

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Smalley*, 2019 NSSC 32

Date: 20190118

Docket: CRH456321

Registry: Halifax

Between:

Her Majesty the Queen

v.

Darren Smalley

DECISION

Restriction on Publication: s. 486.4 cc

Judge: The Honourable Justice Patrick J. Duncan

Heard: September 4, 5, 6, 7, 10, 12, 24, 25, 26, 27, 28, October 1, 2, 3, 4, 5, 9, 10, 11, 15, 16, 18, 2018, in Halifax, Nova Scotia

Oral Decision: January 18, 2019

Counsel: Eric Taylor and Cheryl Schurman, for the Crown

Ian Hutchison and Hanna Garson, for the Accused

Restriction on Publication

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

- (a) as soon as feasible, inform the victim of their right to make an application for the order; and
- (b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court (Orally):

The Charges

[1] Darren Smalley is charged that he did on or about the 10th day of April, 2015, at or near Shearwater, in the County of Halifax, in the Province of Nova Scotia, in committing a sexual assault upon LA, cause bodily harm to her, contrary to s. 272(2)(b) of the *Criminal Code*; and further that he did at the same time and place commit a sexual assault upon LA with one or more persons, contrary to s. 272(2)(b) of the *Criminal Code*.

The Trial

[2] The Crown presented the testimony of 11 witnesses, including the complainant, LA, and her friend KG. Other witnesses included forensic experts, police investigators, medical personnel and two civilian witnesses who were present, at relevant times, in the locale where the offences are alleged to have occurred.

[3] The accused elected to call evidence of three witnesses who were also present at relevant times and in the general locale of where the offences are alleged to have occurred

[4] In addition, the accused made Admissions pursuant to s. 655 of the *Criminal Code*, which are set out in Exhibit 3, a copy of which will be appended to this decision when published. Admissions set out therein are taken to be proved - they require no further proof.

Fundamental Legal Principles

Presumption of Innocence and Burden of Proof

[5] Mr. Smalley has pleaded not guilty. The first and most important principle of law applicable to every criminal case is the presumption of innocence. Mr. Smalley enters the proceedings presumed to be innocent, and the presumption of innocence remains throughout the case unless the Crown, on the evidence, proves beyond a reasonable doubt that he is guilty.

[6] The burden of proof rests with the Crown and never shifts. There is no burden on Darren Smalley to prove that he is innocent.

[7] A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in these proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[8] It is virtually impossible to prove anything to an absolute certainty, and the Crown is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. It is not enough to conclude that Mr. Smalley is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to Mr. Smalley.

[9] I must decide, looking at the evidence as a whole, whether the Crown has proved Mr. Smalley's guilt beyond a reasonable doubt.

[10] In this case there is both "direct evidence" and "circumstantial evidence". I may choose to believe or rely upon either one as much or as little as the other in deciding this case.

General Assessment of Evidence

[11] In fulfilling my responsibilities, it falls to me to decide how much or little of the testimony I accept. I may believe some, none or all of it.

[12] The testimony of all witnesses must be assessed having regard to the passage of time and recognizing that it generally impacts negatively on the ability of persons to reliably recount past events.

[13] To the extent that there are any concerns about reliability based on the passage of time it is self-evident that such allegations are capable of belief. Some events are so memorable that even when the surrounding details are obscured by the passage of time the principle allegations can be accepted as proven beyond a reasonable doubt.

[14] Similarly, any significance that might be attached to the passage of time before coming forward to complain must be assessed in the individual circumstances of the case. It is well understood that victims of sexual assault cannot be expected to act in any certain way. Each person's experiences and ways of dealing with such incidents are individual to them.

Credibility/Reliability Assessment

[15] In this case, the Defence argues that the complainant's testimony is neither credible nor reliable. A court must assess all of the evidence and consider that which may tend to support or undermine the reliability, or even the credibility, of any witness' testimony.

[16] While stated by the court in the context of a civil trial the following statement in *Faryna v Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at paras. 9 and 10, is a useful reminder of some of the factors a judge should be alert to in making findings as to credibility. In making this reference I am clear in my mind as to the different standard of proof that exists in a criminal case than exists in a civil case:

9 If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection, it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, *see Raymond v. Bosanquet* Tp. (1919) 59 S.C.R. 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. ...

Expert Opinion Evidence

[17] Various witnesses were qualified to give expert opinion evidence. As with other witnesses, I may give the expert's testimony as much or as little weight as I

think it deserves. Just because an expert has given an opinion does not require me to accept it. The experts were asked to assume certain facts. I must be satisfied that those facts have been proved in this trial.

Contradictions against prior sworn evidence

[18] There were instances where witnesses gave different testimony at the preliminary inquiry than they did during this trial. In considering any such contradictions, I will consider the fact, nature, and extent of any differences between the versions in deciding whether or how much to believe of or rely upon the witness' testimony in deciding this case. Not every difference or omission will be significant. I will also consider any explanation that was offered to explain any differences or omissions.

[19] The earlier statements cannot be used as evidence of what happened unless the witness accepted the earlier version as true when testifying here at trial. Even if the witness accepted the earlier version as true, when testifying in this trial - as it is with the evidence of any witness - I must determine whether or how much I choose to believe of and rely upon that statement when reaching my decision.

Evidence of prior consistent statements by the complainant

[20] Just because a person has said the same thing about the same event more than once does not make what she said about it more likely to be true. Repetition and accuracy (i.e., truthfulness) are not the same thing. A concocted (i.e., false) statement remains a concocted (false) statement no matter how many times the person who made it up has repeated it. Once a lie, always a lie.

[21] To the extent that there was evidence adduced of what LA reported to others about the circumstances of the alleged offences, I will not use that as evidence of the truth of what she said out of court. In other words, the previous out of court account is not evidence of what happened.

Evidence Review

Complainant - LA

[22] I will begin my review of the evidence with the testimony of the complainant.

[23] LA was 21 years old when, on April 9, 2015, she accompanied her best friend, KG, to meet members of the British Navy hockey team, who were participating in a tournament at CFB Shearwater, in Dartmouth, Nova Scotia. After the game, the two women agreed to go to the nearby Warrior Block barracks where the team was billeted. LA alleges that at the barracks, in the early morning hours of April 10th, she was “gang raped” by members of the team, one of whom is alleged to be the accused, Darren Smalley.

[24] LA’s evidence suffers from, as she candidly acknowledged, significant gaps in relation to material points in issue. She attributes these gaps to intermittent losses of consciousness or memory loss. Because of these limitations, her account of the evening is sometimes confusing and incomplete, and sometimes at odds with the evidence of other witnesses. Notwithstanding these challenges, there is a narrative that has evolved in her evidence, which provides an overview of the events of that evening.

[25] KG and LA had been friends for some time. From time to time they would go out to clubs or bars. They knew each other well enough to give evidence about their respective personalities, personal lives, and drinking habits, as well as their respective tolerance to alcohol. They trusted each other.

[26] There is an app called Tinder which has been described in the evidence variously as a “hook up” app and a dating app. It enables people to view online biographies and photos of strangers and to initiate contact if one chooses. If both parties agree then they can have direct communications. Using this service, KG connected online with Will Stennett, one of the British team members. They agreed that KG would meet him at the hockey game being played at Shearwater arena on the evening of April 9. Mr. Stennett asked her to bring a friend.

[27] LA was, at the time, an undergraduate university student with aspirations of going to medical school. On the afternoon of the 9th she wrote an exam. After the exam she read a text in which KG invited her to the hockey game. LA accepted. When she went home, she had a single drink of rum with mix.

[28] At approximately 7:00 p.m. KG picked up LA and they drove to the arena. Enroute, LA conducted a Facebook search for Mr. Stennett so that they could learn more about him. They located some information about him. Once at the rink they sat in the bleachers. Three other women of about the same age were also seated in the bleachers, but there was no interaction between the two groups.

[29] During the game, the team physiotherapist, Simon Radford, visited the complainant and KG at their seats. He was to let KG know which of the players was Mr. Stennett. The conversation was brief. KG and LA understood that they were going to a restaurant for dinner. As will be discussed later, LA formed the belief that this was to be a double date, with Mr. Radford accompanying her.

[30] After the game, the women met with Mr. Stennett. As a result of their discussion, they decided to make the very short drive to Warrior Block where they would have drinks and order pizza.

[31] It was between 8:00 p.m. and 8:30 p.m., when they arrived at the barracks. Once they entered Warrior Block LA, KG and Mr. Stennett walked to Mr. Radford's room, number 1704. To do this they went up a flight of stairs, along a hallway past rooms numbered in the 1600's plus male and female washrooms, and then turned left along a hallway with rooms numbered in the 1700s. Room 1704 was at the end of that hall and on the right side. It was the scene of the alleged offences.

[32] The room had four beds and nightstands, and a mini fridge. There was a window on the wall facing the door from the hallway. There were two beds on each side of the room, all parallel to each other and to the hallway. For consistency of reference in evidence the beds were assigned numbers. Bed 1 was immediately to the left of the door as one entered. It was identified as Mr. Smalley's. Bed 2 was parallel to Bed 1 and closest to the window. It was Mr. Radford's bed. Bed 3 was opposite Mr. Radford's and thus also close to the wall with the window. It was Joshua Finbow's bed. Bed 4 was the first one to the right as one entered the room from the hallway. It was assigned to Craig Stoner.

[33] Establishing a timeline for the evening is difficult, however there were time stamped photos taken, a video from a beer store and some text messages which provide some milestones. The exact sequence of events, as among the witnesses, is not consistent although that is a more significant issue in the evidence of LA than it was for KG, whose evidence in this regard I preferred.

[34] Initially, LA was intended to be the designated driver. Some beer and a small amount of hard liquor was consumed over the course of the evening and into the early morning, but in the end analysis I conclude that neither of KG nor LA drank significant amounts of alcohol, nor is there evidence to suggest that they ingested any other impairing substances.

