challenged any further.

[195] Mr. Al-Rawi was also challenged with the fact that during the police interview he said to Cst. Berger, “just keep in mind, we are both humans, and this is a girl and I am a guy.” He explained that phrase in the transcript with reference to the entire part of that interaction with the officer and explained he meant that she is a girl and is on the other side, he is a guy and is sitting in custody with the police. There was no further challenge.

[196] It was also suggested in cross-examination that Mr. Al-Rawi did not tell police that Ms. L.W. got out to urinate and he told police something different concerning when Ms. L.W.'s pants came off. As these questions were posed during cross-examination there were defence objections aimed at ensuring that the entirety of the questions and answers between Cst. Berger and Mr. Al-Rawi were placed on record. When this was done it became apparent that while there might appear to be isolated sentences which were inconsistent with trial testimony, when read in context, the exchanges occurred at times during the interview when Mr. Al-Rawi exercised his right to remain silent and not answer certain questions put to him. In addition, Mr. Al-Rawi communicated with Cst. Berger in English, which is not his first language. I must be mindful that the sentence structure and phraseology he used in these transcript excerpts should be considered with that language issue in mind. In this context, I cannot place any weight on the suggestion that his answers were inconsistent on these issues.

[197] In summary, these lines of cross-examination do not have a meaningful impact upon my assessment of Mr. Al-Rawi's credibility.

[198] The Crown urges me to find that Mr. Al-Rawi has concocted certain aspects of the evidence in order to explain the evidence which is incriminating, including the DNA evidence. In this vein, Mr. Al-Rawi was challenged concerning the evidence that Ms. L.W. kissed him on the right cheek and placed her hand on his neck for a period of time; that there was a wet spot on the front passenger seat when Ms. L.W. exited the taxi to pee; that there was mutual contact with the ball caps and sandals; and that it was Ms. L.W. who gave him the \$5.00 bill found in the driver's door side pocket.

[199] Mr. Al-Rawi maintained that Ms. L.W. kissed him on the cheek and put her hand on his neck. He was consistent in his account of this part of the trip and his thinking at the time. He did concede that as a taxi driver physical contact with a passenger is not appropriate and, that he did not tell Ms. W that she should not touch him. I observe that this is the one instance where Mr. Al-Rawi's conduct was not in keeping with the By-laws or standards.

[200] The Crown urges me to reject Mr. Al-Rawi's evidence concerning the wet spot on the front passenger seat as an attempt to account for the DNA Evidence. Mr. Al-Rawi maintained that when the light came on in the cab as Ms. L.W. opened the door, and as the door didn't completely close, the interior light remained on. He testified that it did not occur to him initially that it was pee, because Ms. L.W. got out of the vehicle to do just that.

[201] Mr. Al-Rawi consistently maintained that he did not want Ms. L.W. to get back in the car because of the issue with the seat. He explained that he did his best to avoid complaints from a customer to the Taxi Commission as there would be follow up concerning operating a car that was not fit for work. This is why he said to her, "It's not about you, it's about the car." He testified that the By-laws prohibited him from locking the door or denying Ms. L.W. entry as her belongings were still in the car, and he did not have the right to touch her belongings. Mr. Al-Rawi added that he was tired by this point, that is, another reason to end the shift. I am mindful that this occurred after 1:00 a.m., and Mr. Al-Rawi had been working for 10 hours.

[202] Mr. Al-Rawi was pressed on the point that notwithstanding his position that he did not want Ms. L.W. in his taxi, he continued to drive after Ms. L.W. got back

in the vehicle. He told her she had to go back to the place where he picked her up. She ignored him, sat in the car and said, "Everything is fine."

[203] Mr. Al-Rawi maintained that Ms. L.W. moved from the front to the back seat. He testified that as she did so, she took his ball cap off his head, and when he asked for it back, she threw it forward to him. He continued driving because his intention was to return her to the location where he had picked her up. He continued along Brussels Street and then turned right on Atlantic Street. He repeated that he stopped because he could not drive any further due to the position of Ms. L.W.'s legs. I pause here to point out the significance of this location. As has been established on various maps tendered as Exhibits, turning right is plausibly a path back to Pizza Corner. Turning left would lead to the secluded area near the Grainery.

[204] I observe that Mr. Al-Rawi's account of Ms. L.W.'s behaviour is not dissimilar to the behaviour described by Ms. L.I. That is, somewhat frustrating and not making good decisions.

[205] Mr. Al-Rawi's evidence that the \$5.00 bill found in the driver door side pocket came from Ms. L.W. was challenged. He explained that his practice was to keep cash there while the customer is present, rather than expose the float in his pocket. He would put the cash with the float after the passenger had left. Crown counsel suggested that it would make more sense to have waited until the trip was complete rather than complicate things by taking \$5.00 from Ms. L.W. with the meter still running. Mr. Al-Rawi answered, "Honestly, I did not want Ms. L.W. to come back to the car." Mr. Al-Rawi testified that he believes that Ms. L.W. was

still in the front seat when she paid the \$5.00 after returning to the car, but he conceded that he does not recall where the money came from.

