

SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Williams*, 2019 NSSC 352

Date: 20191127
Docket: CRAT480175
Registry: Antigonish

Between:

Her Majesty the Queen
v.
Jonah Williams and Tyler Ball

Restriction on Publication: ss. 486.4, 486.5 and 539(1)
Trial Decision

Judge: The Honourable Justice D. Timothy Gabriel
Heard: October 21-25 & 28-31, 2019, in Antigonish, Nova Scotia
Oral Decision: November 27, 2019
Counsel: Courtney J. MacNeil and Alicia K. Kennedy, for the Crown
Craig M. Garson, Q.C., for the Defendant (J. Williams)
Stanley W. MacDonald, Q.C. and Jack MacDonald (articled clerk), for the Defendant (T. Ball)

By the Court (Orally)

Introduction:

[1] Each accused is charged that between the 17th day of November 2017 and the 18th day of November 2017 at or near Antigonish Nova Scotia that he did commit a sexual assault on SH, contrary to Section 271 of the *Criminal Code*. Acronyms will be used to designate both the complainant and all of the witnesses who testified at trial (other than the two accused) in accordance with the various publication bans which have been put in place.

[2] The complainant and the two accused were students at St. Francis Xavier University ("St. FX") in Antigonish, Nova Scotia, at the relevant time. Mr. Williams was a second-year student at the University in 2017, while both Mr. Ball and the complainant were first-year students. All were living on campus in Cameron Hall, a complex that includes two male residences (MacDonald and MacPherson houses) and two female residences (Thompson and Thompkins houses). Mr. Williams was a resident of MacDonald House, Mr. Ball resided in MacPherson. Both are Nova Scotia residents. The female complainant, SH, was a resident of Thompkin's house, and resides out of Province when not attending university.

[3] Cameron Hall is configured such that the two female residences are sandwiched between MacDonald and MacPherson. Due to that layout, to traverse the distance between the complainant's room and that of Mr. Williams, took literally a matter of seconds.

[4] Mr. Williams was president of MacDonald house at the outset of that year. He applied for the position, was accepted by the University as such, and attended St. FX early in 2017 (in late August) partly to undertake orientation and training with respect to the duties that he would be assuming in that capacity. The other reason both he and complainant attended the University in late August (before classes had begun) was due to the fact that both were varsity athletes. Mr. Williams was a member of the University football team, while SH was a member of the soccer team.

[5] Both the complainant and her roommate (and friend) MMK, attended in late August 2017. MMK was also a member of the soccer team. Neither of the two young women was from Nova Scotia, and both hail from the same hometown, where they had become acquainted with one another through their local involvement in the sport. They became closer friends once they came to university and became roommates.

[6] The accused, Mr. Ball, was a member of the University football team as well.

Unlike Mr. Williams, however, he was not on the starting team. He was a member of the practice squad, which meant (among other things) that he would get to start actual games only rarely.

[7] On November 17, 2017, SH testified that she and Mr. Williams were close friends. They were not in a relationship at that time, and she was not then interested in pursuing one, although she had been interested previously. Mr. Williams testified that he had indicated to her that he was not interested in a committed relationship with her, and as of that date, she appears to have been accepting of this.

[8] November 17, 2017 was the date of the "Catalina wine- mixer", a university sponsored annual event centred around "the Inn", which serves as the on-campus drinking establishment. To participate, students were expected to dress up in somewhat formal attire and drink wine. Many would congregate at the Inn and, afterward, migrate to private parties that were being held in many of the residences on campus. Due to crowding, however, some students did not manage to get into the Inn, choosing instead to merely attend the myriad other parties in the dorms.

[9] Mr. Williams and SH met up at one of these parties on the fourth floor of MacDonald house. The two occupants of the particular room in which this party occurred had turned it into a "party room". They had pushed their beds back against the walls and moved some of their other furniture out into the hall to facilitate dancing and socializing. The room had been tricked up with special lighting and music equipment.

[10] Mr. Williams appears to have arrived first. Both he and SH testified that when the latter arrived at the room he was up on a window ledge dancing with another young woman. SH entered the room and ended up dancing with some girlfriends directly below that ledge. At some point the other young lady dancing with Mr. Williams got down, and SH got up. Dancing progressed to kissing and holding each other tightly. One of them suggested that they go back to Mr. Williams room. Accordingly, they traversed the two flights of stairs down to his second-floor room.

[11] While there, they began having consensual one-on-one sex in Mr. Williams' roommate's bed. Both agree that this occurred in various positions and that some "rough sex", largely consisting of his spanking of SH, occurred. In the testimony of Mr. Williams, this initial period was somewhat protracted, lasting 45-60 minutes. Because of its duration, the activity was punctuated by "breaks" during which intervals the parties rested and talked.

[12] It was during one of these hiatuses that Mr. Williams says that he raised with

SH the idea of a threesome. SH denies that this conversation took place then or ever. The accused, on the other hand, says that she responded affirmatively.

[13] According to Mr. Williams, the parties had resumed sexual activity when a knock on the door occurred. It was JM, Mr. Williams' roommate, who wished to gain access to their room so that he could replenish his drink. He was with three friends, JC, CG, and the co-accused, Tyler Ball.

[14] According to SH, this was not the first interruption of the evening. It had been preceded by an earlier visit from her friend MMK, who was checking on her well-being. SH had a conversation with MMK, however, does not recall what was said, and MMK left the room.

[15] In any event, when the four other men entered the room, there was a reference by Mr. Williams to "a sixsome" (SH initially said he referred to a "sevensome"). Mr. Williams says it was a joking reference and that everyone, including SH, laughed. He says he then turned to the complainant in a serious vein and again asked her whether she was willing to participate in a threesome, and that she responded affirmatively. SH denies that this conversation, or any conversation to that effect, ever occurred.

[16] The process by which Mr. Ball was selected as the third party in the threesome, as well as the sexual activity involving the two accused and SH which ensued, is controverted and best dealt with when the evidence supplied by the various witnesses is considered. It suffices to say, however, that it is the activity which occurred during the threesome which forms the subject matter of the charges which the two accuseds face.

[17] The crown called ten witnesses. Messrs. Williams and Ball each testified, and Mr. Williams called one additional witness. So there were thirteen witnesses in total.

[18] The assessment of the credibility and reliability of all of these witnesses looms large in this case. It is a somewhat unusual situation in which we not only have the testimony of the actual participants in the impugned activities, but also that of the various people who interrupted their activities at various points. The testimony of these others is not unlike the effect of lightning flashes illuminating an otherwise darkened or obscured tableau.

[19] All of this evidence has been considered and evaluated. Only those portions sufficient to explain the conclusion at which I have arrived will, however, be referenced.

A. The Crown's Case

i) AJ

[20] Ms. A was the sexual assault nurse examiner (SANE) who examined SH on November 19, 2017 (two days after the alleged sexual assault). At the time, AJ was studying to become a nurse practitioner, and SH was the last case in which she was involved in a SANE capacity. Because of this, she indicated that she remembered this case well.

[21] She acted in tandem with a colleague, RP, and Ms. A's role was that of examiner, while RP documented the findings. She testified that SH was originally brought in by her soccer coach, and that her friend, MMK, came in about halfway through the interview process. Part of RP's role was to ask questions related to the sexual assault history and document the answers. AJ was to conduct the examination, but she was present throughout the entire process and "signed off" on the forms, when completed.

[22] One of these forms was what is referred to as a trauma gram. There was an indication on this form that a fluorescent light was not used as part of the examination of SH. It also indicated that a speculum was not used either. AJ indicated that these were mistakes and was firm in her evidence that both a fluorescent light, as well as a speculum were used at various points in the examination.

[23] Another significant piece of her evidence concerned some questions that were put to SH and the answers elicited. AJ was firm in her evidence that SH had advised both RP and herself that she had been penetrated anally during the threesome. She also testified SH told them that another part of the process consisted of Mr. Williams pinning her down on the bed with his hands around her throat.

[24] AJ testified that it was evident from SH's discharge of brownish liquid that she was menstruating at the time of her examination. She could not, however, determine whether SH was just beginning or ending her cycle when she was examined on November 19, 2017.

[25] AJ found evidence of bruising on SH consisting of some bluish purple (relatively blotchy) contusions on both hips (on the sides). These were depicted in photographs taken and entered as Exhibit 1. There was no other bruising on any other parts of her body, and in particular there was none on the bottom part of her

back.

[26] Mr. Williams testified that this bruising is located in the areas that were spanked and also held by him, during the one-on-one consensual sex which preceded the threesome. In fact, as we will see, he felt that he was the one who caused the bruising, albeit during this consensual activity.

[27] AJ also testified that there was some slight redness behind SH's vagina in the posterior fourchette area. This area was marked with an "A" on Exhibit 2.

ii) SH

[28] Ms. H is a 20-year-old St. FX student. On November 17, 2017, she was attending her first year at the University. In addition to her academic duties, she was a member of the varsity soccer team, which involved approximately five practices per week, each of about 90 minutes duration, as well as one to two games.

[29] She testified that she first met Mr. Williams in August 2017. Both had attended university a few weeks in advance of the commencement of classes in order that they could begin training for their respective participation in soccer and football. She characterized him as a close friend, as of November 17, 2017. Accordingly, she trusted him. She did not know Tyler Ball at the time.

[30] On the night in question, and preliminary to her attendance at the Catalina wine mixer, she had attended "Chillis", an all women's residence across the street from Cameron Hall. She was there with some of her friends, including MMK. Before that, at around 6:00 p.m. that evening, she had been at the residence of another friend, EF. During this interval, she had watched EF prepare marihuana brownies.

[31] This latter process consisted of the extraction of the intoxicants from five to seven grams of marijuana into an oil, and the incorporation of that oil into a brownie mix recipe. The result was a pan consisting of twelve brownies. The complainant consumed one of these.

[32] After she left EF's residence in order to attend Chillis, SH testified that she began to feel high. This meant that her eyes felt heavy and her movement, somewhat slowed. She also said that she was "giggly". SH indicated that this was the first time that she had ever consumed marihuana as an edible.