[35] Mr. Smalley, Mr. Radford, Mr. Finbow, Mr. Stennett and the two women were in the room, playing music and talking. Pizza was ordered at some point. A photo said to be taken at 10:43 p.m. shows the pizza boxes in the room.

[36] During the evening, the team members showed the women a Facebook page they had created about Mr. Smalley, who is also known as Daz. The site was unflattering to him and intended to make fun of him. LA discussed her interactions with Mr. Smalley through the evening. There was nothing negative reported.

[37] At around 11:30 p.m., KG, LA, and Mr. Stennett travelled in a van operated by another team member, Paul Hoskins, to a 24-hour beer store, where they purchased three cases of 24 beer. During the drive, LA observed KG and Mr. Stennett kissing, while riding in the back of the vehicle. The Admissions, Exhibit 3, supported by video and documentary evidence, show them to have attended the Moosehead Cold Beer Store on Windmill Avenue in Dartmouth between 11:53 p.m. and 11:57 p.m. that night.

[38] Upon returning to Warrior Block the four entered the barracks with LA and Mr. Hoskins in the lead by about 10'. While walking down the 1600 wing hallway, KG and Mr. Stennett went into one of the rooms where they had sexual intercourse. They did not alert the other two that they were going to do this. LA testified that when KG disappeared, she became very concerned for her whereabouts and began vigorously searching for her - to no avail. She described herself as knocking on room doors and yelling KG's name without a response. This fact, she said, caused her to panic.

[39] Not wanting to leave without her friend, she returned to 1704. While walking down the 1700 wing hallway, she met a man who she called "Toronto" who told her that she "shouldn't go down there". She ignored this, and when she arrived at the doorway to 1704, she observed a number of men in the room with a naked man lying face down on a bed, receiving physiotherapy treatment. The Admissions put this incident at around 12:17 a.m.

[40] She said that one of the men made an inappropriate comment to her and that she replied in kind. She acknowledged that she has the capability of being aggressive and refusing to back down in such circumstances. In cross examination, she did not recall being ordered to "get out" of the room.

[41] LA left and went to the female washroom. She was unsure in her testimony whether she met KG in the washroom on that occasion or another one. She has a

recollection of KG “flying through the door [of the bathroom] ... and having ... a conversation”. KG’s testimony, which I will review later, speaks to this as well.

[42] KG and LA returned to 1704.

[43] At some point after KG’s return to room 1704 it became evident that the team members were preparing to go to bed.

[44] The atmosphere in the room was described as “friendly” at that point.

[45] KG and Mr. Stennett left the room. LA denies being aware of where they had gone or even knowing at what point they left.

[46] LA testified that she ended up alone in 1704 with Mr. Smalley who was in Bed 1, and Mr. Stoner who was in Bed 4. She did not see Mr. Finbow in his bed, number 3, which was empty. Mr. Radford was in bed 2. She crawled on top of the covers of Bed 2 on the side closest to the window. The complainant was still dressed. She and Mr. Radford were positioned lengthwise and with their heads at the headboard end of the bed. LA kissed Mr. Radford on the lips.

[47] She did not ask his permission to enter his bed, nor to kiss him. In fact, she could not recall ever discussing sleeping arrangements with him. This is something that she did of her own volition.

[48] She cannot say if he reciprocated the kiss for as soon as she kissed him, as she said it: [she] “lost consciousness”. The complainant testified that she was not impaired and that she has never had this happen before or since. There is no evidence of a medical reason for this to occur and there is no evidence to conclude that she was under the influence of any drug. She says that she had a “heavy desire to be asleep”. She does not know why she was rendered unconscious.

[49] Before continuing, it is important to understand the distinction that LA makes between “losing consciousness” and not “remembering”. She said:

... to lose a memory means I had one, I believe I was in a state that I had one to forget, whereas a loss of consciousness means there just never was a memory in the first place due to the lack of consciousness.

[50] Later she said:

Q. There have been some gaps in your memory throughout the evening . . .

A. Yes.

- Q. . . ., is there a difference between when you say you're not sure what happened versus the feeling that you had, during the sexual assault?
- A. Yes, yes, there just isn't anything during the assault. I have no recollection. There's no confusion, there's just . . . I don't remember anything, but there are also points during the evening where I simply don't remember as opposed to being confused.

[51] LA testified that after an unknown passage of time, she awoke, laying face down on the bed, naked. She continued to be in the same position with her head to the headboard. The lights were off. She said:

I could see the outlines or shadows of people... there were two penises coming towards my face. ... One made contact and was in my mouth and then from behind me... there was another penis penetrating me somewhere behind me. I don't recall where.

[52] She was unable to describe the males or their penises, when asked by the Crown to do so.

[53] When asked where these males were located, she said "... to the side". She could not offer more details about these acts or the perpetrators. She testified that when she did look up it was toward the wall at the head of the bed.

[54] Similarly, she could not offer any information as to where she was being penetrated or by whom. She does not describe the body position of the person or persons penetrating her, which, given how she says that she was positioned, would be on top of her.

[55] LA did hear voices and in her direct examination she identified one as Simon Radford's and another as the accused, Mr. Smalley. In cross examination her attention was drawn to her April 29, 2015, statement to police in which she said: "I remember thinking it was Darren's, but I can't tell you for sure if it was or not.". She replied that as at the time of this trial she could not remember whether it was Mr. Smalley's voice, but that she could at the time of the police statements.

[56] She heard other voices, but she could not identify them. She was unable to say when she heard these voices - whether it was as she regained consciousness, or at some other point while she was conscious.

[57] The complainant says that she lost consciousness again in "under a minute."

[58] LA testified that she regained consciousness a second time, and found herself in the same position on the bed. She described it:

It was the same way, I was face down it was in the bed. It felt like everything felt like dead, like I wasn't moving.... All I remember was looking back seeing a camera flash and going right back out again... I have no other memory from that point, that I remember...that I know of.

[59] She continued to describe it as one big flash, that had originated from over her left shoulder.

[60] The complainant testified that she regained consciousness a third time:

So, I immediately passed back out and then I came to for a third time, this time I actually felt like I might hold onto consciousness a bit more. ... I'm still face down in the bed, still lengthwise in the bed, uhm, then I heard grumbling, ..., it wasn't the same laughter that I had heard from the first time. Uh, I distinctly heard someone say - this isn't verbatim - but I remember them grumbling like, "I didn't even get to finish", uhm, as if they were mad at me that I did not in fact, I don't know do something to let them finish. Uhm, and then I felt, ... I felt something warm and liquid land in the middle of my back, ... what I had assumed was somebody finishing on my back. It was nearly like along like my spine like in the middle of my back. ... then at this point I distinctly had heard Simon's voice saying: "*LA you're taking up the whole bed, LA move, LA push over.*" ...I don't know if he at any point got into the bed or not, but somebody did, and the person who did get into the bed that I remember was not Simon because he was taller than I was. Uh, it was very clear that his body was just longer than mine was. Uh, and, so, at that point I became actually aware as to what had happened, uh, enough that I didn't know if my best option was to just not move and, uh, I guess fake dead or to just pull a sheet over myself at the least to be covered and just not be naked anymore because at that point I was very aware of my nakedness. Uh, and, so, I . . . I chose the sheet I just couldn't bear laying there being naked in this room. I didn't know how many people were there. It felt like there were a 100 people in the room with me. I felt like the entire hockey team was in that room, so I pulled the sheet up over myself, which, I guess, indicated to whoever was in there that she's alive. Uhm, and at that point I was on . . . laying on my left . . . right-hand side again but on the other side of the bed, so I would have been on the right-hand side. And I remember this because whoever was laying behind me had his arm around me and was just like squeezing my left nipple so hard that I just wanted to scream. Uhm, I didn't know why he was doing it but he just was. Uhm, that I felt so grossly outnumbered that screaming . . . screaming might have meant that they would do it again, so I just stayed really quiet. Uhm, and just hoped that morning would come and no one would bother me and I could just get out with KG.

[61] In later testimony, she testified that she could not identify the speaker who said that he did not get to finish. As she indicated, the person who squeezed her nipple was taller than the accused, Mr. Smalley, thus eliminating him as the perpetrator of this act.

[62] LA described the pain caused by the squeezing of her nipple and that she cried, partly due to pain in her nipple, and partly as a result of the assaults on her person.

[63] She described herself at that point as “quite aware of what was going on, [not] fully conscious... but a lot more aware of what was happening”.

[64] LA made it clear in her testimony that she did not consent to any sexual activity with the accused, Mr. Radford or anyone else that may have been involved in the assaults on her person that morning. Nor did she give the accused or other occupants of the room reason to believe that she would consent to such activity.

[65] KG knocked and entered the room. LA cannot estimate how much time passed between the assault on her breast until KG entered the room. Just prior to her entering, the person in bed with LA was having a conversation but she could not identify the so-called “taller person”, or what they were saying. She testified that she could not even tell what the person’s gender was. I should note at this point, that she had previously indicated that it was a male. The complainant described herself as “silently crying” at that time and that she and KG made eye contact.

[66] The persons in the room were told to leave and KG began gathering clothes for LA to get dressed. According to LA, Mr. Stennett was told to clear the hallway so that she could leave. He did this and once ready she and KG left. On the way down the hall KG realized she forgot her phone in the room and went back to get it. LA could not recall whether she went to the car on her own or stopped in the women’s washroom. KG says that it was the latter.

[67] KG returned with her phone and they went to the car. KG estimated the time to be 1:30 a.m. or 2:00 a.m.

[68] KG was not impaired and drove them to LA’s Spryfield apartment. This took longer than expected since the MacDonald Bridge turned out to be closed and they had to use the MacKay Bridge.

[69] At some point, LA sent text messages to a friend named KE and to her family doctor, DD, who was also a very close friend to her and the complainant's late mother. The complainant testified that her immediate concern was whether she may have contracted a sexually transmitted infection, causing her to want to see Dr. DD first thing in the morning.