[206] I reject the suggestion that an experienced cab driver would have no float on his person ten hours into a shift. It defies logic that Mr. Al-Rawi would have been in possession of a single \$5.00 bill stored insecurely in the pocket of the driver's door.

[207] Other aspects of the challenge on cross-examination concerned what the Crown alleges is inappropriate behaviour on the part of Mr. Al-Rawi which suggests a purpose consistent with an intention to commit a sexual assault. Included in this line of cross-examination were suggestions that Mr. Al-Rawi flirted with Ms. L.W. in the taxi, asking personal questions; that at the time he was broken up with his girlfriend; and he had a condom at the ready.

[208] Mr. Al-Rawi agreed that when Ms. L.W. got into the taxi she was quite emotional and obviously drunk. He conceded that there could have been a number of reasons why she was crying but he asked her if she had "boys drama." Crown counsel suggested that after receiving her answer Mr. Al-Rawi would have known that Ms. L.W. was not in a committed relationship and was vulnerable. Mr. Al-Rawi adamantly disagreed with the suggestion. Given her condition at the time he felt that she was fragile and he spoke to her intending to boost her morale. He agreed that he told her that she was smart, beautiful and a nice talker. Mr. Al-Rawi consistently denied that his behaviour was flirtatious. He explained that he has had a lot of experience with intoxicated passengers. His goal is to take the client to the location they seek, and in speaking to Ms. L.W. as he did, he was trying to calm her down in order to learn where she would like to go.

[209] Mr. Al-Rawi agreed that the then ‘on and off’ relationship with his now wife was ‘off’ on May 23, 2015. I observe that Mr. Al-Rawi’s uncontradicted evidence is that he told Ms. L.W. that he did have a girlfriend.

[210] Mr. Al-Rawi was cross-examined in relation to the fact that the condom was loose in the centre console and not in his wallet where, as he testified, it was his habit to keep a condom. The photographs in Exhibit 3 show the condom outside the wallet, loose in the console. Mr. Al-Rawi theorized that when police took the documents out of his wallet to process the car and photograph the evidence that may have caused the condom to fall out. He maintained that he did not take the condom out of his wallet. He testified that he has carried a condom in his wallet since he was 23 years of age, and that the condom was a personal issue unconnected to his work as a taxi driver. To suggest that I should infer that Mr. Al-Rawi had the condom at the ready as part of a plan to use it in the commission of a sexual assault upon Ms. L.W. at that place and time, and under those circumstances, is not an inference I am prepared to draw.

[211] Mr. Al-Rawi maintained that Ms. L.W. climbed between the seats, rather than get out and use the rear passenger door to enter the back seat. It was suggested that it would have been very challenging for Ms. L.W. to get through that area because of the MDT and the size of the space. One might ask how it would be difficult for the smaller Ms. L.W. to go through the space, but the much larger Mr. Al-Rawi could have turned around and, through that same space, remove the pants from an unresponsive woman.

[212] Overall, Mr. Al-Rawi’s evidence was very detailed. He was articulate, and thorough in answering questions put to him. His evidence was lengthy, allowing

for meaningful consideration on the issue of whether it was internally consistent. Generally speaking, it was. Mr. Al-Rawi was responsive to all questions put to him, whether in direct or cross-examination. By that I mean that he answered rather than attempted to avoid or evade questions. There was very little in the way of delay or pauses as he responded to questioning. He withstood a very challenging cross-examination. He conceded suggestions where he should have. He maintained his denial of criminal conduct consistently. This is of course only one aspect of my assessment of his evidence. I must consider whether his evidence was not only internally consistent, but whether the testimony of other witnesses supports or contradicts his evidence. I have already made reference to certain aspects of the corroborative evidence.

PROOF BEYOND A REASONABLE DOUBT OF THE *MENS REA*

[213] As I said at the outset of these reasons, the position of the defence is that Mr. Al-Rawi should be found not guilty on the basis that the Crown has not proven the *actus reus* of the offence beyond a reasonable doubt. His position is that he did not engage in physical contact, and certainly not sexualized contact with Ms. L.W. I am urged to accept his evidence, or at least be left in a state of reasonable doubt by it and find him not guilty. In the alternative, the defence urges me to find that even if I reject Mr. Al-Rawi's evidence, the Crown has not proven the *actus reus* to the requisite standard. Accordingly, there was no argument made on the issue of Ms. L.W.'s capacity to consent to participate in sexual activity with Mr. Al-Rawi.

[214] I did not press Mr. Hutchison on the point, but there is no other alternative position taken by the defence. That is, the defence does not argue that even if I am

satisfied that the *actus reus* is made out, that Ms. L.W. did consent or had the capacity to consent to participate in sexual activity with Mr. Al-Rawi.