[33] The complainant estimated that she would have arrived at Chillis by approximately 7:00 p.m. In this new location she, while in the company of some friends, consumed roughly one-half of a standard bottle of wine, and approximately

two (out of a package of four) vodka "blackflies". She was drinking the wine directly from the bottle. She described the premixed vodka blackflies as being each slightly larger than a bottle of beer, and about 6 to 7% alcohol by volume. The complainant said that this alcohol heightened the prior intoxication she had been feeling from the marihuana brownie.

[34] Her recollection was that she left Chillis at approximately 8:00 or 9:00 p.m. that evening, and that she took her remaining vodka blackflies with her. She does not recall taking the remainder of her bottle of wine from Chillis. She described her state of sobriety at the time as being "tipsy, on the verge of being drunk". She does not recall specifically consuming any further intoxicants for the duration of the evening, although says that it is possible that she had consumed more alcohol as the night went on.

[35] SH returned to Cameron Hall and began getting ready for the evening. She recalled socializing and visiting various of her friends on different levels of the residence. At some point she ended up at the room where Mr. Williams was partying. She described lots of lights, with beds and desks pushed up against the wall to facilitate dancing. She spotted him while he was dancing on the ledge and went to dance with some girlfriends who were in the vicinity. She said "I got up on the ledge, I don't recall how I got up, I believe he [Mr. Williams] helped me up, it's pretty high up".

[36] Once on the ledge they began dancing, and ended up kissing. The complainant indicates that it was Mr. Williams' idea that they retire to his room. In any event, she was not opposed to this and got down and went with him.

[37] She recalls going down two flights of stairs to his room on the second floor. SH does not recall them stopping off to socialize enroute. She does not recall having any alcohol with her, and could say that she definitely did not consume any alcohol or other intoxicants after the two left the party room on the fourth floor.

[38] SH testified that she was feeling drunk, experiencing slurred speech, blurry vision and that she was "a lot more drunk than usual". She explained that she would not be drinking 7% alcohol (the blackflies) on a casual night. She also indicated that she had not been drinking much during soccer season and the season had just ended at the beginning of November.

[39] She testified that she was "on her period" that evening and, as such, was nervous and did not really want to have sexual relations with Mr. Williams. Moreover, the complainant said that she told him that she was menstruating, and he

responded "okay".

[40] SH cannot recall how the two became undressed but at some point they were naked and began to have sex on Mr. Williams' roommate's bed. She described the bed as plain, with just a couple of sheets on it.

[41] The sex consisted of the two adopting various sexual positions including missionary style (with him on top of her), doggy style (with him behind her while she was on her knees), and with her straddling him on top.

[42] The complainant acknowledged that during this process Mr. Williams was sometimes slapping/spanking her. Although she employed more than one descriptor with respect to this activity, it was clearly consensual on the basis of her testimony.

[43] During their activity, Mr. Williams had his hands on her breasts and the sides of her hips. SH did not find that the force which he had used in spanking/slapping her was uncomfortable.

[44] At some point they heard a knock at the door. SH was unsure how long they had been thus occupied at this juncture. Mr. Williams answered the door. It was MMK. SH cannot recall anyone else being with her.

[45] The complainant had a conversation with her friend. She could not recall either what was said or where Mr. Williams was while it took place. The upshot was that MMK was wondering if she was okay. SH replied in the affirmative, and MMK left. SH believes that MMK remained in the doorway rather than entering the room.

[46] The complainant testified that she and Mr. Williams resumed sexual intercourse. Their entire activity consisted only of vaginal intercourse. She emphatically denied, in particular, that he performed oral sex upon her, as she was menstruating and would not have permitted it.

[47] After thus resuming, there was another knock at the door. Again, Mr. Williams got up to answer, and this time his roommate JM and three friends came in. She remained on the bed, covered up by a sheet. SH did not know any of them at the time.

[48] The complainant testified that she had no conversations with either Mr. Williams or anyone else while the four other young men were in the room. Mr. Williams however, made a reference to having a "sevensome", "sixsome", "fivesome", or words to that effect. She further testified that she felt very uncomfortable during this process as she was naked in the bed. She was further

unsure how long the other men were in the room. They had some conversations not involving her, and eventually they all, with the exception of Mr. Ball, left. She recalled that the lights were on, but did not recall if the door to the room was closed while the others were in the room.

[49] She said that there were no further conversations involving herself or either of the two men after the others left. Specifically, there was no conversation about her being involved in either a threesome, or having sexual relations with Mr. Ball.

[50] While the two men were in the room (she does not recall how long the two had been in the room with her when this occurred) there was further knocking at the door. This time, some Residence Assistants ("RA's") were seeking entry. Significantly, SH could not recall if this occurred before or after sexual activity had taken place between her and the two accused. Nor could she recall any conversation with the RA's. Specifically, she does not recall ever telling them that she was "fine" and that she "wanted to be there".

[51] SH testified that the sexual activity with the two men began with Mr. Williams getting on top of her and penetrating her vaginally. Mr. Ball put his penis in her face and in her mouth.

[52] She testified that her privates were hurting at this time, and she tried to push Mr. Williams away. She was on her back, Mr. Williams was on top of her. He had his hands on her hips, thus pinning her to the bed. She denied that he or Mr. Ball had their hands around her throat at any time.

[53] The complainant testified that the pain in her privates was excruciating. She told Mr. Williams "no", and "you're hurting me". This was to no avail, so she grabbed him and pulled his penis out of her. She testified that, when she did so, he appeared to be in shock, or "stunned". SH could tell by the look on his face. But this only bought her a few seconds respite before he resumed having vaginal intercourse with her once again.

[54] When she had grabbed Mr. Williams by his privates, she testified that Mr. Ball's pants were down and his penis was in her face. She said she was shocked, disgusted, and "frozen in fear". SH said she did not even know Mr. Ball at this point, and said she had no idea why he felt it was okay to do that. He said nothing to her beforehand, nor did she say anything to him, nor could she recall how many times Mr. Ball put his penis in her mouth.

[55] SH testified that she could not recall any other part of Mr. Ball's body coming into contact with her while the three of them were in the room. The ordeal came to

an end when they heard further knocking on the door. She had no idea how long the threesome activity lasted before that, but, on first hearing the knocking, the two accuseds got dressed. She remained in the bed and she said she was numb, trying to comprehend what had happened to her.

[56] Mr. Williams answered the door. She did not recall what either he or Mr. Ball were wearing at the time. Her friend, MMK, was at the door. She came in and sat beside her.

[57] The complainant testified that she was hysterical at this point. MMK helped to dress her and got her out of the room quickly. She could not recall what either accused did when MMK entered the room, and did not recall the specific discussion that she had with MMK while in the room.

[58] The two women went to the room that they shared. SH recalled that some of her other girlfriends were there. She recalls, in particular, JA, MMK, and KS, being there, with some others in the hallway. She was sitting on the bed, crying hysterically. She recalled MMK leaving the room to talk to Mr. Williams, "I could hear her voice in the hallway."

[59] SH testified that she was pretty good friends with JA at the time, and that she had a conversation with her that night, but did not recall what was said. She was also friends with KS, LC, and RL, as well as MJ, but neither recalled them being present while she was in her room, or having a conversation with them about what had occurred.

[60] The complainant remembered crying, lying on her bed, and talking with the others, before she eventually fell asleep.

[61] The next morning when she awoke, she described herself as feeling sore in the area of her hips and vagina. That day was to have been a busy one because they had new recruits coming in for the soccer team, and she was expected to assist with their orientation, along with her other teammates.

[62] She testified that she could not put a tampon in due to the swelling in her privates. She also testified to bruising on her sides, in fact, on each side on her hip joints. The bruises were blotchy and she testified that she did not have them before November 17, 2017.

[63] There was to be a soccer practice that morning (November 18, 2017) and then a get together at the residence of one of the members of the men's soccer team, with the new recruits. SH was unable to participate fully in the planned events. She confided

in her soccer coach as to what had occurred the night before, and his wife drove the complainant and MMK to St. Martha's Hospital the following day (November 19, 2017). She had stayed the overnight of November 18, 2017, with a girlfriend. She testified that she was too afraid to return to her residence in Cameron Hall.

[64] On November 19, 2017, SH testified that she was examined by two SANE nurses, one of whom asked her questions and another one who filled out forms. She described the experience as "overwhelming" and that she did not see the forms that the nurses filled out. MMK was not in the room with her for more than ten minutes at the beginning.

[65] The complainant indicated that she was very emotional during the examination, and did not give the nurses a lot of detail. She did not know how long the process lasted, or the time when she left the hospital. Her best estimate was that it took a couple of hours.

[66] She also testified that the evening of November 19, 2017, which was a Sunday, her soccer coach put her and MMK up in a hotel for the night. After that, she stayed at a girlfriend's residence until her mother arrived from out of province on November 21, 2017. After that, the two obtained a hotel room and stayed together.

[67] During that interval she only returned to her residence long enough to grab her toiletries and belongings and take them with her.

[68] She reported the incident to police on November 22, 2017, and provided them with her first statement that day (she was later to provide them with another, one week before the trial started). She had struggled to decide what to do. She testified that she felt unsafe and that was her number one concern.

[69] SH confirmed that the photographs in Exhibit 1 were taken by the SANE nurses and accurately depicted the bruising on her body at the time they examined her. She was adamant throughout that she did not consent to sexual activity with the two accuseds (together) at any point in time.

[70] The complainant was cross-examined by counsel for each of the two accused. I will recount only the salient parts of those lengthy cross examinations.

[71] For example, SH confirmed that her memory, while she and Mr. Williams were alone in the room, could be characterized (in paraphrase) as "I don't remember every single piece of that night, I remember the important parts".

[72] She also indicated that she told the SANE nurse the "whole story". What

mattered to her was the three-way incident itself, rather than the period of consensual sex with Mr. Williams alone which preceded it (which she did not mention).

[73] She testified that she was definitely menstruating and had used a tampon on November 17, 2017, but does not remember putting it in or changing it. She did feel, however, that she would have put one in in the morning, and changed it approximately five to six hours later.

[74] SH did not recall what she did before arriving at EF's house (where the marijuana brownie was made) on the date in question.