[70] Once home, LA was visited for a brief time by KE, after which she changed into her pajamas and went to bed. At that point her vagina and her nipple were sore and she was generally aching.

[71] Evidence shows that the text to Dr. DD was sent at 3:22 a.m., which would likely place LA at home and readying for bed since she estimated that she went to bed after 3:30 a.m.

[72] At around 8:00 a.m., LA woke up. Dr. DD had replied by text that the complainant could call the office to book a time to see her, which occurred. KG and another friend, EP, accompanied her. There was a long wait but once in with Dr. DD she explained some of the circumstances of what had occurred and then underwent an examination. At that point, LA declined the suggestion of going to the hospital or to the authorities.

[73] During the exam a red mark was observed on the complainant's left groin along where the line of underwear would be. There were two thumb sized bruises, one on the left shoulder and one on the inside of the left knee. Dr. DD also conducted an internal exam, the results of which I will speak to later.

[74] In the early afternoon of April 10th, after the exam, LA returned with her two friends to her apartment. After they left, she showered, and conducted internet research on what to do if one is the victim of a sexual assault. As she described it, one of the "biggest points" is to get medication for various ailments or pregnancy.

[75] Of particular interest to her was information on treatment for HIV infection. As a result, she texted to Dr. DD who informed her that she would have to go to the hospital to obtain that treatment. LA decided that she would do that. Dr. DD made the arrangements in advance and EP agreed to drive her to the hospital. At some point before leaving the apartment LA picked up the clothes she had worn at the barracks. The underwear had been chewed by her cat and buried in a litter box. As a result, it was put in the bathroom garbage.

[76] EP arrived between 9:00 p.m. and 10:00 p.m. to take the complainant to the hospital. Once there, and after a three hour wait, the Sexual Assault Nurse

Examiner team began what became a five-hour exam of LA. During that exam, injuries were noted and photographed, and various samples were taken. She received various medications, including the HIV medication. She acknowledged that she “pushed” the attending physician to provide it to her, notwithstanding the significant side effects she was warned of.

[77] While she was in the exam, military police investigators arrived as a result of a call from Dr. DD’s husband, which was made with the consent of LA.

[78] After the exam, LA went to the military police offices and gave a statement which was video recorded. This began around 5:30 in the morning of April 11. During the first police interview, LA was unable to provide the names of the persons involved. Following this, Sgt. Tyler Bruce Hayes came to the complainant’s apartment to seize the clothing and any other items that could be relevant to the investigation. According to LA, he entered her bedroom and handled the exhibits, except that she retrieved the underwear for him from the garbage.

[79] Over the next days, LA followed the news and says that she learned that four suspects, including Mr. Smalley had been arrested. This provided her the names. On April 29, she was re-interviewed, this time by a Sgt. Biso of the Military Police.

[80] In cross examination LA was asked the following questions and gave the following answers:

Q. Do you have any memory of during the course of this incident two other members of the Royal Navy hockey team coming into the room and telling everyone to keep it down and to be quiet?

A. No, I do not.

Q. Do you have any memory of those two individuals coming into the room and telling you to keep it down and be quiet and you responding words to the effect of, you are jealous, you are not getting laid?

A. No, that did not happen, no.

[81] These questions arose from information provided to the police by Owen James and Brandon Hubbs, both of whom testified in this trial.

[82] LA was cross examined in this trial on another incident described by KG:

Q. Okay. Do you recall when KG and yourself are in the room alone that you tell KG that photographs had been taken of you of an intimate nature in that room?

A. I don't – I don't recall any conversation that I had. I don't.

Q. Okay. You don't recall any conversation with KG?

A. No, I don't.

Q. Okay. Do you recall KG searching through the room looking for a cell phone?

A. No, I don't.

Q. Do you recall KG holding a cell phone and maybe trying to unlock the cell phone?

A. No, I don't.

[83] This runs contrary to the testimony of KG, which I will turn to now.

KG

[84] In April of 2015, KG was 21 years old and employed. She had been “best friends” with LA for some years. When she testified, she informed the court that she was very tired as she had not much sleep. At the outset, I will say that the quality of her testimony did not seem to suffer from this.

[85] She confirmed that on April 9, 2015, she communicated with Will Stennett using the Tinder app. He invited her to his hockey game and asked that she bring a friend, who turned out to be LA. KG testified that she was “interested” in Mr. Stennett and considered that it would be a “date”. She had no clear plan as to what would happen, only to go to the game and to “hang out”.

[86] As agreed between them, KG picked up LA at her apartment at approximately 7:00 p.m. She had not consumed alcohol by that point. KG saw no indication that LA was upset or “down” prior to going out.

[87] They arrived at the arena at approximately 7:30 p.m. and sat in the top bleachers. She and LA reviewed the Tinder profile and Facebook information to identify Mr. Stennett. LA also searched other team members on Facebook.

[88] KG observed the three other young women, of about the same age who sat at the other end of the top bleachers. They were unknown to her and she had no contact with them at rink. During the game, Simon Radford came over to where she was seated, and they spoke briefly.

[89] After the game she and LA moved down to where players were exiting. Mr. Stennett stopped to talk before going to change. She thought that they would be going out for a meal, but instead Mr. Stennett said they were to come back to the barracks where they could eat and drink. At that point, LA was intended to be the designated driver, so that KG was free to consume alcohol.

[90] KG drove Mr. Stennett and LA to the barracks. She testified that it was “maybe 8:00 p.m.” when the game ended. KG indicated that she could only provide rough time estimates for that evening, as she generally is not good on time, and that time was not a concern to her that night.

[91] The three walked to room 1704 where she spent most of the evening. When they arrived at the room there were four people already there. She identified the accused as one of those present. He was sitting on Bed 1. She learned that his nickname is Daz.

[92] She recalled Simon Radford standing and talking near Bed 2, and Craig Stoner at Bed 4.

[93] The women took off their jackets and because there was a “bunch of clothes” between Bed 2 and the window, they put theirs in that location as well.

[94] Initially the women sat at the end of Bed 2 and Mr. Radford sat at the head of that bed. Mr. Stennett sat at the foot of Bed 4.

[95] Mr. Stoner and a male she could not identify from Bed 3 (who I believe was likely Mr. Finbow) would come and go from the room through the evening.

[96] She recalled seeing the three women from the rink, at one point, but there was no conversation.

[97] KG recounted the decisions to order pizza and later to go purchase some beer. She could not recall whether Mr. Smalley left the room during the evening.

[98] She was asked about the alcohol consumption and sobriety of the persons in the room. She was of the opinion that “nobody appeared drunk”

[99] I will digress for a moment. Counsel for both parties engaged in extensive questioning of KG and other witnesses to identify the timing, the amount and type of alcohol that she, LA and others consumed that night. Questions were also asked about the effects, if any, of that alcohol on them and the hockey team members. It

is apparent that some witnesses consumed more than others and that it may have had more of an effect on some than others, but I find that the consumption of alcohol by the witnesses was not an apparent factor in how they behaved that night, nor did it impact in any substantial way on their ability to recall the events of that evening. I say this acknowledging KG's testimony that during the drive to the beer store she was "feeling really drunk." She also had said though that by that time she had one or maybe two beer, and a little bit of Jack Daniels that was shared among the occupants in the room.

[100] Until this time at least, when they went to purchase beer, LA was not, in KG's opinion, feeling any pressure to stay at Warrior Block that night.

[101] KG's account of the trip to buy beer is consistent with LA's evidence.

[102] She recalled that when they arrived back at Warrior Block, LA and Mr. Hoskins were walking ahead of her and Mr. Stennett. Paul Hoskins was carrying one case and she had another which she in turn passed to Mr. Stennett to carry. KG could not recall who carried the third case.

[103] While walking along the hall of the 1600 wing Mr. Stennett said to her "hey, let's go in here" and they went into one of the bedrooms opposite the female washroom. She believes it was room 1610. Initially, she and Mr. Stennett talked. He left the room to go to the washroom and when he returned, they began to have sex. I estimate that this would have been after 12:15 a.m.

[104] KG then testified that someone knocked on the door, wanting the beer that they had – Mr. Stennett told her not to reply and so the person left without getting the beer. Unfortunately, the witness was not asked to identify the person who was looking for the beer. It is clear that the person who did this knew they were in that room and that they had the remaining case of beer.

[105] There is evidence from other witnesses to indicate that LA was trying to locate Mr. Stennett and KG to obtain the beer. LA does not testify to the same effect. As previously stated, she indicates that she was knocking on doors because she did not know where Mr. Stennett and KG were located and that she was motivated by a fear for KG's safety. There is no evidence of anyone other than LA knocking on doors or looking for the beer.

[106] Neither does LA's evidence deal with the issue of Mr. Stennett leaving room 1610 and going to the washroom at a time when she apparently was knocking on doors looking for the couple.

[107] After she and Mr. Stennett ended their intimate time together, KG returned to 1704, with the beer. LA was seated on Bed 2 as she had been previously. Mr. Smalley, Mr. Radford, Mr. Stoner and the unknown male associated with Bed 3 were all present at that time.

[108] KG observed that LA had taken her boots off and appeared “comfortable”. This is not consistent with the description provided by LA who described herself as having feelings of panic at that point.

[109] LA asked where KG had been, to which KG replied that she was fine. She felt that LA was “concerned/annoyed” with her.

[110] KG testified that LA indicated a desire to go the washroom and so they did. They were alone in the washroom and while there they discussed where KG had been. KG apologized for not having told LA where she had gone. She told LA that she and Mr. Stennett had engaged in sex. KG, in cross examination, indicated that LA did not indicate any concerns for her welfare when given this information.

[111] She adopted evidence previously given at the preliminary inquiry in which she described LA at that point as “fine”, and “her regular self”. When asked what “regular self” meant, she replied “smart, confident, stubborn, kind”.