[215] Accordingly, I will deal with this element of the offence in a summary fashion and move on to the contested issue in these proceedings. Ms. L.W. consumed beer in some quantity commencing shortly after 8:00 p.m. at Keith's Brewery. She had not eaten any food that evening. Shortly after 10:00 p.m. she left with her friends and they made their way to Boomers. Between the time she arrived at Boomers, and the time her friend Ms. L.I. found her outside on the sidewalk sometime after midnight, she consumed more alcohol. It is likely that she consumed one or two mixed drinks with vodka and two shots of tequila. There is no evidence that she consumed any food during this time. In terms of alcohol consumption, there is a complete absence of evidence as to Ms. L.W.'s activities between 12:30 a.m. when she left her friends on Grafton Street and 1:09 a.m. when she entered Mr. Al-Rawi's taxi.

[216] There is no direct evidence on the issue of communicated consent. Ms. L.W. has no memory of the events. Mr. Al-Rawi's evidence is that there was no sexual contact. In the event that I am satisfied that the Crown has proven the *actus reus* of the offence beyond a reasonable doubt, the issue is whether Ms. L.W. had the capacity to consent to sexual activity with Mr. Al-Rawi.

[217] I have considered the following evidence in assessing whether the Crown has proven, beyond a reasonable doubt, that Ms. L.W. did not have the capacity to consent to sexual activity with Mr. Al-Rawi: the evidence of Ms. L.I. and Mr. K.O., concerning the events of the evening and Ms. L.W.'s behaviour and condition between midnight and 12:30 a.m.; Dr. Cherlet's evidence in relation to

the blood alcohol content and of the sample taken from Ms. L.W. at hospital; Dr. Cherlet's evidence that at 1:19 a.m. Ms. L.W.'s blood alcohol concentration was in the range of 226 to 251 mgs percent; Dr. Cherlet's evidence as to the likely effect of that blood alcohol content upon Ms. L.W.'s person and the effects associated with that BAC; Mr. Al-Rawi's evidence as to Ms. L.W.'s state between 1:09 and 1:18 a.m.; and Cst. Thibault's evidence as to Ms. L.W.'s state from 1:18 a.m. onward.

[218] It goes without saying that while Ms. L.W. was lying unresponsive, she could not have consented to sexual activity. Taking into account the evidence as a whole, between 1:09 a.m. and the moment that she became unresponsive, Mr. Al-Rawi's evidence supports a finding that Ms. L.W. would not have been in a position to appreciate the nature and quality of sexual activity in those circumstances. I am satisfied that the Crown has proven the *mens rea* element of the offence beyond a reasonable doubt, that is, Ms. L.W. did not have the capacity to consent to sexual activity in these circumstances.

PROOF BEYOND A REASONABLE DOUBT OF THE ACTUS REUS

[219] In terms of proof of the *actus reus* of the offence, the theory of the Crown is twofold. One, that Mr. Al-Rawi committed a sexual assault upon Ms. L.W. in that it was he who removed her jeans and underwear while she was in the back of the taxi. Two, that Mr. Al-Rawi committed a sexual assault upon Ms. L.W. by touching her body with his mouth. Mr. Al-Rawi denies touching the body of Ms. L.W. in either manner. I must apply the framework in *R. v. W.D.* and determine whether the Crown has proven this element of the offence beyond a reasonable doubt.

[220] I have considered the totality of the evidence on the issue of proof of the *actus reus*. The evidence is too voluminous to permit or require that I address each piece of evidence I have discussed above. I will address the essential aspects of the circumstantial evidence relied upon by the Crown to establish that it was Mr. Al-Rawi who removed Ms. L.W.'s jeans and underwear.

[221] I should state the obvious. There is no direct evidence, other than that of Mr. Al-Rawi, as to Ms. L.W.'s whereabouts and activity from just after 12:30 a.m. when she left her friends on Grafton Street and Cst. Thibault's arrival on Atlantic Street some time around 1:19 a.m. As Ms. L.W. fairly acknowledged, she is not in a position to deny Mr. Al-Rawi's account of the taxi ride.

[222] Throughout the evidence the Crown put much emphasis upon the location of the taxi on Atlantic Street as an isolated area, therefore chosen by Mr. Al-Rawi to perpetrate an assault upon Ms. L.W. The taxi was discovered after 1:00 a.m. on a darkened street in a quiet residential neighbourhood in the south end of Halifax. This is not contested by the defence. The issue is twofold. Did Mr. Al-Rawi, contrary to the instructions of Ms. L.W. to drive her home to another part of town, seek out this quiet secluded area in order to take advantage of Ms. L.W.'s vulnerable state and perpetrate this offence, or, did Mr. Al-Rawi, with no ulterior purpose at the beginning of the fare, follow the directions of his passenger to drive to that part of town and once there, take the opportunity to commit the offence?

[223] Mr. Al-Rawi's evidence on the issue of Ms. L.W.'s demeanour and directions to him were detailed and quite specific. As a professional driver at the time, he had acquired fairly detailed knowledge of the streets in the south end. He described, and was not contradicted, as to the frequency with which taxis were

engaged by students in particular who lived in the south end, attending Dalhousie or Saint Mary's University. Mr. Al-Rawi was cross-examined in detail concerning the numerous alternate routes he could have taken in order to reach Ms. L.W.'s home address. Without a doubt, turning left on South Park Street off Spring Garden Road is to travel away from any reasonable path to Ms. L.W.'s home. The issue is whether I accept Mr. Al-Rawi's evidence that he was not given those instructions.