[75] The complainant confirmed that when she was with Mr. Williams, and the other four males entered the room, the reference to "sevensome" was made by the accused jokingly. She had also testified on direct that he had also referred to a fivesome, foursome, or sixsome. She agreed that before her direct examination, she had never mentioned this fact to anybody, nor had she mentioned:

(a) the slapping/spanking during consensual sex with Mr. Williams;

(b) pain in her vagina during sex; or

(c) the fact that she had not provided a lot of detail to the SANE nurses.

[76] The very first formal statement that she gave to anybody was made to St. FX University investigators, to enable them to pursue an investigation of the incident. (This was followed by the previously mentioned statement that she provided to police on November 22, 2017). She told the university investigators, among other things, that on November 17th she was "pouring her own drinks". She denied that this was inconsistent with what she had said on direct, which was to the effect that she was drinking directly from the bottle. She said that what she meant was that she was looking after her own drinks and was not dependent upon somebody else to make them for her.

[77] The complainant agreed that in her statements to the SANE nurses, the St. FX University investigators, the police, and at the preliminary inquiry (June 12, 2018), she had said that "seven guys entered the room" when she was there with Mr. Williams. She agreed that this was incorrect, as she never knew the exact number of people who entered at that time. She said she got the figure when Mr. Williams made the reference to a "sevensome".

[78] Ms. H agreed that it was possible that she had had a conversation with LC in her room after the incident saying: "I don't know if she was one of the people in my

room afterward". It was pointed out to her that at the preliminary inquiry, she had agreed that LC had been there at that time.

[79] SH was asked if she was aware that LC had written in her St. FX statement words to the effect that SH was visibly upset, and that SH had told Ms. C that she had consented, but then realized that it was not what she wanted when MMK was at the door to remove her from the situation. The complainant indicated that she had no recollection of having made that statement to LC. She also agreed that LC was a friend on November 17, 2017, and remains one to this day.

[80] The complainant testified that she did not know who LB was. She conceded that LB could be a Residence Assistant ("RA"), but was not familiar with her. Importantly, she had no specific recollection of such an individual being in the room with her and while the two men were there, or of LB speaking with her.

[81] Counsel for Mr. Williams asked SH why she did not mention the fact that an RA had come to the door, to which she had testified during direct, earlier to the St. FX investigators, or in her subsequent statement on November 22, 2017, to the police (and mentioned nothing about it at the preliminary inquiry until she was cross-examined). She responded to the effect that, she knew there were people in and out of the room the whole time, just did not mention it and that her statement to the police was intended only to give the important points of the case.

[82] SH reiterated that she recalled the RA at the door but nothing beyond that, and in particular, she was unaware of LB's statement to the police. In particular, she was unaware of LB's statement to effect that she had been one of the RA's on duty that night, and had indeed entered the room while both men were there with the complainant. She was also unaware of the thrust of LB's evidence, which will be recounted further on, since she testified as one of the Crown witnesses.

[83] In particular, when asked whether she recalls telling a female RA that she was "fine" and that she "wanted to be there", [in the room with the two men], and that her friends were just "overreacting", she responded that she recalls an RA at the door, could not recall if it was male or female, and did not recall any of the conversation that she would have had with this individual. She did add, however, that "I feel I wouldn't have said that." Ms. H also indicated that if the female RA were to testify that she would characterize the complainant's level of intoxication at a 2.5–3 on a scale of 0 to 10, she would disagree.

[84] The complainant disagreed with the suggestion that she was alone in the room with Mr. Williams, before the entry of the other males, for about an hour. She did,

however, agree that the interval could have been between 30 to 45 minutes. Moreover, she disagreed with the SANE nurse's specific recollections that she had claimed to them that there had been penile penetration of her anus, or that Mr. Williams had put his hands around her throat to hold her in place during the threesome. SH was, in fact, clear that neither of these two things occurred at any time.

[85] She did not remember much about the spanking, except that it occurred and that everything which took place between her and Mr. Williams while they were alone was consensual. She also agreed that when she was "on top" his hands were often on her "hips and butt", and that he was also holding onto her and moving her while she was on top.

[86] SH did not recall whether Mr. Williams was forcefully lifting her up and down while she was on top of him. She also could not recall whether, when the two of them were having consensual sex doggy style, Mr. Williams had his hands on the sides of her butt/hips area, but could not deny that it had occurred. She also could not recall how many spanks/slaps were administered during consensual sex. She did agree that when Mr. William spanked her, she had no idea whether he was using one hand or the other, and agreed that he could have been using both at times.

[87] One conversation that SH specifically recalled involved her explaining to Mr. Williams before they had sex that she was on her period. She recalled no breaks during sex, when the two discussed other things. She specifically did not recall a discussion initiated by Mr. Williams as to whether she wanted to participate in a threesome that night. She did not recall a knock at the door preceding the other males entering the room, or Mr. Williams roommate asking if they could come in and get some liquor, nor does she recall telling Mr. Williams to "ignore" that knock, or any subsequent one.

[88] The complainant did agree that at one point during the consensual sex (while the two of them were alone), she had told Mr. Williams that he had hurt her. She agreed that he stopped when he was advised by her to that effect, however she did not recall whether he asked her if she wished him to "try lube", before resumption of intercourse. She specifically denied that he performed oral sex upon her at any time before or after resumption of intercourse. In fact, as indicated, she denies that he performed oral sex upon her at any time that night. She could not recall if she performed oral sex on him.

[89] After the other males were in the room and Mr. Williams jokingly referred to having a seven, six and fivesome, she could not recall if everyone, including herself,

laughed. She emphatically denied that (while all were in the room), Mr. Williams asked her, seriously, if she was still interested in the threesome that the two of them had discussed while they were alone. She went on to deny that she agreed to that activity, to deny that he asked her again "really?", and/or that she reiterated her consent. She further denied any recollection of Mr. Williams assisting her in choosing the third person by pointing at two of the men and saying to the effect that "they both have girlfriends they're out". She again emphatically denied that Mr. Williams pointed to Mr. Ball and asked if she was okay with him, that she said yes, and/or that she reiterated this once again after the other males had left the room.

[90] The complainant confirmed that JA was a friend of hers on November 17- 18, 2017, and she specifically denied that she had ever said to JA (after the threesome activity on that date), or at any time since, that the two men in the bedroom had asked her if she wanted to have a threesome.

[91] SH testified that she had no idea how long it was after the other males left the room before Mr. Williams had further sexual contact with her. She had said at the preliminary inquiry that that interval was "one minute or so" and agreed during cross that this was the truth. She denied any recollection of what went on during that minute or so, and also denied that she had any thought as to what was to happen when she was left alone in the room by the others with the two men. She suggested that some of the differences between the manner in which she testified at the preliminary inquiry and at trial were caused by the fact that the former was a very "traumatic experience". She described it as an interrogation, and said that she "was confused". She emphasized that, "I always tell the truth".

[92] SH appeared to agree that the episode of the RA's at the door occurred while both men were in the room, but she has no recollection of talking to either of them.

[93] She also agreed that the RA's visit was followed by MMK again banging on the door. SH said "I know MMK banged on the door twice that night. I can't recall what she said the second time." Specifically, she did not recall MMK saying to her "do you remember what happened?" either once or a number of times, or of her saying to MMK "but Jonah doesn't know." The complainant could not, however, "rule it out" that these things were said.

[94] The complainant was reminded of her testimony (during direct), which was to the effect that when she grabbed Mr. Williams' penis and pulled it out of her, his face looked shocked and stunned. She was reminded further that, at the preliminary inquiry, when asked what his reaction had been when she grabbed his penis, she had answered "I don't remember". She acknowledged on cross that she saw the

contradiction but was adamant that she was telling the truth then, and now. She also agreed that prior to November 17, 2017, she liked and trusted Mr. Williams, and considered him a friend. She indicated that up to that point he had never threatened or hurt her, and that he had not lied to her or misled her (to her knowledge).

[95] SH also agreed that although she presently does not know whether she ever had bruises across her back, she did tell the police on November 22, 2017, that she had bruises all across her back the next morning. When she testified, she could not say whether she ever saw any bruises across her back at any time.

[96] Ms. H agreed that she is aware that a "threesome" is sexual activity involving three people, that it can include sexual intercourse, oral sex, and sexual touching, and that she knew all this in November 2017.

[97] SH specifically agreed that she remembers her activities at EF's residence, where the marihuana brownie was made, she remembers going to Chillis, remembers MacDonald House, remembers what she was wearing, specifically remembers changing from heels to slippers after she got back from Chillis, remembers dancing in the upstairs room with the lights flashing, dancing on the ledge with Mr. Williams, some of the people in the room, and leaving the room with Mr. Williams hand-in-hand. She also recalls going down two flights of stairs to his room, going into the room, details of the layout of the room, sexual contact with Mr. Williams before the other males entered, the different sexual positions which they consensually employed and hair pulling and the spanking, before the other males entered the room. She recalls no conversations about a threesome at all.

[98] She does recall engaging in further sexual activity with Mr. Williams while Mr. Ball was still in the room, and that she did not ask Mr. Ball or anyone else why he was in the room with them. When asked why she said nothing to Mr. Ball when he began removing his pants, she indicated that she was "worried about Mr. Williams at that point".

[99] The complainant agreed that when Mr. Ball put his penis in her mouth she was on her back and he was to her right standing up. She did not recall him touching her with his arms or hands. She does not remember whether he moved her prior to placing his penis in her mouth. She specifically denied that she took Mr. Ball's penis in her hand and placed it in her mouth.

[100] When asked why she had agreed at the preliminary inquiry, that she could have placed her hand on his penis, she indicated some uncertainty as to what she did. SH added that she was "frozen with fear" at the time.

[101] On cross she indicated that when she was aware that Mr. Ball's penis was coming towards her face, that she did not turn her face towards his penis, although at the preliminary inquiry she had answered "I don't remember" to that question. Moreover, on cross, she indicated that she did not recall how long Mr. Ball's penis was in her mouth, whereas on November 22, 2017, in her statement to the RCMP she said it had been there for a couple of minutes before MMK banged at the door and interrupted their activity for the final time.

[102] During her cross-examination, SH denied any recollection of JM's girlfriend, AM, opening the door or entering the room while the two men were in there with her.

[103] SH also explained that her soccer coach became involved in the situation on November 18, 2017, after she felt he was upset with her for her lack of participation in some of the events with the new recruits. It was at that point that she told him that she had been sexually assaulted the night before, and he explained that going to the hospital was an option for her.