[112] To this I will add that at another point in her testimony she was asked to describe LA’s personality which he characterized using similar terms but adding “strong-willed” and “independent”.

[113] KG agreed that LA did not express any concerns for her own safety and did not ask to leave the barracks. KG perceived LA as being “not extremely emotional”. During their conversation in the bathroom, she made inquiries about Mr. Stennett and commented that “the guys are pretty funny.”

[114] She gave no indication that she went “flying into the washroom” as described by LA. Neither is her description of LA’s demeanour consistent with how LA described her feelings after KG’s disappearance with Mr. Stennett.

[115] The two women returned to 1704 from the washroom. The two of them sat on Bed 2 and LA asked whether KG wanted to go home or to stay at the barracks for the night. LA said that if the decision was to stay then she would be able to drink more alcohol and that she would no longer have to worry about driving. KG indicated that she was good to stay if LA was. She testified that she and LA made the decision to stay.

[116] KG was also asked whether there had been any discussion with Mr. Stennett about staying for the night. She indicated that there was, and that in the presence of LA he told them that there were plenty of rooms in which they could stay. This conversation took place in room 1704 earlier. She was unable to say whether LA heard this conversation.

[117] In time, the two women became bored and decided to take a walk “to stretch our legs”. KG was unsure whether Mr. Stennett accompanied them on the walk. They went along the 1700 wing and turned onto the 1600 wing. They met a male referred to as “Toronto” and two other males. I am satisfied that “Toronto” was Brandon Hubbs. It was apparent that LA had met him previously that evening. The walk lasted about five to ten minutes and was uneventful.

[118] When they arrived back in room 1704, the occupants of that room appeared to be getting ready for bed. The two women decided to find a place for KG and Mr. Stennett to sleep. They and Mr. Stennett walked to room 1616. Upon request, KG confirmed to LA that that is where she would be staying the night. She did not, however confirm where LA was intending to sleep. A couple of minutes after LA left, another couple came in the room. As a result, Mr. Stennett and KG left and went into room 1610. That fact was not conveyed to LA.

[119] LA’s evidence makes no reference to going with KG to 1616. Instead, she portrays her circumstances as having been left alone in 1704 with the team members and without better options for a place to sleep.

[120] In cross-examination KG adopted a statement that she made to the police in which she reported that LA stated her plan to sleep in Simon Radford’s bed, because he had seemed like “a pretty decent guy”. She had not personally heard Simon Radford tell LA that was agreeable to him.

[121] LA was asked several questions by counsel as to why she chose to get into bed with Mr. Radford instead of going to an empty room, leaving the barracks, or even sleeping in Bed 3, which she had described as empty. LA gave reasons why each of these options and others were not better choices than the decision she made to get into bed with Mr. Radford. Her reasons for rejecting other options were unconvincing, especially when taken in the context of her conversation with KG in which she stated before returning to 1704 that it was her intention to sleep in his bed. This goes to her credibility as a witness.

[122] Returning to KG's testimony - Once in room 1610, Mr. Stennett and KG again engaged in sexual intercourse. Approximately 15 to 20 minutes after having entered the room there was a knock on the door. Mr. Stennett answered the door and was met by two males. After a discussion, Mr. Stennett asked KG where LA was located. KG did not know. As a result, the two of them went to room 1704.

[123] KG and Mr. Stennett encountered three individuals during their walk back to 1704. Mr. Stennett stopped to talk with them while she continued to 1704. Upon arrival, KG looked under the door and noted that the light was off and that there was no sound. She testified that she knocked quietly on the door, but that there was no answer. She decided to sit on the floor of the hallway, outside the door. She heard no noise, screaming, or banging while she was sitting on floor.

[124] She decided to knock again, and this time Mr. Radford came to the door. The room was dark, but she could see LA's face. She was in Bed 2. KG told Mr. Radford that she needed to see if LA was okay. Mr. Radford replied that she was sleeping.

[125] KG observed that LA "was lying in bed on her right side, facing the door." The rest of LA's body was under a blanket. Her eyes were closed.

[126] It did not appear to KG that there was anything wrong with LA. As result she told Mr. Radford "good night" and then began to walk away. Mr. Radford closed the door to 1704 behind her.

[127] As she walked away, she met Mr. Stennett and confirmed for him that everything appeared fine. They discussed it and decided to return to 1704, this time entering without knocking. They turned on the light. As she walked toward LA, KG observed a person lying on the bed behind LA.

[128] As she was kneeling next to the bed to talk to LA, the person in the bed left the bed. She did not identify the person at the time and only provided a physical description which did not match that of Mr. Smalley.

[129] LA was described as having a "very red face" and "trying not to cry". KG put her arm on LA, and asked "what's going on?" LA replied that "you need to get out of here, you need to leave". This is the first evidence that LA, at least at that point, was clearly conscious, alert to her surroundings, and exercising mental acuity.

[130] They spoke for a minute or two. KG adopted evidence given at the preliminary inquiry in which she indicated that LA appeared to understand what she was saying and appeared sober. She did appear to be scared or worried.

[131] Mr. Smalley was observed to be in Bed 1, Mr. Stoner was in Bed 4 and Mr. Radford was standing in the room. She believes that the man who had been in bed with LA when she entered the room was still there at that point. She said that she “didn’t really pay attention to him”.

[132] At KG’s request, Mr. Stennett directed the men to leave the room, which they did.

[133] Before leaving the room, Mr. Stoner handed LA’s pants and underwear to KG. She cannot say where they were before he did that. Once they were alone, KG gathered up LA’s other clothes and directed her to get dressed. She found the boots by the nightstand, a shirt at the end of Bed 2, a bra at the end of Bed 3 and her tank top at the foot of Bed 2. She cannot recall where she located the socks.

[134] LA was able to walk and stand. There was no smell of alcohol on her person. She appeared upset and because of that had some difficulties speaking.

[135] In her direct examination, KG testified that she was furious and very scared, because she assumed that LA had been sexually assaulted. She testified:

I find one guy’s phone and ... I didn’t know what to do with it because I was furious. I didn’t want to break it because that would be rude, and I didn’t want to steal it. So, I ended up just putting it in – like throwing it in the mini fridge that was in there and then just leaving it there.

[136] When asked what she was seeking at the time she replied:

I don’t know. I guess I’ve never like stolen anything before, so I didn’t want to take it. ... I thought that was rude. And I didn’t want to damage or break someone else’s property even though I guess refrigerating it could damage it, but I was – again, I was still like kind of drunk at this point, so I don’t know, I just put it in the fridge so that they couldn’t find it.

[137] It was made evident in cross-examination that this was not a complete account of what had taken place. It may be recalled that LA had first expressed concern, while getting dressed, that photos had been taken of her.

[138] Counsel for the accused cross examined KG as to the account she provided to the police in her statement. She adopted the following from her statement as being correct:

- LA was very concerned that there were compromising pictures of her on one of the men's phones;
- she and LA started looking for the phones and she found one belonging to Craig Stoner;
- the plan was to break the phones or delete the photos if they found them;
- KG tried to unlock the phone but was unsuccessful, so she was frustrated;
- at first, she tried to hide the phone under the bed, but didn't succeed;
- so, she put it in the fridge in hopes that it would destroy the contents.

[139] I have concluded that KG understood the potentially damaging nature of this evidence to LA's claim of having suffered a loss of consciousness immediately prior to this. Therefore, in her direct testimony KG presented this event as having been solely hers and solely motivated by her own anger. She would, of course, have been aware that she had told the police about the reasons for putting the phone in the fridge. Perhaps in answering as she did in direct testimony, she hoped that she would be able to avoid telling the entire story at trial.

[140] The truth, however, is that LA was fully alert at that point, and engaged with KG in a plan to seek out and destroy evidence that could be potentially embarrassing to LA. When LA was asked if she recalled this, she said she did not. I do not believe her.

[141] It is important to remember that LA's decision to try to find and destroy any embarrassing photographs does not, by itself, mean that the photographs would depict her engaged in consensual sexual activity. Such photographs, if they existed, and depending on what they contained, would still need to be seen in the context of other circumstances, such as the words and conduct of the parties engaged in those activities to determine what weight to attach to them in assessing whether the activities could be consensual. The more significant point is that, on a material issue, LA elected to deceive while under oath, and appears to have done so to protect her own interests.

[142] Mr. Stennett cleared the hallway of people to enable LA to leave privately. On the way to the car, KG recognized that she forgot her phone and returned to 1704. During this time LA remained in the women's washroom. After re-joining LA, the pair went to the car and drove to LA's apartment. KG estimated the time at approximately 1:30 a.m. or 2:00 a.m.

[143] KG confirmed the evidence given with respect to texts that LA sent, and as to the visit from her friend, KE, before she went to bed.

[144] She also confirms the sequence of events that took place throughout Friday, April 10 and April 11, including the visits to Dr. DD, the hospital and to the police investigator's office. KG provided her statement to the police on April 11, following that of LA.

[145] It is correct to say that there was ample opportunity for discussion of the events as among KG, LA and EP in the period from leaving Warrior Block in the early hours of April 10, until the police interviews were conducted approximately 27 hours later. I am satisfied that such discussion did take place, however it is difficult to assess the degree to which they may have influenced the statements given to the police, or the subsequent testimony given to the courts by LA and KG.

[146] In summary, I found KG to be generally a very good witness, but sometimes selective in her recall. She is intelligent. To her credit, she was prepared to adopt her earlier statements, even when not helpful to her or LA's position. In this regard, she acknowledged that she was quite dependent on earlier statements to police and in the preliminary hearing. I find that her evidence is more reliable and credible than that of LA, where their evidence differs.

Paul Hoskins

[147] Paul Hoskins was a player and manager with the Royal Navy hockey team. He has been with the team since 2007 and knows Mr. Smalley, but only through the team. They are not friends outside of hockey.