[224] I am not persuaded that the evidence establishes Mr. Al-Rawi as having essentially confined Ms. L.W. to his cab from the corner of Spring Garden Road and South Park Street in order to drive her to a secluded location and engage in sexual activity with her, a vulnerable person meaningfully impaired by alcohol. Mr. Al-Rawi's detailed evidence as to Ms. L.W.'s comportment, directions to him, and the route taken is plausible. Ms. L.W.'s youthful appearance and attire support the reasonable assumption he made that she was a student and, accordingly, directing him to a part of town inhabited by university students.

[225] The evidence establishes that not long before Ms. L.W. entered the taxicab she had left her friends with the stated desire to continue the evening, and not to go home. Ms. L.W. was familiar with the south end of Halifax and, notwithstanding the fact that she could think of no reason that she would travel to Atlantic or Brussels Streets, there is no way to know what transpired immediately before she made the decision to flag down a cab.

[226] I am mindful of the evidence showing Ms. L.W.'s belongings in the front seats of the taxi, and I have considered the Crown's theory that Mr. Al-Rawi took Ms. L.W.'s belongings away from her, separating her from her purse and from her

phone so that she could not call for assistance. To draw this inference would be to reject Mr. Al-Rawi's explanation for the placement by Ms. L.W. of her belongings on and around the front passenger seat. His detailed evidence is that Ms. L.W. chose to sit in the front seat of the car and left her things on the seat and on the floor during the events. It is plausible that in the state she was described, Ms. L.W. chose to sit in the front seat of the taxi. Having her cell phone in hand, removing money from her wallet to pay for the fare is logical. Further, if I accept that Ms. L.W. got out of the taxi to pee, the location of her belongings makes some sense.

[227] However, even if I accept that Mr. Al-Rawi was given direction by Ms. L.W. to drive to the south end on the path described, I must consider whether, as the Crown argues in the alternative, what transpired was a purely opportunistic crime of sexual violence.

[228] By all accounts, Atlantic Street is a quiet residential area. Police did not observe any vehicular or pedestrian traffic. There are streetlights and mature trees along the street. There are homes on both sides of the street, and in the words of Cst. Marriott, from upstairs in these homes you would be able to see down to the street.

[229] The evidence concerning the precise location of the car comes from witnesses called by the Crown, as well as Mr. Al-Rawi. Cst. Thibault came upon the taxi on Atlantic Street just around the corner from Brussels Street. On her evidence the car was stopped about a metre away from the curb, and the car was running or idling. Cst. Thibault was unable to recall whether the taxi's lights, roof light or brake lights were illuminated. That is, Mr. Al-Rawi's evidence that the car

was not only running but in gear, is not contradicted and partially corroborated. In addition, there is a fire hydrant parallel to the location of the taxi.

[230] In cross-examination of Mr. Al-Rawi, the Crown challenged the defence theory that the location of the car was obvious and counter-intuitive with the idea that it was a good place to assault a passenger and remain undetected. I take the point that the taxi would have been visible to any number of people if it were stopped a metre away from the sidewalk in the downtown core, or on a street without mature trees, or on a street with illumination greater than streetlights. However, I am not persuaded to infer that the location of the taxicab was consistent with a location chosen for its seclusion. In fact, the opposite is true. Had Mr. Al-Rawi made a decision that he would drive to a location where he could perpetrate a sexual assault upon a passenger, the location where his taxi was found was not such a place. Cst. Thibault's evidence is that the taxi was not hidden, and in plain view.

[231] The Crown had adduced evidence in relation to the grain elevators situated close to the location where the taxi was discovered. I note, in keeping with this line of cross-examination, if the proposition is that travelling to the area of the Grainery would have taken Mr. Al-Rawi to an isolated area in which to commit a sexual assault, he should have turned left on Atlantic Street towards this more isolated area rather than right towards the residential area and arguably on a path back to Pizza Corner.

[232] The condition in which Ms. L.W. was discovered in the back of Mr. Al-Rawi's cab is critical. It is not contested that when police arrived, Ms. L.W. was in a state of undress. She was no longer wearing her jeans or underwear and her top

was described as mid-way across her breasts. Without question, this is a significant piece of circumstantial evidence. The jeans were described as tight-fitting, or 'skinny jeans' meaning that removing them would be more difficult than would a loose-fitting pair of jeans. The jeans were wet with urine. It is reasonable to infer that however the jeans were removed, the fact that they were wet may have made it a little more difficult to remove them. The underwear were caught up in the jeans which were found inside out. It is reasonable to infer that the jeans and underwear came off together.