[104] In her final answer while on the stand, given on redirect, she was asked why she used the word "interrogated" to describe her experience at the preliminary inquiry. At this point, SH began crying and pointed to defence counsel and said "he was yelling at me, pointing at me ..." The word "interrogated" had been first used by SH when she was involved in explaining one of the apparent differences between what she had said at the preliminary inquiry and her trial testimony.

iii) JM

[105] JM was the roommate of the accused, Mr. Williams, on the night of November 17 – 18, 2017. He had known Mr. Williams since grade four and testified that the two had played high school football together.

[106] They shared a small room together in MacDonald house. When one entered the door to their room, (he testified) his bed was on the immediate right with a mini fridge on the left and Mr. Williams' bed across the room by the left wall. There was a desk between the two beds with a TV on it. He confirmed, that in the fall of 2017, AM was his girlfriend, although she is no longer.

[107] JM also knew the accused, Mr. Ball. They had played on teams with "Football Nova Scotia" together, and while at St. FX University they had become better friends. He had known Mr. Ball since the ninth or tenth grade. They were not really friends until they got to the University.

[108] CG was another acquaintance, so was JC. These two were close friends, closer than they were to JM and Mr. Ball. On the evening of November 17, 2017, JM met up with CG, who had been drinking. He did not seem intoxicated. He did not observe any of the others with whom he came in to contact that evening consume any other substances besides alcohol.

[109] When they met up with Mr. Ball, JM was pretty sure that this accused was drinking wine. While he could not recall if he saw Mr. Ball actually drinking, he could say he did not observe him consume any other substances.

[110] JM estimates that he drank approximately one-half of a bottle of white wine ("Great White"). This is a fortified wine of a higher than normal alcohol concentration by volume. He said he was feeling a little "buzzed" but was not drunk. He definitely was not stumbling, or slurring his words, and he felt he had a clear mind.

[111] He is pretty sure that he saw Mr. Williams that day, as the two are roommates, but did not observe him consume any alcohol or other intoxicating substances. He met with JC, CG, and Mr. Ball in JC's room, however he cannot recollect the exact time on November 17, 2017, when this occurred.

[112] He testified that he had probably just finished a glass of his wine before they all went out to socialize in the densely packed hallways, and that there were "people everywhere".

[113] Most of the parties were on the third floor. JM's room was on the second floor, (MacDonald side) and JC's room was also on the second floor, but on the MacPherson side. They all went over to the MacDonald side to socialize and saw people drinking wine, but nothing out of the ordinary.

[114] His wine was kept in his room, so when his glass became empty, he and the others went to it. When he opened the door to his and Mr. Williams' room, he saw a young woman under the blankets on his bed. She did not appear to be wearing any clothes, as he could see her naked shoulders and the bottom of her legs. Upon seeing this, they closed the door abruptly. He estimated that they were in and out in about two seconds. JM did not recall having seen the young woman before.

[115] While the men were outside the door, JM saw Mr. Williams run back into the room. He was wearing only his boxers. When he asked Mr. Williams to grab his wine for him so that the four of them could refill their drinks, the latter replied " it's fine, you can come in and fill it up." So they did.

[116] When JM and the others entered the room, Mr. Williams said something jokingly about a foursome or fivesome. Everyone, including the young lady on the bed, laughed. Mr. Williams then jumped in bed with the young lady and asked, "how about a threesome" – those were not his exact words but that was the effect of what he said.

[117] JM could not tell immediately if Mr. Williams was still joking. While the other men looked at one another, JM testified that Mr. Williams looked at SH and said "seriously, would you be down for a threesome", to which she responded "sure, I don't care".

[118] Upon being invited by Mr. Williams to "pick" which of the other men would form the third party, JM testified that SH laughed in a somewhat embarrassed fashion and turned her head. Mr. Williams then pointed at JC and JM saying "girlfriend, girlfriend", meaning both had girlfriends. CG volunteered that he was not interested, which left the co-accused, Mr. Ball. He said "okay" and began walking towards the bed. At this point, JM, CG, and JC all left the room.

[119] JM felt that SH appeared comfortable with the situation, and appeared to be awake and alert. He also said that if she had appeared uncomfortable, or gave an indication that she did not want to be involved in what had been proposed, he would have intervened to prevent it from happening. Quite apart from all that, he was aware that St. FX University has a policy that if something illegal happened in his room, (with his knowledge) he could be "written up", or become subject to some other form of discipline himself.

[120] JM indicated that he and the two others went up to the third floor to socialize. Approximately 15 minutes later, after he had returned to the second floor, he saw MMK banging on the door to the room that he shared with Mr. Williams. She was banging very aggressively. When he said to her, "it's locked" or, "they're busy in there", he testified that she screamed back at him, "I know". JM, feeling that this was something he did not want to be involved in, left the area.

[121] JM's best recollection is that he went back to the third floor to continue socializing. The next thing he remembers is hearing a commotion involving MMK and SH, who were upset. He remembers also seeing Mr. Williams coming upstairs. When he asked the accused what happened, or, "did you have sex with her?", his response was to the effect that he had not, but rather simply had had oral sex. He also said that MMK had accused him of sexual assault.

[122] JM also recalled a later conversation with Mr. Ball, who said he did not have

sex with SH, and did not give many other details. He went on to testify that he spent the night in his girlfriend, AM's room. He did not recall discussing what had gone on that night with her. Since Mr. Williams' arrest and removal from campus, which occurred sometime the following week, he said that he has only seen him maybe four times. He has seen Mr. Ball maybe eight times. This occurs when he (JM) happens to visit HRM.

D) CG

[123] This witness was one of the men who entered Mr. Williams room with JM. In the fall of 2017 he was in his first year at the University, taking "human kinetics". He is a close friend of JC, and had known him since the age of five or six. He had also known Mr. Williams since elementary school and had played football with him on various teams over the years. He did not know Mr. Ball prior to attending St. FX in the fall of 2017, but rather had met him through JC.

[124] November 17, 2017, although also the night of the Catalina wine mixer, was significant because it was the night before JC's nineteenth birthday. Because of that milestone, it was in the back of CG's mind to touch base with JC around midnight. He also recalled taking a variety of pictures of different people in their finery that evening.

[125] At one point, while socializing, he came upon Mr. Ball, JM, and JC all talking in the hallway of MacDonal House. They talked about his pending birthday and getting a picture together. JC had been consuming alcohol although CG did not recall the type. The former was "feeling the effects" by which he meant that his friend seemed kind of "energetic". As to Mr. Ball, CG felt that he had been drinking, but did not recall noticing any signs of intoxication. He later clarified that he felt at the time was that Mr. Ball was intoxicated, but that it was only an assumption. JM was also drinking but CG could not remember any more details than that. Again, he recalls "assuming" that they were all intoxicated.

[126] Eventually, they went back to JM's room. His recollection was that they went there to take a picture. He recalls that when the door was opened, they saw a girl on the bed under the covers and that he did not know who she was. The door was quickly closed. He did not recall if the lights were on or off in the room, although when his memory was refreshed on cross-examination with a copy of his police statement given in December 2017, he agreed that the lights were on. Nobody said anything to the girl.

[127] Afterward, they stood outside the room for a couple of minutes, then started to

walk in the hallway. After a very short interval, they saw Mr. Williams coming down the hall. He did not recall where this accused was coming from and believes he was wearing a dress shirt and dress pants. They asked him if he knew there was someone in his room. He responded that SH was with him and that it was okay if they went into the room. So, they went in for the second time, and, again on cross, confirmed that he thought the lights were still on.

[128] The girl was still on the bed, the one closest to the door. There were a total of six people now in the room. CG testified that this was where Exhibit 6, the picture of himself and JC, was taken. He could not recall who took the photo or if it was taken on his cell phone. Behind them in the picture is Mr. Williams' bed, rather than the one SH was in. CG could not recall when the photograph was taken that evening, the caption at the top says 9:53 p.m., but he was unsure if that was accurate. There appears to be a hat, a bottle of cologne, and a can of Bud Light on the table visible in the picture. CG felt that JC might have consumed some alcohol in this room. While the photo was being taken, he recalled seeing Mr. Williams and SH talking, but he could not make out what they were saying.

[129] After the photograph (Exhibit 6) was taken, they continued to talk and Mr. Williams got undressed and got in bed with the girl. The latter proposed a "fivesome" which was clearly said in jest. Then he addressed the girl, proposing a threesome. He did not recall the exact words that the accused used, but was not joking this time.

[130] To CG, a "threesome" includes sexual intercourse, sexual touching, and oral sex. The girl responded with "I don't care."

[131] CG testified that Mr. Williams then told her that the choice was between CG and Mr. Ball because JM and JC were in relationships. CG promptly said he was not interested, whereas Mr. Ball said "sure". CG recalls that Mr. Williams then asked the girl again if she was okay with Mr. Ball, to which she (once again) repeated "I don't care". SH's demeanour was somewhat quiet, but he could hear her responses. He himself had no conversation with her, but she appeared to be responding to Mr. Williams in an appropriate manner and appeared to be understanding of what was said to her. Like JM, he testified that he saw no indication of reluctance or coercion, and felt that she wanted to participate. If she had said no, or he had gotten the impression that there was a problem, he would have stopped it. He said he himself was relatively sober and had had only a couple of drinks that evening.

[132] CG and the others then left. He could hear Mr. Williams, Mr. Ball, and SH talking to one another as he and the other males were leaving. At that point, Mr. Williams was in bed with the girl. Mr. Ball was in the middle of the room in his dress

clothes. He did not hear what was said.

[133] After leaving the room, he went to a party in one of the residences on the MacPherson side of Cameron Hall. He was in a room with 40 to 50 other people listening to music and dancing. He did not recall what time his evening ended and/or speaking with Mr. Ball further that evening. His memory was refreshed with a portion of the statement that he had given to the RCMP on December 13, 2017, in which he recounted a further brief discussion with Mr. Ball, in which he had asked the latter how "that" was, and that he received the response "nothing really happened".

E) MJ

[134] In fall of 2017, MJ was in her second year at St. FX living in Cameron Hall, (Thompkins House), on the second floor. Her roommate was SK, and their room was directly across from MMK and SH's room.