[148] He testified that on the evening of April 9 he played in the hockey game after which he went out to dinner with some other team members. He believes they returned to Warrior Block around 10:00 p.m. or 11:00 p.m. He was assigned room 1708 with two other team members. The fourth bed of the room was used to store hockey equipment.

[149] He testified that Mr. Stennett asked if he would drive to purchase some beer. He agreed and transported LA, KG and Mr. Stennett. He and LA talked during the trip.

[150] He believes that they arrived back at Warrior Block at around midnight.

[151] Mr. Hoskins testified that he and the complainant entered the building walking in front of KG and Mr. Stennett. As they were walking down the 1600 wing hallway there was the sound of a door clicking shut behind them. KG and Will were no longer in sight. It was evident to him that they had gone in one of the rooms. The complainant laughed and made a rude comment using a swear word to describe what KG and Mr. Stennett were going to do. He noted, accurately according to the floor plan in evidence, that there are four rooms on the right-hand side of that hallway as one enters from the front entryway. There is also an office of the duty NCO. Opposite the four numbered rooms, being 1610, 1612, 1614 and 1616, are the male and female washrooms. He observed that other doors on the wing were open.

[152] They carried on to 1704 where Mr. Hoskins delivered one case of beer to Craig Stoner. He recalls that Josh Finbow was present in the room and that Simon Radford was in and out of the room. These men were dressed. He did not observe a naked man being massaged.

[153] LA wanted to know where her beer was, and he responded that Will Stennett and KG had her beer. The complainant was not happy with this answer. She left the room looking for KG and Mr. Stennett in order to obtain the beer. He described her as in the hall, shouting, and he observed the door of one room slammed.

[154] This witness testified that he overheard a conversation between KG and LA that took place in the hallway between the entrances to rooms 1704 and 1706. In direct examination he indicated that the two women discussed that LA would sleep with Simon Radford and KG would sleep with Will Stennett.

[155] The Crown objected to the admissibility of this evidence and following a *voir dire* I ruled the evidence to be admissible. In reaching this conclusion I agreed with the position of the Crown that the statement could only be admissible for the limited purpose of assessing the credibility of the complainant as it may have been inconsistent with an answer provided to her by the defence counsel in cross-examination.

[156] In reviewing other testimony of LA, I note that she was asked on three different occasions about conversations that she may have had with KG about their plans for the rest of the night. On one occasion she denied discussing with KG that she would be spending the night. At another time in her testimony, she indicated that she could not recall a discussion about staying or leaving the barracks that evening. Her evidence that she did enter into Simon Radford's bed, of her own volition, is consistent with the information relayed by Mr. Hoskins.

[157] I have concluded that this evidence of Mr. Hoskins, on its own, is not useful to determining issues of what took place at the time of the alleged offenses, and especially offers no assistance in assessing whether sexual acts took place as between Mr. Smalley and LA or whether there was consent or lack of consent thereto.

[158] In cross-examination Mr. Hoskins stated that he observed LA go into Christopher Hamilton's room, number 1703, which was directly across the hall from 1704. He testified that there were team members in there watching hockey. LA was loud and trying to banter with the men in the room who had been watching hockey. While the conversation during the trip to the beer store was friendly, subsequent observations caused Mr. Hoskins to conclude that LA was rude and obnoxious, sometimes joking, though not sarcastic. She criticized the hockey team, which had not been well received.

[159] He told the Crown Attorney that not all of the rooms in the 1700 wing were occupied and that he was aware that there were other women visiting members of the team.

[160] Mr. Hoskins was referred to his statement to the police in which he said:

I chatted with Brandon Hubbs in the hallway and I remember the two girls come out and I can't remember which one it was that said this. One of them said, like, I'm with Will, that was KG or she... If Will said it, she said, you're with Will, obviously. If KG said it, she said I'm with Will and then they said, you're with Simon or I'm with Simon, which ever way that was, I can't remember.

[161] The Crown pointed out that his statement did not include the use of the words "sleeping", "stay" or "bed". The witness acknowledged the discrepancy but felt confident that his current recollection was accurate.

[162] Notwithstanding these discrepancies, Mr. Hoskins presented as a forthright witness who presented his evidence as to what he understands to be the truth.

[163] I accept his account of LA presenting herself at the entrance to room 1703 and that the exchange took place as he described. There are other witnesses who confirm this.

[164] I accept that there was a conversation in the hall as between KG and LA and that the topic was the issue of whether they should stay or leave. I also accept that the conversation involved a discussion of Mr. Stennett and Mr. Radford. However, I am not confident that Mr. Hoskins' trial evidence was accurate as to the actual words used. Given my earlier comments as to the significance or lack thereof of these comments, this evidence is not material to my deliberations.

SR and CMB

[165] SR and CMB were two of the three young women who were at the hockey game during the evening of April 9, and also attended at Warrior Block over the night of April 9 and 10, 2015.

[166] SR indicated that they arrived at the rink at about 7:15 p.m. for a 7:30 p.m. game time. They observed the complainant and KG at the game although they did not know them.

[167] After the game she and her two friends went to a local restaurant with a number of hockey team members that included a man named Gary Parker. She estimated that they left the restaurant at about 10:30 p.m. or 11:00 p.m. and returned to Warrior Block. They went to Mr. Parker's room, which she believed was either 1706 or 1708. She described that there was a party going on with music and drinking.

[168] At around 11:30 p.m., there was a discussion of someone going to buy beer. SR said that she volunteered to drive, however Mr. Stennett went with the complainant and KG. While they were gone, she remained in Mr. Parker's room. In time people returned to the room with some beer.

[169] She indicated that people were coming and going from the room through the evening. At one point the lights were turned off and when turned back on Mr. Smalley was mooning her, that is exposing his buttocks to her. I refer to this evidence because it was not objected to but could be considered evidence of bad character when seen in the context of the allegations in this case. Evidence of bad character is not admissible as against Mr. Smalley, having not put his character in issue. I have specifically instructed myself to ignore this evidence and treat it only as part of the narrative.

[170] At about 1:00 a.m. or shortly thereafter, SR and Mr. Parker left to go to room 1612 or 1614. CMB and one of the other team members accompanied them. There was a fifth person who also went with them. While in this room Mr. Stennett entered and hid in the closet for about a one minute. He was apparently hiding from LA or KG. He then left. After 30 to 45 minutes she and Mr. Parker returned to his room. Before entering the room, she observed a woman who fits the description of KG sitting on the floor in the hallway outside the door to room 1704. She appeared to be looking at her phone. SR estimated that this was at about 2:00 a.m.

[171] When they went into Mr. Parker's room they got into bed and after 10 or 15 minutes, Mr. Radford entered and got into an empty bed in the room. After 10 or 15 minutes he left, and then a group of four men entered into the room including Mr. Stoner and Mr. Smalley. They were laughing and talking. One person, in the presence of Mr. Smalley stated "she won't leave". SR cannot attribute any of the comments to Mr. Smalley. The men stayed a few minutes and then left.

[172] SR described Mr. Parker's room as quiet after they returned on this last occasion.

CMB

[173] CMB gave testimony that was very similar to that of SR, with some differences that are to be expected. She confirmed coming back to the barracks from the restaurant at about 10:30 p.m. and that there was a party at which everyone seemed to be in good cheer. Mr. Smalley was among the persons in attendance.

[174] She recalled seeing KG and LA on a couple of occasions but did not interact with them. She recalled a discussion on the topic of going to the cold beer store.

[175] CMB confirmed that she went to a room in the 1600 wing with SR and others, and that Mr. Stennett came in the room and appeared to hide in the closet for brief time. She testified that she was standing in the doorway, and observed LA calling out for Mr. Stennett, while he was in the closet. Mr. Stennett indicated that he did not want to see LA. In cross-examination, she said that on the occasions that she saw LA or KG they seemed comfortable and having no difficulties interacting with members of the hockey team. It is difficult to place this incident, that is of Mr. Stennett allegedly hiding in a closet, on a timeline and its significance to the case, if any, is not made out.

[176] CMB also believes that it was 30 to 45 minutes later that they left this room to go back to Mr. Parker's room. She too observed KG sitting on the floor in the hallway by room 1704. She recalls hockey players wearing boxers in the hallway at that time. She believes that these included Mr. Stoner, Mr. Finbow and Mr. Smalley. They were chatting and having a good time. This part of her evidence is not consistent with other testimony. I suppose its possible that she may be confused with seeing these men in the hall after KG went into 1704 and they were directed to leave.

[177] After observing KG sitting on the floor, she went into Mr. Parker's room. A little later, Misters Stoner, Finbow and Smalley as well as a fourth unknown person came into the bedroom. One of them said: "the girl asked who was next?". She does not recall who said it, but she did recall that Mr. Smalley made a comment about "coming on her ass". In cross-examination she was asked about the context of this comment. She was referred to her statement to the police about this incident. Mr. Hutchison posed these questions, with her answers:

- Q. One of the males said the girl was asking "who was next?"
- A. Yes.
- Q. You also mentioned that you recall Mr. Smalley mentioning ejaculating?
- A: Yes.
- Q. The comment about "who was next?" - when you were spoken to by the police you said that one of the male persons said they were taking turns and she was letting them take turns?
- A. I remember them saying that.
- Q. You said to the police, in your words "a just, like they said they were taking turns, she was letting them take turns".
- A. I do recall saying that.
- Q. Do you recall that being said in the room?
- A. Yes it would've been said at the same time as the comment of "who was next?"
- Q. You recall that being said by one of the males wearing boxer shorts?
- A. Yes, He and the others laughed when he said this.

[178] She said that they did not stay in the room very long after that.

[179] Both SR and CMB presented as unbiased and making their best effort to accurately recall the events as they perceived them. Their accounts are consistent

with much of the evidence. What they add to the matter is the description of LA seeking out Will Stennett and him hiding from her in one of the 1600 rooms.