[233] I have considered the evidence concerning the coral top and the fact that it was pushed up, partially exposing Ms. L.W.'s breasts. The top is described as loose-fitting. While Cst. Thibault's evidence does not account for the bra that Ms. L.W. was wearing and seized later at hospital, it seems logical to infer that Ms. L.W. was wearing the bra when Cst. Thibault dealt with her. If, as the Crown theorizes, Mr. Al-Rawi reached into the back seat to pull the jeans off Ms. L.W., given the confines of the vehicle, it is conceivable that the top would be pushed upward. But equally, if Ms. L.W. was moving her legs and feet in the back of the vehicle as Mr. Al-Rawi has described, again given the confines of the space, it is conceivable that the top would be pushed upward.

[234] Ms. L.W.'s clothing was seized at hospital. The jeans were inside out when D/Cst. Wood obtained them from police custody in January of this year in order to photograph the items. It is reasonable to assume that the witnesses who testified as to seizing and securing Ms. L.W.'s clothing for evidentiary purposes were respectful of their obligation to preserve evidence in the condition in which it was found. The evidence does not establish who removed the jeans at hospital. However they were removed, it is reasonable to infer that when Ms. L.W.'s jeans

were removed at hospital, they were removed inside out. It is possible that Ms. L.W. removed them in this fashion. I simply do not know.

[235] The Crown invites me to infer that the fact that Ms. L.W.'s jeans were inside out and the underwear caught up in the jeans, should lead me to infer that both had been taken off in one swift movement. Firstly, I do not think the evidence permits me to infer that the pants were removed either 'in one movement' or 'in one swift movement.' Secondly, common sense does dictate that I consider Ms. L.W.'s physical size, the size of the interior of the taxi, and the difficulty in removing tight-fitting wet jeans from an unresponsive body. I am mindful of the evidence that there were absolutely no injuries or marks of any kind on Ms. L.W.'s body when she was examined in hospital.

[236] I am troubled by the proposition advanced by the Crown that there is no evidence that it would be impossible to take the pants off in this situation. That seems to me to run dangerously close to imposing a burden on Mr. Al-Rawi to prove otherwise. I think it would have been extremely difficult for Mr. Al-Rawi to have removed the pants in these circumstances from the driver's seat of the taxi.

[237] The Crown urges me to consider an alternate theory, that Mr. Al-Rawi could have been in a different position when he removed the pants. That is, he could have been in the back seat with Ms. L.W. It is correct to say that if he had stopped the car, got out and entered the back seat through a rear door to the taxi it would have been easier to remove the jeans. However, for that theory to fit with Cst. Thibault's evidence, Mr. Al-Rawi would have had to then get back into the front seat of the taxi, with the car idling, only to be discovered by the officer. In

addition, this theory is difficult to reconcile with the fact that the sandals were found at the foot of the front driver's seat.

[238] The defence urges me to consider the Crown's theory that Mr. Al-Rawi removed Ms. L.W.'s pants as implausible. The photographic evidence depicts the size of the car. Mr. Al-Rawi's physical size, 6 foot 2 inches, and weight at the time of approximately 220 pounds is not in contest. What is in contest is the theory of the Crown that it would not have been difficult for a man of his stature to turn around in the driver's seat of that vehicle, physically reach back to where Ms. L.W. was positioned, presumably on the passenger side of the car, undo her belt and wet tight-fitting jeans and get them off her, presumably, unresponsive body. This argument by the defence has merit.

[239] The evidence concerning Ms. L.W.'s condition when Cst. Thibault first approached the taxi is critical. Cst. Thibault was patrolling the area looking for a taxi involved in a recent robbery in the area. She was alone in a patrol car in an area not familiar to her. She described looking into the taxi, seeing the female passenger, asking the taxi driver for his identification, receiving his driver's licence and then, having taken a second look at the female, realized that the female was naked as she described. She believed the driver was trying to hide something next to the console. While simultaneously calling for back up, she immediately told Mr. Al-Rawi to turn off the car and get out. She then observed the male fumbling with something between his legs below the seat. She used forceful language to demand that he get the fuck out of the car. The situation was extraordinary, fluid and no doubt highly charged. The events unfolded very quickly.

[240] I have discussed Cst. Thibault's evidence concerning her initial approach to the taxi and interaction with Mr. Al-Rawi. I will not repeat those comments here. I am not persuaded to accept that Ms. L.W.'s legs were resting upon the sides of the seats next to the headrests as described. Having accepted Cst. Thibault's evidence that Ms. L.W. was unresponsive at the time, the evidence concerning the position of the legs is difficult to accept. Ms. L.W. would have been unresponsive, with both calves resting on the edges of the seats as seen in the exhibits, and even as Mr. Al-Rawi is said to have been "between her legs" and "would have been touching her body with his upper arm or chest", yet the legs are said to have remained in place. As Mr. Al-Rawi was said to have turned from facing the back of the car to sit forward, it would seem he would have had to move his head and upper body around Ms. L.W.'s left shin. Equally difficult to accept is that as Cst. Thibault spoke with Mr. Al-Rawi, asked for and received his identification, yet did not report seeing Ms. L.W.'s shins or feet which would have been at shoulder level extended towards the front of the taxi. This point is made clear in Exhibit 6.