[135] She had friends visiting from out of province and was preoccupied with them most of the evening of November 17, 2017. At around 9:30 p.m. that evening they made an attempt to go out to "The Inn" but it was too crowded and they could not get in. They returned to her residence between 10 and 10:30 p.m. She herself had consumed one bottle of "Girls Night Out" wine, which has a lower than usual alcohol content of between 7 to 8%. This was consumed in its entirety before their attempt to get into "The Inn". She consumed no intoxicants after that.

[136] After their return to residence, her roommate and the others planned to visit SK's boyfriend. She herself met up with LC at the staircase on the Thompkins side of the house. They were either on the second or third floor, and began chatting and catching up.

[137] While the two young women were talking, MMK approached them. At first the conversation was about unrelated matters. Then RL, another of their friends, joined them. There were now four people in their group.

[138] At this point, AM approached the four, and began talking mainly to MMK. She told MMK that SH was in an unusual situation, and asked her whether she thought something should be done about it. MMK appeared to be somewhat upset and became intent on interrupting the situation in which SH was involved. MJ went back to her own room, but one or more of the others accompanied MMK.

[139] While back in her room, MJ made a phone call to see where her out of province friends had gotten to. She estimated that approximately 20 minutes had

passed before she heard some "chatter and crying" from either SH's room or the hallway in that vicinity.

[140] When she attended, she saw SH in her room sitting on the bed crying uncontrollably. She was crying so hard she appeared to be gasping for air. There was no way to tell her level of intoxication because she was crying so hard. Other girls (she recalls MMK, JA and AM) were there listening and attempting to comfort her. MJ went in to try to figure out what was going on, and only left very briefly to grab some tissues and water.

[141] Upon her return to the room, and upon hearing a male voice in the hallway she went outside to see what was going on and saw Mr. Williams. In her words, this accused appeared to be "concerned and a little bit confused". She saw him with RL, and at this point felt it was in SH's best interest if the latter did not see or hear from him right away. As a consequence, MJ told Mr. Williams and RL to take their conversation further down the hallway to get it away from the room. In fact, she led the two of them away from the door.

[142] During the brief interval that she was thus occupied with these two others in the hall, she recalls MMK exiting the room, walking very quickly towards them and saying to Mr. Williams "don't come back to our room again, you're a rapist". Mr. Williams left, and she, MMK, and RL returned to the room to be with SH.

[143] At some point while MJ was there, there was a knock on the door and, when she answered it, it was a female RA, checking to see if everything was all right. MJ told the RA in words to the effect that there was a lot of people with SH right now and that if they needed her (the RA) they would go get her. The RA did not go into the room.

F) AM

[144] In November 2017, AM was in her second year of university in the nursing program. Her roommate was RL. JM was her boyfriend at the time, although he is not now. She had known Mr. Williams since grade 7, but had only just met Mr. Ball upon her attendance at St. FX in September of that year.

[145] On November 17, 2017, she was drinking wine, and believes that she had three to four glasses during the evening. Although she lived on the third floor, she knew both SH and MMK, having met them through friends who lived on the second floor.

[146] At some point (she thinks around 9:00 p.m. but could not say exactly) she had a discussion with MMK about the latter's relationship with Mr. Williams. In particular, MMK wanted AM to let her know if she saw Mr. Williams talking to SH, because SH was involved with a boy "back home" that she (MMK) believed would be better for her than Mr. Williams.

[147] After that conversation, AM continued about her night, and sometime later ended up at JM's room (the room he shares with Mr. Williams) looking for him. She could not recall if she simply walked into the room or walked in after knocking first and receiving no response. When she entered she saw SH, Mr. Williams and Mr. Ball all in there together.

[148] SH was on the bed by the door (JM's bed). Mr. Williams was standing at the end of the bed and Mr. Ball was standing next to the bed near the top of it. SH appeared fine. She was lying on the bed, under the blankets, laughing and smiling. Mr. Ball had all of his clothes on, and Mr. Williams was standing near the end of the bed. He appeared to have a blanket around him. He seemed to be otherwise naked.

[149] She felt that she might have taken one step into the room, and was there for 10 to 15 seconds at most (on cross she agreed that it was probably less than 10 seconds) saw what was going on and left. To her recollection, the lights were off. No one said anything that she can recall. While she thinks that they saw her there, she did not remember anyone specifically looking at her. She confessed to a "little surprise" to see them in JM's bed, but did not see anything that gave her any sense that there was something bad going on in that room.

[150] AM closed the door, and left. She ran into MMK and RL approximately 10 minutes after that. They were on the stairwell of the second floor on the girls side and she stopped to talk to them. She recalled MMK asking her if she saw SH, and she recalls telling MMK where she was, and conceded on cross that she had told her that SH was involved in a threesome with Messrs. Williams and Ball. MMK appeared upset, her reaction was very quick, and she got up and headed immediately towards Mr. Williams room to get SH. AM walked down the hallway with MMK, then left from there, not continuing on to the room itself. AM went back up to the third floor.

[151] When she came back down approximately 10 minutes later, she saw SH sitting on her bed in the room that she and MMK share, with JA, MJ and RL with her. SH was crying and quite upset. AM believed that SH was under the influence of alcohol, and had observed her with a glass of wine in her hand earlier that night.

[152] AM helped her boyfriend, JM, wash the sheets the next day. She noticed no stains on them when they did so. She recalled that the sheets were navy blue.

G) JA

[153] JA was in her second year of a health sciences program in November 2017. She then lived in Tompkins house on the second floor two doors down from the room shared by MMK and SH. Her roommate was KK. She had known Mr. Williams for just over a year at that point, and had only just met Mr. Ball at the beginning of that academic year. She did not know him, merely "knew of him", and that is still the case today.

[154] JA and SH originally met through mutual friends. They became "sort of close" because of the proximity of their rooms. She did not recall drinking much that evening. Although she was drinking white wine, she consumed merely enough to have a "buzz on" at some point during the night. She recalls going to the MacDonal side of the residence where a couple of different rooms had parties going on.

[155] She had attended a couple of these parties. At some point she came into contact with MMK who was worried about SH being in a room with Mr. Williams. She was upset about this and wanted to get SH out. JA responded that if MMK was intent on doing so, she would accompany her. JA proceeded to do so.

[156] She remembers people in the hallway enroute. When they got to the door they tried the handle then knocked. JA kicked at it. The door was locked. They waited for a couple of minutes and then the door opened.

[157] A recalls that when they went into the room, it was she who grabbed SH and took her out. She did not recall if anyone else was in the room besides SH and Mr. Williams. She also thinks it was she who entered first and grabbed SH, with MMK entering behind her, but she was not sure. SH was crying and shaking and "couldn't really talk" at the time. She estimated she might have been in Mr. Williams' room for maybe a minute.

[158] JA did not recall anyone else being with her when she brought SH back to the room. She believes that, once there, RL entered at some point, but was not sure when.

[159] MMK returned to the room a couple of minutes later. At that point SH started to say what had happened and her roommate consoled her. MMK then ran out of the room quickly.

[160] JA could not recall if SH made mention of any reference having been made by Mr. Williams to a "seven some" while she was in the room, but she did specifically recall SH mentioning that she had been invited to participate in a threesome by Messrs. Williams and Ball while they were in the former's room.

[161] JA also recalled that, while she was with SH in her room, the latter called her ex-boyfriend (out of province) and used her cell phone to do so.

H) RL

[162] RL was AM's roommate. In 2017, she was in her second year at St. FX University. She had known Mr. Williams since high school, as they had mutual friends. She had met Mr. Ball at University in the fall of that year, also through mutual friends.

[163] On the night of November 17, 2017, she did not start drinking and socializing until around 8:00 p.m. She was taking her time while drinking, as she did not want to fall asleep early.

[164] After they had socialized a bit, she recalled going to the second floor to check on a friend (KK). She could not recall at what time of the evening she did so. While with KK, from two doors down, she could hear MMK speaking in a panicky voice. RL could hear her saying that SH was in a room with Mr. Williams, that she had been knocking and no one had answered, and that, "there is no way she [SH] would consent to a threesome."

[165] By this time, JA had consumed a full bottle of wine, although it was of a low alcohol variety. She said she usually gets something around 5%. She had begun consumption around 8:00 p.m. and it would have been around 12:00 a.m. that she heard this commotion. She felt fine, and she was not as drunk as she had been earlier.

[166] She exited KK's room to try to find out why MMK was so upset. When asked, MMK said SH was having a threesome and that there was no way that she would want to do that. On cross-examination, RL recalled that MMK also said that SH had had a very bad experience in a threesome the year before, and that she also said that "even if she did consent to a threesome, she can withdraw consent at any time. What if she had a flashback about the earlier incident?" By now they were outside of the room that MMK shared with SH.

[167] RL's advice to MMK was that they should get the RA's involved. They went to Mr. Williams' door and knocked upon it. At some point they were joined by two RA's. She testified that one was "Abel" and she thought the second one was a male

also. They advised the RAs that SH was in the room and they had to get her out. They further said she was really drunk and needed to get some help.

[168] All of them knocked at the door. When the door opened she saw SH, she had her clothes on and was bawling her eyes out. She was standing up when the door opened. She saw both of the accused as well, both were standing up but she could not recall where in the room. She could not recall much of what they were wearing "I think everybody had their clothes on" and thought the men were wearing suits.

[169] RL described MMK as grabbing SH because she was crying so hard. She said that MMK had to literally hold her up as they returned to their room. She said she didn't see MMK go into the room, but she must have grabbed her very quickly. The RAs did not accompany them back to MMK/SH's room.

[170] She recalled that MJ, AM and JA all came into the room but could not remember who came in first or last. SH was very upset, and RL described her as crying so hard she could barely breathe.

[171] While she could not make any observations as to MJ's sobriety, she said that both JA and AM appeared not to be drunk. RL recalled that while they were all in the room, a female RA came to the door but that they didn't tell her anything, opting instead to say that SH had just drunk too much and was having "boy problems". At that point, they still didn't really know what had happened, and SH was not in a position to tell them.