[180] CMB's account of the conversation in Mr. Parker's room when the accused and others came in, presumably after KG had ordered them out of 1704, constituted statements against interest. They have the effect of placing Mr. Smalley and others in 1704 and, at least inferentially, admitting to having engaged in sexual activity with the complainant. Mr. Smalley's admission of ejaculating on LA is consistent with the discovery of his DNA, as determined by the forensic test results testified to by Florence Celestine.

[181] The comments also, however, suggest that LA was participating consciously and expressing consent to that activity. This is directly contrary to LA's account of what was taking place in 1704. CMB also noted that the accused and the others did not appear concerned in sharing this information. LA's account expressly rejected any notion of consensual sex with any of these men.

Brandon Hubbs and Owen James

[182] Brandon Hubbs and Owen James are British Royal Marines who are originally from Toronto.

[183] Mr. Hubbs testified that although he was not a member of the Navy he was a member of the hockey team and was present in Warrior Block on April 9 and 10, 2015, at times relevant to this proceeding.

[184] Marine members of the team were billeted together and occupied rooms 1703 and 1705. He and Mr. James were assigned room 1705. That room shared a common wall with room 1703 which was opposite room 1704.

[185] Mr. Hubbs has known Mr. Smalley as a member of the hockey team since 2008. They do not serve together, they do not socialize, and he has not talked to him since the day of Mr. Smalley's arrest.

[186] He testified that he had three encounters with LA on the night of April 9 and 10. He is unsure as to the sequence of the first two encounters. One was in the hallway at which time he observed the complainant knocking on doors, yelling and making noise. She was with Paul Hoskins at that time. This was likely after the

beer run, although Mr. Hoskins and LA attribute different reasons for LA's behavior.

[187] The second (which may have actually occurred before the beer run) was when the complainant attempted to enter room 1703 while he and other marines were watching a hockey game. Chris Hamilton would have been one of the occupants of that room.

[188] He stated that LA was not welcome there and that at one point he blocked the door when she tried to enter. She was told to "get out". LA, he said, threw some "trash" in the partly opened door.

[189] At what he believed was approximately 12:30 a.m. he and Owen James were in their beds when they were disturbed by noise coming from 1704. He texted to Mr. Smalley asking that they keep the noise down. There was no response and so he and Mr. James went across to that room to complain. He believes the lights were off when the door was opened. He told the occupants to "keep the noise down" to which a female voice yelled "you're just jealous because you're not getting some." or very similar words. He did not sense any duress in her voice. He testified that he was 90% certain that it was LA's voice from having heard her speaking earlier in the evening. The female speaker was in Mr. Radford's bed and had long dark hair and "big hips".

[190] He could see Mr. Smalley by his bed, that Mr. Stoner was in his bed, and that Mr. Finbow appeared to be sitting on his bed. There was no indication of sexual activity taking place. He described it as a short exchange and he left to return to his room.

[191] Mr. Hubbs was cross examined on inconsistencies in his statement to police as to who made the demand for the occupants to be quiet and whether the lights in 1704 were on or off at the time he went to complain. In relation to the latter point, he told the police that he could not remember whether the lights were on or off when they went to the door, but that Owen James had told him that he didn't think that the lights were on.

[192] When asked by the police investigator what was said at the door Mr. Hubbs told them:

I basically said, "can you keep it down" and I believe Owen's words, he said "yeah". And then I believe her words, and I wrote this down in a statement or they wrote it down where... I can't remember word for word but it was kind of like

something on the lines of “you’re just jealous you’re not getting any, or you’re not getting this.” At which point I was like “I had enough, boom, let’s go back to bed.

[193] The investigator then asked whether the words were actually “you’re just jealous you’re not getting any of this”, to which Mr. Hobbs replied that “again, I don’t remember it word for word but it was along the basis of the line like that”. Any inconsistency suggested in this line of questioning is, in my view, not significant. It was clear that the witness was conveying a consistent account but with slightly differing words to express that.

[194] Owen James has known Mr. Smalley as a fellow hockey team member since 2014. He does not serve or socialize with him.

[195] After the game he went with some teammates to Boston Pizza for dinner. When he returned to the barracks, he received a deep tissue leg massage performed by Mr. Radford in room 1704. He was naked during the massage. A female entered the room and he was upset that she was in the room. He wanted her to get out. There was a verbal exchange in which she made a comment about his appearance. He told her to “fuck off”. She was the only female that entered the room during that massage. As previously noted, this occurred at approximately 12:17 a.m.

[196] After the massage, he spent time in his room and then in 1703 to watch hockey. Eventually he returned to his own room and went to sleep. He was awakened by what he called a “commotion”. He observed that Mr. Hubbs was awake too. He and Mr. Hubbs went across to 1704 and either he or Mr. Hubbs knocked on the door. The door was opened and he observed a female in what has been identified as Bed 2. She had dark hair and was lying on the bed with her head to the headboard side. The bed clothes were over the female.

[197] He said “would you mind shutting the fuck up?” or words to that effect and the female replied “you’re just jealous because you’re not the one getting laid”, or words to that effect. He then returned to his room and went to bed. There was no further noise that he heard.

[198] It is apparent that after the police investigators came to the barracks to conduct a search, there was discussion among the team members about these events. It may have influenced how these two witnesses remembered events, but I am satisfied that the material aspects of what they say took place, is accurate. Any

discrepancies in how they recall the exact wording of some exchanges, or whether the lights were on or off, are not significant to the central point of this evidence.

[199] I acknowledge that Mr. Hubbs seemed, at times, to be trying too hard to have his evidence accepted, but that did not cause me to doubt his evidence going to LA's credibility or reliability.

[200] I accept that LA was the female who each of them had interactions with, as described. Mr. Hubbs was the person that LA referred to as "Toronto" and Mr. James was the person she referred to as the "naked man" being massaged.

[201] I accept that Mssrs. Hubbs and James responded to the noise coming from 1704 as they described, and that when they went to complain to the occupants of 1704, the person in Bed 2 that they spoke with, was LA.

[202] The evidence shows her to have been fully alert and communicative at that time. In saying this I acknowledge that neither witness observed sexual activity taking place, but LA's credibility suffers by failing to disclose this exchange.

[203] To summarize, the exact words that were spoken is not as significant as the fact that LA omits significant facts that are relevant to an assessment of what occurred in 1704 once she got into Bed 2. While it is possible that this occurred before the time that she says she lost consciousness, the failure to acknowledge this conversation and put it in context speaks to a lack of credibility on her part.

[204] The evidence of these two witnesses also brings to the fore, questions about LA's veracity in how she set out the sequence and substance of various events in the time leading up to the alleged offences. Her conduct as described by these witnesses is contradictory to LA's testimony that she was fearful to the point of panic and feeling trapped at the barracks, unwilling to abandon her friend, KG.

Dr. DD

[205] Dr. DD was LA's family physician in April 2015. They had a very close relationship. Dr. DD had treated, and was a friend of, LA's mother who was a single parent. When the mother died in 2012, Dr. DD became the executrix of her estate. Dr. DD stated that she also became the "adult in LA's life".

[206] Dr. DD confirmed that on the morning of April 10, she read a text that LA had sent to her some hours earlier at 3:22 a.m. She made arrangements for LA to see her later that day at her professional office.

[207] When they met, Dr. DD felt that LA looked upset. LA provided some details of alleged sexual assaults by more than one person. Dr. DD asked whether LA intended to press charges but was told that the complainant's concern was to be treated for any sexually-transmitted diseases that she may have contracted.

[208] Dr. DD conducted a pelvic exam. This included taking swabs for the determination of the presence of sexually transmitted diseases.

[209] During the examination, which did not take very long, the doctor used a speculum and inspected LA's vagina, the vagina walls, mons, labia and cervix. She also took a Pap smear. During the course of the examination she noted the following:

- That nothing of concern was observed about the condition of the cervix;
- There was a long linear "mostly red" bruise located on the left groin along the panty line;
- A slightly brown watery discharge from the vagina was noted;
- The outer area of the vagina was "slightly bluish";
- LA was not unduly uncomfortable when the doctor squeezed the uterus and ovaries;
- There was no indication that LA was impaired; and that
- LA was "relatively calm" during the course of the examination.

[210] The sequence of events and her contact with LA through the rest of that day and into the early morning hours of April 11, is consistent with that of LA's testimony.

[211] There are additional details, however, that arose in her testimony:

- After the initial examination, and when they were texting through the day of April 10, LA expressed concerns with respect to the potential for contracting HIV. Dr. DD informed her that to receive HIV treatment she would go to have to go to the emergency department.
- LA also indicated that she was having second thoughts about whether to report the matter to the police, that is, she was more inclined to do so.

- Dr. DD located a photograph of the British Naval hockey team online and sent the link to LA, who used it to identify some of the men involved in this incident. LA did not mention this in her testimony.
- While at the hospital, they discussed whether LA was going to report the matter to the police. Dr. DD noted that the complainant exuded anger when speaking of the incident and of the men involved.
- At one point through the course of the time in hospital, she observed the complainant to become quite upset and tearful.

[212] Dr. DD's evidence was straightforward. She obviously cares for LA and saw her role from that time on to be one of support.

Paula Nickerson

[213] Paula Nickerson was the Sexual Assault Nurse Examiner who conducted the examination of the complainant in the early morning hours of April 11, 2015. There is a detailed written report and photographs in evidence as Exhibits 25 and 26.

[214] Ms. Nickerson described LA as mostly calm during the examination although there were periods when she was tearful.

[215] The significant findings included tenderness in the neck and upper back area with accompanying redness. There was a 1cm x 1cm bruise on the left shoulder and a 1.7cm x 1cm bruise on the inner left knee. These bruises were both described as being tender. Her nipples were painful. The left groin area was noted to have a 25cm long bruise described as tender. There was a laceration to the posterior fourchette and redness at the introitus. There was also a small laceration noted to the external anal area.