[241] Significantly, Cst. Marriott's evidence is in complete contradiction with this evidence. His description of the state of the woman's clothing, and the placement of her body, apart from the legs, is the same. However, his evidence as to the placement of the legs is very different. Cst. Marriott testified that the woman's legs were together, straight ahead, resting on the centre console as seen in Exhibit 9; precisely as Mr. Al-Rawi described.

[242] Crown counsel argues there are several reasons why I should accept Cst. Thibault's evidence and reject that of her colleague. Cst. Marriott testified in a straightforward manner. This aspect of his evidence was not challenged by Crown counsel during his testimony. It is true that Cst. Marriott's evidence as to the

colour of Ms. L.W.'s top and his description of Mr. Al-Rawi's ball cap is incorrect. There are numerous oversights and memory lapses in relation to Cst. Thibault's evidence that might be said to be more significant. I am mindful of the most significant fact, which is that Cst. Marriott's opportunity to observe Ms. L.W. was brief, intentionally so. But his evidence was delivered in a clear, confident manner on this point. I reject the argument that Cst. Thibault's evidence should be given more weight because she is a woman.

[243] I am not persuaded to accept that Ms. L.W.'s legs were positioned as described by Cst. Thibault.

[244] The Crown urges me to find that Ms. L.W. was unconscious when Cst. Thibault observed her in the back of the taxi. For fear of implying a medical condition different from that supported by the evidence, I conclude that the word unresponsive is appropriate and captures the evidence on the subject. Various terms were used by Cst. Thibault and to a lesser extent Cst. Marriott who used the term most familiar to lay persons, 'passed out' which can be equated with asleep. I accept Cst. Thibault's evidence that Ms. L.W. was unresponsive as she began to deal with her. Other than Mr. Al-Rawi's evidence, there is no other direct evidence as to when Ms. L.W. fell into this state. I am mindful of Dr. Cherlet's evidence that an individual does not swing from one extreme to another. I am also mindful of Cst. Thibault's evidence that Ms. L.W. fell in and out of 'sleep' at the hospital.

[245] The time line in this case is significant. I accept that Ms. L.W. entered the cab at Grafton and Spring Garden Roads at 1:08:56 a.m. on May 23, 2015. Cst. Thibault's time of arrival on scene is not established so precisely. As I have

explained, I accept that Cst. Thibault's time of arrival on scene was approximately 1:18 a.m. I conclude that the entire encounter was no less than nine minutes in duration.

[246] The nine-minute time line is important in terms of establishing Mr. Al-Rawi's opportunity to assault Ms. L.W. I accept Mr. Al-Rawi's evidence that the actual driving time occupied about five minutes. I have no evidence to the contrary. In fact, Cst. Marriott's evidence tends to corroborate Mr. Al-Rawi that the lights would have operated as flashing four way stops at that time. I am not prepared to find that a sexual assault could have occurred while the taxi was in motion. I accept that Ms. L.W. asked to get out of the car to pee, walked out of sight, then returned to the taxi. Accordingly, the time frame is reduced even further.

[247] Cst. Thibault testified that the rear window of the taxi, and only the rear window, was fogged up. I have no other evidence to assist me in drawing an inference from that evidence and the passage of time while the taxi was stopped on Atlantic Street. In oral argument Crown counsel conceded that I have only the evidence of Cst. Thibault on this point. I will not speculate further.

[248] Martin Westcott's evidence concerning the presence of Ms. L.W.'s DNA on the sample taken from the area around Mr. Al-Rawi's lips is not contested. What is contested is the inferences that can be drawn from this very significant piece of circumstantial evidence.

[249] The theory of the Crown is that this evidence supports the inference that the DNA came to rest in that area as a result of a primary transfer of Ms. L.W.'s DNA to Mr. Al-Rawi's lip area when he assaulted her with his mouth. The defence

urges me to consider that the evidence should lead me to conclude that there is more than one way in which the DNA could have been deposited to this area making it entirely possible that it occurred by way of secondary transfer.

[250] Mr. Westecott readily acknowledged that he cannot say how or when the DNA was deposited to the lip area. He cannot identify the source of DNA other than to say that it was not blood. DNA is found in skin cells and saliva. It is also found in tears and in urine, but in very limited quantities. DNA can be transferred from one person to another directly – that is, a primary transfer, if Ms. L.W. and Mr. Al-Rawi came into direct contact by way of a kiss or a hug where their skin touched, including the possibility of skin wet from tears. A secondary transfer of DNA can occur if one individual comes into contact with DNA which has already been deposited onto another thing or surface. It is possible that Ms. L.W.'s DNA had been directly transferred to shoes or a ball cap or a \$5.00 bill. Further, the evidence of the presence of at least three and four DNA profiles found on Mr. Al-Rawi's right and left finger swabs is an example of the transfer of DNA from one source to another.