[172] RL recalled that the Residence Assistant's name was "L" but she wasn't sure. She also recalls SH saying at one point "Jonah doesn't know what happened", but was unsure of the context. She testified that she remembered Mr. Williams at one point out in the hall, and he was trying to talk to SH and seemed like he didn't "know what was going on". He seemed sober. She heard him say "I don't know what's wrong" and essentially pleading with MMK to let him speak to her. She also heard a male voice in the hall saying (apparently) to him "come on man, leave it for now". She also recalled MMK screaming at him at one point, calling him a rapist.

[173] Shortly after this time, RL left because her boyfriend was waiting for her in her room on the third floor, and that he did not know where she was. On the basis of a reconstruction from the text that she sent to her boyfriend, she thinks that she had been in the room with SH around 12:30 a.m. She returned to her room approximately 10 minutes after she sent the text.

[174] Later that evening, Mr. Ball appeared outside her door. He was looking for JM, and seemed upset. He looked like he had been crying. He said "I don't know

what I did. She said it was “okay”.”

I) LB

[175] LB was one of the Residence Assistants (RA’s) on duty on November 17, 2017. She was in her second year of a psychology program at St. FX University that year. Accordingly, by the time of the night in question, she had lived one year and three months in residence (her first year at the University had been spent in MacKinnon Hall). She confirmed that the term Residence Assistant (RA) is interchangeable with the title "community advisor" (CA).

[176] Her duties involved working nights in residence, from 8:00 p.m. until “quiet hours”, which usually means 11 pm on a weeknight or 1:00 a.m. on the weekend. She was also accessible by phone off hours in the event there was a perceived need for her assistance (for example in the event of a noise complaint). The bottom line was that she was expected to be available to her floor if residents on the floor needed help, such as a referral to resources, or other types of assistance. The hall director was her direct supervisor at the time.

[177] LB described her main task in carrying out her duties as relating to the enforcement of the house rules, and making sure there was no trouble, whether due to intoxication or some other cause. On occasion, she was required to "write up" a resident in the event of misbehaviour, and the consequences would be dealt with by the University's conduct officer.

[178] In the hierarchy of sanctions, the least serious would be meted out for noise complaints, while the most serious would involve write ups, especially if violence or property damage were implicated, or if someone had been seriously harmed. Sanctions could run a range from the offender receiving a “talking to”, or an email from a university official, to the most serious, which could involve expulsion from the residence or the University.

[179] LB’s training involved attendance at the University before classes started in 2017, and listening to some lectures on what to do in the event of specific situations, combined with other courses on first-aid training, and the like. On November 17, 2017, the night of the Catalina wine mixer, she was in her first year as an RA.

[180] Up to that point, she had had occasion to observe many students under the influence of alcohol. In fact, LB ventured to say that she saw somebody intoxicated pretty much every night except, perhaps, Sundays or Mondays. Less frequently, but still not rarely, she would see people under the influence of other drugs. Among

these “other drugs”, marihuana was relatively common, harder drugs less so. If she did see evidence of hard drugs, it was generally on a Friday or Saturday night. Part of her training involved what to look for with respect to drug use.

[181] During September to November 2017, she spent the majority of her time in Cameron Hall. After November, she determined that that residence was not a good fit for her, due to the relatively high amount of partying and alcohol consumption that went on there. She found it very mentally trying to discharge her duties because of this volume.

[182] On the evening of November 17 – 18, 2017, LB was not scheduled to work. She was requested (after the shift had already started, to cover for another residence assistant who became ill that evening. Accordingly, she ended up on duty with Abel Mazwa that night. Generally, the university’s policy was to have a male and female RA working the same shift together, so that one of them could enter a male or female residence if the need arose.

[183] LB remembered that she got called into work around 11:00 p.m. that evening. Although she knew Mr. Williams, it was only well enough to say "hi" if they encountered one another. She knew him to be the president of MacDonald house. She merely knew Mr. Ball as a resident of Cameron Hall. As for SH, she knew her face, but not her name.

[184] LB testified that, when working as an RA, one is responsible for the entire building, rather than a specific section of it. As a consequence, she was expected to go up and down each floor all shift long.

[185] November 17, 2017, being the night of the Catalina wine mixer, was recollected by her to have been definitely busier than average. LB recalled multiple fights having broken out, lots of yelling and crying, with broken glass "everywhere", for good measure.

[186] LB's first contact with Mr. Williams that evening came about as she was dealing with a separate unrelated incident. As she was going to where she was needed, she recalls him coming out of his room with a towel on him. He appeared to have exited his bedroom, and to be going to the bathroom.

[187] Approximately 15 to 25 minutes later, as she and Mr. Mazwa were again making the rounds in that area, she observed two girls banging on Mr. Williams’ door. They had banged for about 20 seconds before the RA’s intervened. When asked what was going on, one of the girls started to say something in response, but

the other girl "the one in the red dress" told her to stop talking. When encouraged by LB to tell her the problem so that the RA's could help if necessary, the first girl said something to the effect that her friend was in there (meaning Mr. Williams' room) and they needed to get her out.

[188] LB testified that Mr. Mazwa then knocked, identified himself, and let Mr. Williams know that he needed to open the door. Mr. Williams complied, and the male RA proceeded to advise him that there were some young ladies out in the hall who were worried about their friend. Mr. Williams went out in the hall and spoke to him. He was wearing jogging pants, she believed.

[189] Meanwhile, LB went to the door to speak to the girl. She looked inside and saw her on the bed, under blankets. She recalls "another guy" in an adjacent bed on the other side of the room under blankets up to his chest. She recalled that the lights were off when the door was opened, did not see anyone turn the lights on, but that the light from the hall was sufficient to enable her to see the interior of the room.

[190] She stepped into the room and testified that she asked the girl how her night was going and received a response "good", or "it's fine". She then asked her "is everything okay?" And received an identical response. LB then, in her testimony, asked the girl, who was somewhat flushed and propped up in the bed by a pillow, "do you want to be here?" The latter responded "yes, I want to be here". When LB told the girl that "your friends are worried about you", SH responded that her friends were "overreacting". The entire conversation lasted between four and five minutes. At no point did the female attempt to leave the room or even stir from the bed.

[191] LB testified that if she felt the girl on the bed was really intoxicated, she would have made her leave the room. Moreover, she would have done the same if SH had appeared uncomfortable about the situation, or had said that she was.

[192] The female, in LB's view, could have been "tipsy", but she could speak clearly and was not slurring her words. Moreover, she followed the conversation quite well and her responses were appropriate. LB described her, on a scale of 0 to 10, as perhaps a 2.5 – 3 in terms of her level of intoxication, with zero representing complete sobriety and 10 being as intoxicated as it was possible for a person to become.

[193] LB did not notice what the fellow in the other bed did while she was speaking with SH. She said she was "focused on the girl", and did not recall speaking with him. Having determined that there was nothing amiss, she left the room, and the two RA's allowed Mr. Williams (who seemed sober) to return inside.

[194] Following that interaction, the RAs began dealing with other issues. One such issue that LB was able to specifically recall was that a fight had broken out, which had caused a lot of shattered glass to be spread about.

[195] LB's next interaction with Mr. Williams occurred approximately 15 to 20 minutes later. She was once again back in the relative vicinity of Mr. Williams room and saw the same two girls, joined by two more girls, all banging on the door. She could not recall what they were all wearing. She had been talking to another student about a separate incident when she heard the banging on the door.

[196] Both she and Abel Mazwa began to once again walk toward the door, but it had already been opened by the time they got there. She agreed that it was likely that Mr. Williams was the one who opened it. They were still about 15 feet away by this point. LB watched the girls go into the room. Neither of the RAs went into the room this time.

[197] Mr. Williams came out of the room once again, and she was able to ask him what was going on. He replied, "I really don't know". Since the door seemed locked, LB asked him if he needed her to get a key to unlock it and let him back in. He responded "no, it's okay – leave them be", or words to that effect.

[198] LB testified that just after she spoke with Mr. Williams, the door then opened again and three girls came out with the girl that LB had formerly observed on the bed. The latter was crying. The girl in the red dress and two others took her to her room. One girl remained in the room, at least initially, and LB thinks that it was the girl who had been with the girl in the red dress on the earlier occasion.

[199] L B thereupon followed them to the room to which they had taken the girl. She stepped into the doorway and asked, "are you okay?", and received a response from the girl in the red dress to the effect that "it's okay, she's just having boy troubles and needs to cry it out". Another friend responded to the effect that it was okay, "we have this". The RA asked them if they had the number for her duty phone, and received an assurance from the girl in the red dress that they would call her if they needed her. She felt that the door was then closed in her face. LB described the girl (SH) as really crying, "like you do at a funeral". She left the room. Shortly after that, the RA whom she had replaced that evening was able to resume duties, she was not needed any longer, and so retired to her room.

[200] She confirmed that RA's are expected to be completely sober when they undertake their duties, and she certainly was that night.

J) MMK

[201] During the 2017 – 2018 academic year, MMK was in her first year at St. FX University. She was SH's roommate, and they had known each other from growing up in their hometown and province, where they both played soccer together. By November 17, 2017, she described the two of them as "pretty close" friends. She had first met Mr. Williams in August 2017, since they were both at the University early to train for their respective sports. She did not know Mr. Ball on the night of the Catalina wine mixer.

[202] Before the event started on the evening of November 17 – 18, 2017, she recalled attending Chillis with SH, MF, and a few others she "couldn't recall". She had a few drinks there. After returning to residence, she had finished getting ready between 8:30 and 9:00 p.m. To her "getting ready" meant doing her makeup and hair. She had made arrangements to obtain a bottle of white wine and a pack of "blackflies" to consume. The wine was a normal sized bottle but she did not recall its alcohol concentration. The blackflies are a premixed vodka drink and she recalled that they were approximately the same size as a beer bottle, but she wasn't sure.

[203] She testified that she wore the red dress that evening, and indeed the photograph (Exhibit 3) taken of her that evening (by whom she was not sure) shows her thus attired. She identified MF and SH in the photograph with her.