[216] Ms. Nickerson particularly noted that the cervix was red, and very swollen. She noted petechiae on the cervix. On this question, counsel for the accused advised Ms. Nickerson of Dr. DD's observations made the day before in which she indicated that nothing of concern was noted about the condition of the cervix. It was apparent that Ms. Nickerson was very surprised by this and was not previously aware that LA had been examined on the day previous.

[217] Ms. Nickerson provided some limited opinion evidence with respect to the aging of some of the injuries. To the extent that evidence was admissible, and considering the above listed findings and the opinions offered by Ms. Nickerson, it

can be said that the results of the examination are consistent with the testimony of LA and could be consistent with the use of force during an assault or a sexual assault. Ms. Nickerson was clear in saying that it is not her role to offer opinions on whether the sexual activity was consensual or not.

Florence Celestine

[218] Florence Celestine was qualified as a forensic DNA specialist able to provide opinion evidence in the forensic application of DNA typing, interpretation of DNA profiles, and the forensic application of statistical significance to the comparison of DNA profiles.

[219] She received several exhibits from the investigators in this matter and was tasked with interpretation comparison of the genetic data found, if any, on swabs from LA's back, vagina, anal area, and rectal area. She was also to test LA's underwear.

[220] Her key findings were that DNA belonging to the accused, Darren Smalley, was obtained on LA's underwear and anal swabs.

[221] She was asked whether she would expect to find DNA if the person had showered before the swabs were taken. Ms. Celestine testified that she would expect the DNA to be washed away. She was then asked to offer scenarios where DNA could be found in the anal area or on underwear. However reasonable her opinions might appear, there was no evidentiary basis upon which to determine whether those opinions were accurate. Her testing is limited to determining whether DNA is present. She is unable to tell how the DNA was deposited on the sample area, when it was deposited there, or by what mechanism. For example, in cross examination she acknowledged that semen can be transferred from another area such as a chair or a blanket. She was aware of the allegation of a "gang rape" and that she had the male profiles of all four original accused, yet only identified the DNA of one male.

Christopher Keddy

[222] The parties agreed that the report of toxicologist, Christopher Keddy, would be admitted for the truth of its contents without the necessity of him being called to testify. Mr. Keddy examined blood and urine samples provided by LA. He also examined the contents of various beverage containers seized from room 1704 and

which have been identified in evidence as containers used for beverages consumed by LA and others on the night of these events.

[223] The results of his report were all negative. That is, no alcohol, similar volatile substances or drugs were detected in either of the urine or blood samples tested. No drugs were found in the beverage containers.

[224] He qualified the test results in relation to the blood sample by indicating that many sedative drugs are eliminated from the body within 6 to 72 hours and differ for each specific drug. Therefore, a negative result may in fact be inconclusive depending on the drug, and the timeframe between the consumption and the taking of the sample.

[225] The evidence that I accept shows that LA demonstrated no impairment of motor function, communication abilities, or intellectual capacity up to the point at which she claims to have lost consciousness while in Mr. Radford's bed. I also find that when, according to her evidence, she fully regained consciousness, she again exhibited no signs of impairment to either of her mental acuity or motor control.

[226] Therefore, while Mr. Keddy's observation is accurate, the results are consistent with my conclusion that LA was not impaired by alcohol or any substance at the time during which she was subjected to the alleged sexual assaults.

Sgt. Daniel Corneau

[227] Sgt. Daniel Corneau is a technologist at the Department of National Defence specializing in examination of electronic devices. He was tasked to examine the smart phones seized by the police from Warrior Block. The report of his findings is found as Exhibit 31.

[228] He identified a series of photos extracted from some of the electronic devices that were seized. He was able to tell the court when some of the photos were taken and that it was his view that there were two photos deleted. There is insufficient evidence before me to draw any negative inference against the accused from this fact.

Police Investigators

[229] Sgt. Tyler Bruce Hayes was the lead investigator of the complaint. There was nothing controversial in his evidence as to the investigation with two exceptions.

[230] LA testified that he told her that he needed to personally seize the clothing from her apartment on April 11, 2015, and that he did so, except for the underwear which she retrieved from the garbage. Sgt. Bruce Hayes testified that LA retrieved the clothing and brought it to him. Nothing has been shown to turn on this discrepancy in the evidence.

[231] It was surprising to learn that although some 13 hockey team members present at Warrior Block at the time of the incidents were available for interviews, the investigators chose not to interview those witnesses until after the decisions were made to arrest Mr. Smalley and three others. Some of their testimony, such as that of Mr. Hubbs, has been shown in this trial to constitute material evidence. This was pursued by counsel for the accused. This was an investigative decision and nothing in this trial turns on that fact.

[232] D/Cst James Wasson was the identification officer who gave evidence of his examination of Warrior Block, observations and evidence collected. In view of the issues in this trial and other evidence, it is not necessary to review his evidence. I am cognizant of the contents of his testimony.

[233] That concludes my review of the evidence.

Law of Sexual Assault

[234] Section 272 of the Criminal Code, being the section under which the accused has been charged reads, in part:

272 (1) Every person commits an offence who, in committing a sexual assault,

(a) ...

(b) ...

(c) causes bodily harm to the complainant; or

(d) is a party to the offence with any other person.

[235] I am satisfied that there is evidence to support the conclusion that LA engaged in sexual activity in room 1704 between the hours of approximately 12:30 a.m. and 2:00 a.m. of April 10, 2015. I am also satisfied that the lacerations described by Paula Nickerson and some of the other injuries described were likely caused by that sexual activity and could constitute “bodily harm”.

[236] The central issues in this case are whether the Crown has proven beyond a reasonable doubt the essential elements of sexual assault, being common to both

offences, and if so, whether the evidence proves beyond a reasonable doubt that Mr. Smalley is criminally culpable of either or both alleged offences.

[237] A person commits a sexual assault when without the consent of another person, he or she applies force intentionally to that other person, directly or indirectly in circumstances of a sexual nature such that the sexual integrity of “the victim”, is violated (see s. 265(1)(a) and (2)).

[238] Section 273.1 of the *Code* provides the “meaning of consent”, specific to a charge contrary to s. 272. The relevant provisions to the circumstances in this case read:

Meaning of consent

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

Where no consent obtained

- (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (b) the complainant is incapable of consenting to the activity;
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (2) not limiting

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained. 1992, c. 38, s. 1.

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused’s belief arose from the accused’s
 - (i) self-induced intoxication, or
 - (ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[emphasis added]

[239] The recent case of *R. v. El Rawi*, 2018 NSCA 10, sets out the applicable law, both as to the elements of sexual assault and more specifically, what is the appropriate test is to determine the question of capacity to consent. I will quote it at length:

THE ELEMENTS OF SEXUAL ASSAULT

19 *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 is the seminal decision on the elements the Crown is required to prove in a sexual assault prosecution. The decision cemented the demise of implied consent and reinforced the necessity of focussing on the subjective state of mind of the complainant to determine if he or she did not consent to the sexual touching.

20 The *actus reus* of the offence is simply the intentional sexual touching of the complainant and the absence of consent. Justice Major, for the majority, wrote:

[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] 4 S.C.R. 333, and *R. v. Chase*, [1987] 2 S.C.R. 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), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

...

33 Of course, an unconscious complainant lacks the capacity to consent (*R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Humphrey* (2001), 143 O.A.C. 151, at para. 56; *R. v. Ashlee*, 2006 ABCA 244, leave to appeal to S.C.C. ref'd, [2006] S.C.C.A. No. 415).

34 The Supreme Court in *R. v. J.A.*, 2011 SCC 28 reiterated this axiom--the definition of consent in s. 273.1 requires a complainant to be conscious throughout the sexual activity in question. Any consent given before loss of consciousness is inoperative. But what impairment of cognitive ability short of loss of consciousness voids capacity to consent?

...

42 With respect, there is nothing in the words of s. 273.1(1) that suggest the Crown need establish communication of a voluntary agreement to prove the *actus reus* of the offence of sexual assault. The issue of communication, or lack thereof, of a voluntary agreement is highly relevant to the issue of the *mens rea* of the offence--that the accused knew that the complainant did not consent to the activity in question--particularly in light of the statutory requirement in s. 273.2 of the *Code* that an accused took reasonable steps to ascertain the existence of consent.

...

46 However, Justice McLachlin expressed, in *obiter*, comments about the common law concept of consent, which mentioned the role of communication. She wrote:

[64] I turn next to the common law concept of consent. Much of the difficulty occasioned by the defence of honest but mistaken belief is related to lack of clarity about what consent entails. Consent in the context of the crime of sexual assault is a legal concept. At law, it connotes voluntary agreement. It embraces the notions of legal and physical capacity to consent, supplemented by voluntary agreement or concurrence in the act in question. *Webster's Third New International Dictionary* (1986), at p. 482, defines consent as "capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action".

...

59 That only a "minimal capacity" suffices is supported by comments by the Supreme Court of Canada that a complainant must have had an "operating mind" in order to be capable of consenting to sexual activity. For example, in *R. v. J.A.*, *supra*, McLachlin C.J., for the majority, wrote:

[36] Section 273.1(2)(b) provides that no consent is obtained if "the complainant is incapable of consenting to the activity". Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent. This might be because of mental impairment. It also might arise from unconsciousness: *see R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Humphrey* (2001), 143 O.A.C.

151, at para. 56, per Charron J.A. (as she then was). It follows that Parliament intended consent to mean the conscious consent of an operating mind.

[emphasis added]

60 This begs the question: what constitutes an operating mind? Comatose, insensate or unconsciousness cannot qualify....

61 On the other hand, requiring the cognitive ability necessary to weigh the risks and consequences of agreeing to engage in the sexual activity goes too far.