[251] Of note, D/Cst. Hewitt testified that in his training as a Forensic Ident investigator, he understood the possibility of cross-contamination of DNA by handling exhibits to be a fundamental principle. Cross-contamination of DNA, that is, touching one thing and then touching a second thing and depositing DNA, is another way to say secondary transfer.

[252] I conclude that the evidence does not preclude the possibility of secondary transfer of DNA in this case.

[253] The Crown urges me to place weight upon the evidence that there was approximately two times more female DNA than male DNA in the sample. D/Cst. Hewitt explained his training in relation to swabbing the area around Mr. Al-Rawi's lips. He described a delicate process whereby he lightly swabbed the area, because, if you put a lot of pressure on the swab the sample may contain a predominant amount of DNA from the subject. He explained that his method was intended to produce a sample that was not overwhelmed by the subject's DNA. We know that the resultant sample contained Ms. L.W.'s DNA. And that the comparative ratio was 2:1. The Crown urges me to conclude that this 2:1 ratio is significant and inculpatory. With respect, I think this is incorrect. The extension of the argument is that had D/Cst. Hewitt taken the sample in what he would describe as an incorrect fashion, applying significant pressure, and the resultant sample had a 2:1 ratio of Mr. Al-Rawi's DNA to Ms. L.W., this would somehow be less inculpatory. I think not. Martin Westecott was not asked to opine on the issue of Mr. Al-Rawi's DNA being what he termed the minor source. Without more I cannot infer more than the fact that Ms. L.W.'s DNA was deposited somewhere on the area outside of Mr. Al-Rawi's lips. Nothing more. But nothing less. This is a crucial piece of evidence.

[254] The Crown argues that I should accept the evidence of Cst. Thibault and find that as she was first dealing with Mr. Al-Rawi he was attempting to hide Ms. L.W.'s urine-soaked jeans and underwear and was fumbling with her shoes. This is said to be after-the-fact conduct indicative of Mr. Al-Rawi's consciousness of having committed a sexual assault. The Crown also argues that the evidence should be used to question Mr. Al-Rawi's credibility.

[255] Earlier this year the Supreme Court of Canada released *R. v. Calnen*, 2019 SCC 6, dealing with this very issue. Justice Martin, dissenting in part, articulated the legal principles governing the admissibility of discreditable conduct evidence, which principles were adopted by the Court. After-the-fact conduct encompasses what the accused said and did after the offence charged was allegedly committed. It is admissible when relevant to a live, material issue in the case, so long as its admission does not offend any other exclusionary rule of evidence, and its probative value exceeds its prejudicial effects.

[256] In order to make this analysis I must first determine what facts have been proven. I do not mean to suggest that the Crown need prove beyond a reasonable doubt that Mr. Al-Rawi was actually attempting to hide the jeans and/or sandals, but the Crown's argument presumes that I reject Mr. Al-Rawi's alternate account of this aspect of the evidence.

[257] Cst. Thibault believed that Mr. Al-Rawi was trying to hide something between his body and the centre console. The thing was identified as the jeans and underwear. Mr. Al-Rawi's evidence, as corroborated by Cst. Marriott, is that Ms. L.W.'s legs were on the console at that time. If I consider Mr. Al-Rawi's uncontradicted evidence that the gear shift, which is directly in front of the console, was still in drive, and if I accept that Cst. Thibault in no uncertain terms ordered Mr. Al-Rawi to shut the car off and give her the keys, his right hand would have had to be in precisely the place where the jeans would have been. I recognize that Cst. Thibault testified that attempting to hide the jeans preceded her order to shut the car off, but I observe that the events would have unfolded very quickly.

[258] The Crown argues that the position of Mr. Al-Rawi's seat and the state of his clothing add to the circumstantial case against him. I accept as perfectly reasonable that a man of Mr. Al-Rawi's height, in a car the size of the Honda Civic, would be more comfortable and in a better position to operate the car with the seat back and reclined as seen in the photographic evidence. I reject the suggestion that I should infer he reclined the seat in order to facilitate access to Ms. L.W. Of course, with the seat reclined, there is actually slightly better access to the back seat. Mr. Al-Rawi fairly conceded this point.

[259] Similarly, I accept as plausible that an individual operating a motor vehicle for a lengthy period of time may choose to undo the top button of their jeans in order to be more comfortable. I reject the invitation to conclude that the only reasonable inference to be drawn is that Mr. Al-Rawi undid the button on his jeans in furtherance of a sexual assault. I must of course still consider the evidence that Mr. Al-Rawi's pants were down several inches.

[260] Cst. Thibault described the pants as halfway down his back side, and she could see his butt crack. Cst. Marriott testified that Mr. Al-Rawi's pants were probably down three to four inches such that Mr. Al-Rawi bare buttocks were exposed. Both officers agreed that Exhibit 1, photos 1 and 2 are similar to Mr. Al-Rawi condition at that time. Photograph 2 leaves me uncertain as the pants appear to sit on Mr. Al-Rawi's hips properly just as D/Cst Hewitt observed. I recognize that with the button undone, getting out of the seat to the standing position may have had some impact upon the positioning of the jeans when Mr. Al-Rawi was searched. I accept that Cst. Marriott's search of Mr. Al-Rawi would have given him the opportunity to examine the position of the pants.