[204] When they began to "party with everyone" that evening, she was aware that SH had consumed "an edible", and that the latter was acting "loopy". She could also tell that SH had been drinking, and stated that she was slurring her words and stumbling. She clarified that these observations were made over the course of the evening, not necessarily when they first arrived. She said she has observed SH under the influence of alcohol before, that the number was too many times to say, but did venture that her friend seemed more drunk than usual that night". She rated SH 's level of intoxication at a "seven or eight" on a scale of 0 to 10. She said this despite not having seen SH actually consume any alcohol that evening, but attributed to her that level of intoxication based upon her observations of SH at MacDonald house, where everybody was partying

[205] MMK recalled that she, herself, was definitely intoxicated, and that she had consumed the bottle of wine over the course of the evening. She acknowledged that she might have also had a black fly drink, but was not certain. She observed that she considered this to be a "normal amount [of alcohol to consume] for going out."

[206] This witness could not recall when SH left their group, but she did recall that

she eventually found her in Mr. Williams' room. She did not recall how much time had elapsed between losing track of SH, and eventually locating her there.

[207] MMK could not recall having had a conversation with AM around 9:00 p.m. (or at any other time for that matter) whereby she had told AM that there was a guy back home that SH liked, and who liked her, that she (MMK) did not want SH around Mr. Williams anymore, and asking her (AM) to tell her if she saw Mr. Williams with SH that night.

[208] In fact, MMK testified that it was from MF, in a third-floor party room, that she had heard that SH had gone off with Mr. Williams. She then went to this accused's room for the first time that evening. She does not recall what time of night it was, but that it was "before 12, I believe". (In her RCMP statement on November 22, 2017 she had indicated that it was between 12 and 1:00 a.m. that night). She "checked on" SH, and recalls seeing just her and Mr. Williams in the room at that time. Her recollection was that the latter was wearing a burgundy suit and SH was still in her black dress. SH appeared to be fine. MMK was not there any longer than five minutes.

[209] When she left, she returned to the MacDonald house party room. A short time later, as she went to the washroom, she ran into AM, who MMK says told her some things about Mr. Williams, for example, that he is not "good with girls" and some other things that made her feel uncomfortable. She then went back to Mr. Williams room, resolved to get SH out of there. She had no recollection of being advised by AM beforehand that her friend was involved in a threesome with two men.

[210] When she went to the door of Mr. Williams' room she did not remember being accompanied by anyone else. She also did not recall having told someone else to "stop speaking" when LB asked what was wrong. Indeed, she did not remember speaking to an RA at all that evening, even after they had SH back to her own room, nor did she remember telling RL (before going to Mr. Williams room for the second time) that SH was in a room with Mr. Williams and another man having a threesome.

[211] MMK did recall knocking louder and louder at Mr. Williams' door on the second occasion, and progressed to kicking it. She acknowledged also that when the door was opened, there were two men in there with SH. MMK was very upset and went directly into the room. She testified that she went over to SH and said, "are you okay", and that the latter responded "I'm fine", to which MMK rejoined "you don't look fine to me". When confronted with the police statement that she provided on November 22, 2017, she acknowledged that the rejoinder might have been "no, you're not". She was prepared to acknowledge that there may have been more to the

conversation than she can remember.

[212] MMK's testified that when she was back in their room with SH, Mr. Williams was somewhere in the area of the hall, and that she told him to get away and stay away. When confronted with the testimony of a number of witnesses who had indicated that she had called Mr. Williams a rapist at this time, she testified emphatically that, "I did not say that". She did recall, on the basis of what Mr. Williams said to her, that he appeared to be only worried about himself and his reputation because "a girl had left his room crying". MMK also remembered hearing SH say, "Jonah doesn't know" and repeating that phrase a number of times. She also recalls her understanding at the time that this utterance related to a complaint about a prior incident in their hometown made by SH involving two other males.

[213] MMK also had no recollection of a statement attributed to SH by LK, while in the room she shares with MMK, to the effect that she (SH) had initially consented to the activity with the two young men but had realized that it wasn't what she wanted when MMK arrived at the door to remove her.

[214] The Crown concluded its case at this point.

Defence witnesses

A) Tyler Ball

[215] In November 2017, Mr. Ball was a first-year student at St. FX University. Before that, he had been involved in the high school football program in Truro. Like Mr. Williams, he had arrived at the University in August, before the commencement of classes, to train and try out for the football team. He ended up making the team as a backup.

[216] He recalls the Catalina wine mixer event held on November 17, 2017, and that after he had gotten ready, he and JM went to the MacPherson side of the residence to get JC. It was around seven or 8 PM by this point. He had known JM from their participation on the provincial football team and was acquainted with JC from their prior involvement in track.

[217] He was attired in a pink dress shirt, dress pants with brown shoes and a white undershirt underneath. Mr. Ball had also consumed alcohol that evening. He recollected that it was a brand known as "Great White", which is a larger than normal sized bottle of fortified white wine. He started drinking around 8 PM and had consumed about half of the bottle of wine as well as 2 to 3 beer (no more than four) during the course of the evening. His method of consumption of the wine was to

pour approximately one half of it into an empty Gatorade bottle, then pour some Sprite in as well, so as to attenuate the "awful" taste.

[218] After having collected JM and JC, the three talked in the latter's room for a while and were joined by CG. There had been an incident earlier that night whereby JC had almost gotten into a fight with someone who was not a student at the University, after this individual had shoved JC's girlfriend.

[219] Mr. Ball indicated that he was involved in assisting his friend's removal from the situation, and bringing him downstairs to calm him down. This occurred around midnight. He recollected the time because JC was turning 19 at midnight that evening, and he had contacted CG to meet up with them. The three of them told CG about the fight, and then they went to JM's room (also Mr. Williams' room) to get some beer from the fridge. This accused recalled that JC's condition was pretty drunk, but Mr. Ball felt that he himself was relatively sober.

[220] Upon arrival at JM's room they opened the door, and then closed it pretty quickly, because JM said words to the effect of "there's a girl in there." He just recalls seeing a glimpse of a person "outlined on the bed" directly to the right of the door. Mr. Ball then recalls the three just standing around outside the door for a moment and then seeing Mr. Williams come from around the corner wearing a towel. JM asked him "Can you grab us some beer? There's someone in there." Mr. Williams responded by saying "that's okay, come on in and get it." He opened the door to his room, and Mr. Ball and the others followed him in.

[221] He recalls the group of them telling Mr. Williams about the fight, and that they, almost simultaneously, started searching for beers in the fridge. Meanwhile, Mr. Williams had jumped into bed with the girl and gotten underneath the covers. They did not end up getting any beers because there were not enough left in the fridge for all of them.

[222] After they had all been in the room for roughly five minutes, Mr. Williams made an (apparent) jest about a "six-some", and they all laughed. He heard SH laugh as well, because her voice was higher pitched than the others. He did not see her do so. He did not recall the photograph (to which CG testified) being taken in the room, although conceded that it was possible that this had happened.

[223] They were about to start a conversation again when they heard Mr. Williams address SH saying, "what about a threesome", to which she responded "yeah sure", or "sure yeah". He then recalls Mr. Williams pointing at JC and JM saying "girlfriend, girlfriend" in quick succession, and then CG saying, "no thanks", or

something to that effect. SH 's only response was to giggle. Mr. Ball testified that then his co-accused pointed at him, and SH said "sure, I don't care." He himself said "okay, yeah." SH seemed (to him) to be properly oriented and following the conversation, with a normal speech. He conceded that, while he had probably met SH before that evening, he could not recall when, or the specifics of their encounter(s).

[224] When the other three guys left, Mr. Ball testified that he said to SH "are you sure you want to do this?" And received a response from her "yeah, I don't care." Then Mr. Williams asked her "are you sure?" And she said to him "I told you Jonah, I said "yes"". Mr. Ball felt that this latter response from her was said with some annoyance or testiness, and he interpreted the tone to mean that she was getting tired of being asked that question.

[225] They turned the overhead lights off, but there were still what this witness called "vibe lights" in the room which change from red to golden to yellow, and were nonetheless pretty bright. He could still see the other two participants, and the fact that SH was propped up by a pillow at the head of the bed.

[226] At this point Mr. Williams leaned against the bed frame at the foot of the bed and started performing oral sex on SH. She was lying on her back with her knees up. The sheets were off, and no part of her body was covered. When she looked at Mr. Ball, he testified that he took off his dress shirt, his pants and underpants.

[227] This being what he described as a "new experience" for him, he had difficulty getting an erection. By this point he was standing near the head of the bed with one knee resting on it, and SH took his penis in her hand and masturbated it until he became erect, then she moved her shoulders towards him and began performing oral sex upon him. Mr. Williams continued to perform oral sex on her and this went on for a few minutes before there was a knock on the door which was persistent

[228] He recalled Mr. Williams putting on his sweatpants and opening the door, and it was AM. Mr. Ball himself was attired in his white undershirt and sweatpants as she entered the room.

[229] Mr. Ball recalls her asking "what's going on here?", and three of them looking at each other and laughing. AM then said, " all right, have you seen JM?". He knew her to be JM's girlfriend at the time. He told her "no I haven't seen him", AM said, "all right" and left. She had taken perhaps one step (at most) into the room during the conversation.

[230] At that point there was a discussion between the three of them as to whether

they should keep going. SH said that they should do so, so they did. They each adopted the same positions as prior to the interruption. It was necessary, once again, for the complainant to masturbate him in order for him to become erect, and they resumed their activities for a few minutes more.

[231] At this point there was another knock on the door. A male voice asked "Jonah, it's Abel, can you open up?" Mr. Ball testified that his co-accused expressed some frustration at the second interruption, but nonetheless got dressed and opened the door. He recalls LB immediately starting to talk to SH, and that Mr. Williams was asked by her to leave.

[232] When she entered the room, Mr. Ball was sitting on Mr. Williams' bed by the wall opposite to that in which SH was situate. He recalls LB asking him to leave as well, and he did so. He recollected stepping into another room nearby, and passing Abel, the other RA, who was speaking to Mr. Williams in the hallway. After a few minutes had passed, he heard LB say to Abel and to Mr. Williams "everything's good" or words to that effect, and they both went back in the room.

[233] When the three were back in the room together, he, Mr. Williams, and SH had a discussion which Mr. Ball could not recall word for word, but which was along the lines of "what's going on, this is so weird." He specifically recalled hearing SH say, "my friends are overreacting".