62 What then should be the test for 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.

68 In *R. v. Hutchinson, supra*, the majority reasons penned by McLachlin C.J. and Cromwell J. helpfully suggest a two step approach. First, determine if the complainant consented, or at least, is there a reasonable doubt that she did not. If there is doubt that she did not consent, determine if her consent was vitiated:

[4] The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no "voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation: *Ewanchuk*, at para. 36. Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2) (c)).

69 Difficulties present where the complainant, due to the ingestion of drugs or alcohol, truly has little or even no memory of the event. Absent direct evidence from a complainant that subjectively she did not consent, the judge or jury frequently must rely on circumstantial evidence to determine the absence of consent ...

70 Where a complainant testifies that she has no memory of the sexual activity in question, the Crown routinely asks: "Would you have consented?" Despite the potential to discount the typically negative response as speculation, the answer is usually received into evidence, and depending on the reasons, may or may not have a bearing on the determination if consent or capacity to consent were absent

71 ... a trial judge is required to consider all of the evidence adduced at trial and direct his or her mind to making the necessary findings of fact or mixed law and fact presented by the issues to be decided. In doing so, the judge must not start with any presumptions that certain types of witnesses are inherently credible or reliable, nor must the judge employ stereotypical myths or flawed assumptions.

72 There is, of course, the legal presumption that any accused is innocent of the accusation that he or she faces. This legal presumption can only be displaced by reliable and credible evidence that establishes beyond a reasonable doubt all of the essential elements of the offence or offences charged.

73 A trier of fact is not to assess each piece of evidence individually on a standard of proof beyond a reasonable doubt (*R. v. Morin*, [1988] 2 S.C.R. 345). Rather, the trier of fact must take into consideration all of the circumstantial evidence relevant to any particular element.

74 When the evidence is entirely circumstantial, the judge must again consider all of the evidence. If after considering that evidence, existence of the elements is the only reasonable or rational inference, the trier of fact should draw the inference that the elements, and hence guilt, have been established beyond a reasonable doubt (*see R. v. Villaroman, supra* at para. 41). If there are other reasonable or rational explanations inconsistent with guilt, the inference must not be drawn and the accused acquitted.

Analysis

[240] LA testified that she was unconscious and therefore unable to describe the nature of the assaults on her person or to identify who assaulted her. If that evidence is accepted, then it is incontrovertible that she did not have the requisite capacity to consent to any sexual touching of her person that occurred during those periods of incapacity. One element of the *actus reus* of sexual assault would be satisfied.

[241] The analysis would then turn to an assessment of whether on all of the admissible evidence it is proven beyond a reasonable doubt that the accused touched the complainant for a sexual purpose, which is to be measured objectively. If the evidence meets that threshold of proof the Crown must also establish beyond a reasonable doubt the *mens rea* of the offence, that 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.”

[242] Each case presents its own unique challenges to assessments of credibility and reliability. While there may often be common features such as the involvement of alcohol and relative youth, it would be wrong to generalize when sorting through the details of testimony taken years later, about events that take far shorter time to occur than is spent questioning about them. In particular, it is not permissible to make assumptions based on what might be the societal expectations of behavior – each person’s conduct must be assessed on the basis of what they did during the events that constitute the subject matter of the alleged offences. This case exemplifies the importance of these core principles.

[243] LA is intelligent, well-spoken and obviously well read. She had an unusual amount of information available to her, about the medical and legal issues that arise in sexual assault cases. The degree to which she prepared herself as a complainant from the outset has undoubtedly influenced the manner in which she presented her evidence.

[244] Her presentation as a witness was controlled, and if demeanour was the only gauge of the truthfulness of her testimony then she would be viewed as highly credible. However, demeanour is a notoriously poor gauge of truthfulness or reliability. In this case, both are in question.

[245] I have concluded that I must reject her evidence that she lost consciousness during the alleged sexual assaults. Overall, it was my impression that the complainant was selective in how she presented her evidence of her conduct throughout the evening. She maximized that evidence which supported her narrative and minimized any events that might be inconsistent with her narrative. I will provide some examples.

- I do not believe her testimony when she said that she did not know where KG and Mr. Stennett went when the four of them returned from the beer store and KG disappeared into a bedroom on the 1600 wing to have an intimate moment with Mr. Stennett. Mr. Hoskins’ evidence in

this regard, and a look at the floor plan, make it clear that they had to have gone into one of four rooms. Mr. Hoskins testified that he heard the door click and that doors of other rooms were open. As such, I reject her evidence that she was in a state of panic, banging on doors and calling out for KG, all without success.

- I believe that LA minimized her role in creating conflict when she walked in on Mr. James' massage while he was naked, and again when she attempted to enter 1703 where a group of people were gathered and who did not want her there.
- I do not accept that she was in an extended state of fear and panic over being among the hockey team members after KG's first disappearance to have sex with Mr. Stennett. Evidence from the witnesses, including KG, give little indication of this being the case. Instead I accept that she was behaving in a manner consistent with her own self-assessment – assertive, confident, one who shares opinions and thoughts, whether or not the other person likes what they heard.
- Her explanation that the safest place for her to stay that night was in a bed with Simon Radford was not credible. By her evidence, there was an empty bed in the room which she rejected as a better choice. There is also evidence that there were empty rooms available. She made no inquiries of what her other options might be, which would have been the logical thing to do. This makes it more probable that it was her intention, from at least the time of her conversation with KG, that she was going to sleep in Mr. Radford's bed. (I want to be clear that her decision to sleep in Mr. Radford's bed is not relied upon to suggest that she was more likely to be consenting to sexual activity, rather it is relevant to her credibility in that she presented this as a safer choice when reason would say otherwise. It must be remembered as well that she made this choice without consulting or asking the permission of Mr. Radford.)
- Her explanation for giving Mr. Radford a kiss when she got in Bed 2, is lacking credibility. The notion that it was a "good night kiss" was provided to her by the police investigator taking her statement. She could not offer any explanation for her action. In the way she presented this, Mr. Radford would have had no expectation that she would get into his bed or give him a kiss on the lips. It is ironic that she testified that none of the persons, including Mr. Radford, would

have had any reason by her earlier conduct or words, to believe that she would engage in sexual activity with them. If this is true, then Mr. Radford would have been justified to be surprised when she got into the bed with him and kissed him.

- Her claim to have lost consciousness permitted LA to avoid examination as to what actually happened in that room at that time. If she was indeed sexually assaulted, then it would have been far better to have said so. Instead, the court is left with a loss of consciousness that only occurred at material times to the offences charged; this has never happened to the complainant before or since. There was no medical reason for this to have happened and the evidence does not support any possibility of alcohol or drug ingestion as being the cause.
- LA had full motor control and mental acuity immediately before the sexual activity occurred and immediately after it had apparently concluded. This type of switched on/switched off consciousness was not credible.
- There are problems with LA's account of waking up to two penises in her face, one of which was in her mouth, and that she was being penetrated from behind at the same time. The evidence is, that there was little room and a lot of clothes on the window side of Bed 2. There was a night table on the opposite side. There are photographs of the area in evidence. Her description does not explain how the men could have been positioned to have their penises in the location of her head, which was at the wall next to the night table. There is also no detail of where the person or persons were that were allegedly penetrating her. In sum, this allegation is so lacking in detail and so improbable, having regard to the physical space in which it is alleged to have happened, that it too is lacking in credibility.
- The final example I will give is perhaps the most significant problem. LA denies directing KG to find and destroy any photos or phones on which such embarrassing photos might be located. I have previously stated my reasons for rejecting her denial and the significant damage that I believe it does to her credibility.

[246] To summarize, I cannot accept LA's account of what occurred. How or why LA went down this path is something that one could speculate about, but in a criminal trial there is no obligation on the defence to provide a motive as to why

the complainant makes an allegation. It is enough if the evidence fails to prove beyond a reasonable doubt the essential elements of the offences charged.

[247] In this case, the very serious problems with the credibility and reliability of LA, as her evidence relates to material facts in issue, leaves me with a reasonable doubt as to what took place, who was involved and whether she did not consent to the sexual activity.

[248] It is impossible to know where the truth begins and ends in this matter. The Crown must prove the absence of consent beyond a reasonable doubt. Obviously, something of a sexual nature occurred in that room. Maybe it was a criminal offence, maybe it was not. Without credible evidence it is unsafe to convict.

[249] Before concluding I want to speak to two other matters.

[250] LA testified that there was no factual basis upon which the accused could believe that she would engage in consensual sexual activity with him and that she would not have done so with him and definitely not with him in group sex. The rejection of her testimony and the reasons for that rejection, as it relates to proof of her lack of consent permeates the entirety of her evidence.

[251] Whether she held these views is not determinative of what her actual conduct and thought process was with respect to consent at the time of the sexual activity. I have found her evidence on that question to be wanting and so there is no basis upon which to suggest that her earlier conduct or intentions can be relied upon to establish a lack of consent during the sexual activity.

“Bodily Harm”

[252] The first count alleges “bodily harm” and I have previously indicated that in my view the injuries sustained by LA could be viewed as bodily harm within the meaning of s. 272(2)(c) of the *Code*. I am not satisfied, for the reasons previously set out, that the evidence proves beyond a reasonable doubt that Mr. Smalley either caused bodily harm to LA, or that he was a party to the infliction of bodily harm on her by another person. In this regard I am cognizant of the provisions of the statutory and common law in determining whether a person is a party to an offence. It would be unsafe on this evidence to conclude beyond a reasonable doubt that he is culpable under either basis of liability for an assault that caused bodily harm.

[253] For the reasons set out herein, I find Darren Smalley not guilty and he is discharged.

[254] Before concluding these comments I want to thank counsel, some of whom are at the table and some of whom have been counsel on this matter, in the earlier stages. I want to thank all of you for what I freely say was a exhibition of a high degree of competence and professionalism in a very difficult case, was exhibited throughout this lengthy matter. You are all to be commended in that respect.

Duncan, J.