[261] The Crown asks me to consider that Ms. L.W. would not have entered the front seat of the taxi, asked Mr. Al-Rawi to take her anywhere other than home, kissed or hugged him and certainly not have removed her own clothes in the back of Mr. Al-Rawi's taxi. As the Nova Scotia Court of Appeal discussed in *R. v. Al-Rawi, supra*, where the complainant testifies that she has no memory of the sexual activity in question, the Crown routinely asks: "Would you have consented?" The Court observed that while such evidence may be discounted as speculative, the answer may or may not have a bearing on the determination in relation to consent. As I understand the Crown theory, this piece of evidence is offered in support of proof of the *mens rea* certainly, but also offered in support of my overall assessment of what Ms. L.W. would or would not have done as it relates to proof of the *actus reus*.

[262] I have no difficulty accepting that Ms. L.W., if sober, would not have entered the front of the cab, would not have found herself needing to urinate in a residential area, would not have removed her clothing in the back of a taxi for any reason and that she would not have engaged in sexual activity of any kind with a man who was much older and a complete stranger. I have no difficulty accepting that Ms. L.W., if sober, would have said good night to her friends and taken a cab back to her home. Further, I have no difficulty accepting that Ms. L.W., if sober, would not have been denied entry to a drinking establishment, got into a very upsetting and emotional argument with and ultimately yelled at her then best friend, and stormed away from her friends as they tried to help her make her way home safely. But Ms. L.W. did do the latter. Under the influence of the alcohol she consumed, in the circumstances of that particular evening, and with no food in her stomach, Ms. L.W.'s behaviour was extraordinarily out of character. This

proven behaviour is understood in the context of Dr. Cherlet's expert evidence that alcohol consumption not infrequently impacts human behaviour in just this way. For these reasons I can place very little weight on this circumstantial evidence.

[263] As I have said, Mr. Al-Rawi's account of the nine minutes during which Ms. L.W. was in his taxicab was compelling. An extraordinary story without question. But not, as the Crown urges implausible or incredible. I am asked to accept that an intelligent and experienced taxi driver, at the least, made a decision to take advantage of a young woman meaningfully impaired by alcohol. In order to commit a sexual assault he drove his taxi to a residential neighbourhood, with houses on both sides of the street, stopped the car at least a metre from the sidewalk such that the car was not hidden and in plain view, parallel to a fire hydrant, and with the car running assaulted Ms. L.W.. It defies logic that he would choose to stop in a location which is the opposite of secluded and private in order to commit such an offence.

[264] Further, Mr. Al-Rawi believed that having engaged the MDT, his entire trip was captured by Bob's Taxi, including a GPS track of the path of his taxi. In these circumstances, he left the meter running and the car running, with the Bob's Taxi sign on the top of the car while alleged to have committed the offence.

[265] It is alleged that, at 6 foot 2 inches tall, in the confines of the Honda Civic, Mr. Al-Rawi was able to reach into the back of the taxi, remove wet tight jeans from Ms. L.W.'s body, all while the taxi is idling and he is found in the front seat of the car just nine minutes after Ms. L.W. entered the taxi. If as the Crown theorizes, Ms. L.W. was unresponsive while her jeans were removed, the task of removing the clothing would have been extremely difficult. Ms. L.W. had

absolutely no physical marks or bruises on her person. There is no damage to any of her clothing. I am not persuaded to infer that Mr. Al-Rawi exited the front seat of the taxi, entered the back seat and removed the jeans, and then returned to the front seat of the car, still idling in a residential neighbourhood.

[266] I acknowledge the Crown's argument that Mr. Al-Rawi's account of the events which culminates with Ms. L.W. having removed her own pants, at the precise moment that Cst. Thibault located the taxi, and seemingly as Ms. L.W. 'passes out', is an extraordinary set of circumstances. But the law demands that I assess all of the evidence, that I draw only those inferences which are grounded in reason and common sense, that I not fall into error by "filling in the gaps" and engaging in speculation. Is the circumstantial evidence in this case, viewed logically and in light of human experience, reasonably capable of supporting an inference other than the accused is guilty? The answer is yes.

[267] I am not satisfied that the Crown has proven that it was the accused who removed Ms. L.W.'s clothing. Further, given my comments generally, and in particular, with respect to the DNA evidence, I am not satisfied that the Crown has proven that Mr. Al-Rawi touched Ms. L.W.'s body with his lips, and accordingly the *actus reus* of the offence is not made out. Finally, I am not satisfied that the Crown has proven beyond a reasonable doubt that Mr. Al-Rawi attempted to commit a sexual assault upon Ms. L.W.

[268] I am taken to the conclusion that Mr. Al-Rawi's evidence, and the evidence which supports and corroborates aspects of his testimony, leaves me with a reasonable doubt. Accordingly, I find Mr. Al-Rawi not guilty.

Ann Marie Simmons, JPC