[234] By this point, Mr. Ball had had enough. He testified that he told the other two that he was going to head out and began searching for his shoes and other clothes, including his dress shirt. He testified that there was no resumption of sex of any type, and that while he was trying to collect his clothes, the next (and final) knock on the door took place. It was hard and loud. He estimated that the amount of time that had passed since the three other males had left the room to have been around 20 minutes.

[235] Mr. Williams, still clad in his sweatpants, opened the door and a girl in a red dress (MMK) came flying in. Some other girls followed her. Mr. Ball, at this point, left the room and never returned. He had still not retrieved his pink dress shirt by the time he left.

[236] He testified that he felt SH was clearly willing to engage in all of the sexual activities which were undertaken between the three of them. He reiterated that she verbally expressed consent a number of times (so much so that she appeared to be annoyed one time when she was asked) and was willing to masturbate him on two occasions to enable him to become erect. Moreover, she had placed his penis in her mouth on both occasions, all the while positioning her body so as to facilitate the

oral sex which ensued. In particular, he testified that at no time did SH say "no", "stop", "it hurts", nor did he ever observe her grab Mr. Williams penis or attempt to abort the activity in which they were engaged. At no time did he see any blood (menstrual or otherwise) on SH, Mr. Williams, or anywhere else.

[237] He also recalled a conversation with JM after leaving the room, whereby the latter asked him "how was that?", and that he replied that it was kind of weird and also told him that they "didn't have sex", by which he meant they did not have vaginal sex.

[238] Mr. Ball also recalled the later conversation to which RL had testified, which occurred after he had gone out to get pizza and was trying to locate JM. He recalls being asked by RL "what happened" or, "what did you do", and replying "I didn't do anything, she said it was okay". He also said that he did not hear anyone call Mr. Williams a rapist that evening.

[239] During his direct and cross-examination, Mr. Ball was shown video recordings taken by a number of cameras in different hallways of Cameron Hall at various times during the evening of November 17 – 18, 2017. These depicted action in the hallway during the times indicated, on the footage, and most were related to the immediate aftermath of the fight in which JC was almost involved. They depicted some of the efforts to which Mr. Ball had testified that he expended in attempting to keep his friend out of trouble.

[240] One of these, in particular, that taken from camera 11 at about 23:57 hours (the USB with all of the video footage on it was marked as Exhibit 11) shows JC running down the stairs quickly and Mr. Ball apparently chasing after him, followed by CG and Abel, the male RA on-duty. Neither this sequence, or what is captured in any of the others, was sufficient to support the imputation of significant intoxication (on his part) suggested to him by the Crown, during cross. In particular, his movements appeared quick and agile, his coordination going down the stairs was sound, and the visual footage supported his contention that he was behaving responsibly at that time by attempting to prevent his friend from getting into trouble.

[241] Finally, when shown footage captured at 1:01:58 a.m. on November 18, 2017 from camera 11, Mr. Ball identified himself and JC going down the stairs, and he agreed that he was not wearing his pink dress shirt at this point. He agreed that, at this time, it would have been after he had left it behind in Mr. Williams' room.

B) Jonah Williams

[242] Mr. Williams testified that he attended Citadel High before going to St. FX University for the first time for the 2016 – 2017 academic year. He attended on both academic and athletic scholarships. This meant that he had to maintain certain grades to remain eligible for his academic scholarship. He did retain the scholarship after that first year. In fact, he was named to the "academic all Canadian football team" after that first year, an appointment that honoured the best student-athletes in the country.

[243] Thus, he attended in late August 2017 (weeks before classes were scheduled to start) in order to prepare for the football season, in advance of his second academic year at the University. Another reason for arriving early that year was that he had applied for (and been appointed) president of MacDonald house, which meant he would be in charge of about 45 residents in that facility, and he was required to undertake the advance training provided by the University with respect to the duties that he would be expected to fulfil in that capacity.

[244] The first time he and SH met was when she and MMK were moving into Thompson house in August 2017. Mr. Williams recollected that he introduced himself, advised them at that time of the position that he occupied, and told them that he was there to help them if they needed it.

[245] The next time he bumped into her was approximately one week later when they were at Piper's pub, an off-campus bar. The football team had just played (and won) its first game of the season. The two made eye contact and danced.

[246] Next came "frosh week" and, as president, he was expected to accompany the first-year students to each event to make sure they were okay, and that they made it back to MacDonald house safely. Classes began during the latter part of the week. He had no recollection of having seen SH during that interval.

[247] Both his and SH's residences were very close by. He found SH attractive, and began spending time with her. When he visited her at her room, she was often there with friends. When they were alone, they would often watch movies on her laptop and talk.

[248] One Sunday in October of 2017, she invited him to participate in a "Sunday/fun day" event with her soccer team, and he agreed to do so. It reached a point where they saw each other almost every day, and on one occasion, while she was having "FaceTime" in her room on her laptop, she introduced him to her mother.

[249] At one point, Mr. Williams testified that it appeared to him that Ms. H wanted them to have a "boyfriend – girlfriend" relationship. He advised her that he was not

ready for that at that point.

[250] On November 17, 2017, he dressed up in blue dress pants with a grey/blue shirt, white and blue tie and navy blue vest in anticipation of his participation in the Catalina wine mixer. He specifically denied the earlier testimony of MMK, who thought that he had worn a "burgundy suit".

[251] He had purchased a bottle of Sangria, which was something that he had never consumed before, as he is usually a beer drinker. He testified to having had a conversation with SH earlier that day, whereby she asked him if he would be around later. When he replied in the affirmative, she told him that she would come find him, and that she expected to spend some time alone with him.

[252] Mr. Williams estimated that he consumed two glasses of the Sangria, as well as four beers, at most. In addition, he had ingested what he described as a small "bump" of cocaine that had been given to him right after he started to drink in a friend's room. The drug affected him by, in his words, giving him a lot of energy for about 20 minutes. After that, he noticed no further effects that evening.

[253] When dancing in the party room, at the time he first spotted SH that night, he felt affected only by the alcohol, but "in control". He said that this meant that he had no difficulty with his motor skills. When she entered the room, SH was with friends, and when he next noticed her, she was directly below him (he was still on the ledge) dancing. He recalled that they started lip-synching (the words to the song being played) "at" each other.

[254] Eventually, the person with whom he was dancing got down off the ledge, and SH got up. Mr. Williams testified that she got up on her own, without the need of any assistance from him. They danced, and this progressed to what he described as passionate kissing, and holding each other. One of them suggested that they go to his room, they got down off the ledge, and went his room on the second floor.

[255] Mr. Williams testified that he opened the door and they got on the bed of his roommate, JM. From the time they met in the fourth floor party room, to the time they were in bed together, he did not consume any alcohol or drugs, and he did not observe SH do so. He himself said that he had started drinking around 7:30 that evening, and had definitely stopped no later than 11:00 PM. He described SH's level of sobriety as "more sober than anything else, she could have been affected [by alcohol]", but he did not notice any signs that she was intoxicated.

[256] He also testified that he had seen her on previous occasions when she had been "really drunk" including "throwing up drunk", and in his view, she was not drunk

when they went to his room that evening. Moreover, he was firm in his testimony that, prior to sexual contact, she said nothing to him about being on her period or menstruating, nor did she even hint at it.

[257] He described their one-on-one sexual activity as consisting of oral sex (him performing oral sex on her) and vaginal intercourse. The latter activity was performed in three positions: missionary style, doggy style, and with her on top straddling him. Doggy style consisted of him penetrating her vaginally from behind while she was either on her knees or on her stomach facing away from him.

[258] Mr. Williams testified that when they were in the positions other than missionary style, he spanked her on occasion with an open hand. While this was done forcefully, it was not full force, as he did not wish to hurt her, and at no time did she voice an objection. It was done primarily just to the hip and butt area. Moreover, on those occasions when she was straddling him, while he was lying on his back, he would also hold on to her in the same area, essentially lifting her and allowing some of the weight of her body to be borne by his hands.

[259] He said the period of one on one sex went on, with some breaks, for between 45 minutes to an hour. He characterized it as "rough sex", and quickly qualified it as "rough by my standards, anyway."

[260] During one of these "breaks" he asked her about the possibility of having a threesome that evening, and she responded yes, affirming that she was interested in doing so. After that discussion, they reengaged in sexual activity once again. At one point, SH told him he was hurting her and he stopped. He testified that he provided oral sex to her for a period of time, during which time she reacted the same way she had earlier, which is to say by grabbing at his hair, at other times placing her hands on her breasts, moaning and, eventually, with a "pickup" in her breathing.

[261] After a while, she pulled him up, by which he assumed that she wanted to continue having vaginal intercourse. He testified that he asked her at that point if she wanted him to "try lube", she said yes and he proceeded to apply it to himself. Intercourse resumed. He asked her if that felt better and she said yes.

[262] Shortly after this occurred he heard knocking. He heard JM's voice and was initially told by SH to "ignore him". When the knocking began again he opened the door, not realizing that JM had others with him. He acknowledged that his testimony on this point was different from Mr. Ball, CG, and JM, who had recollected him coming down the hall clad only in a towel or boxers after they had inadvertently walked in on SH alone. He nonetheless maintained that what he himself said on

direct was "the memory that I have". Then, on cross, said "there is a possibility that I let them in from outside, my memory is just my memory".

[263] JM, CG, JC, and Mr. Ball all walked in. Mr. Williams did not recall any photos being taken. He agreed that he made a joke about a six some, at which everyone laughed. He then said something to the effect of either a "foursome" or a "fivesome" (but not both). He then turned to SH and asked her in a quieter voice if she wanted to have the threesome that they talked about earlier and she responded "sure". He then said "really" and she again said yes. He acknowledged that JM had attributed the response of "sure – I don't care" to SH, and CG had attributed to her the words, "I don't care", but he reaffirmed that his recollection was the way he had just testified. He then said that he pointed at JM and JC, and told her that they each had girlfriends. He then heard CG say that he was not interested, which left Mr. Ball. He then pointed at him and said, "are you okay with Tyler?" And she said "yes".

[264] In Mr. Williams's testimony, it was at this point that he got up to go to the bathroom. He said he was gone for one to two minutes, during which interval he realized that he was sore in the area of his privates from the sexual encounter in which he had just participated with SH. Besides his scrotum, two other areas of particular soreness were at the base of his penis, and the end of it when he urinated. He observed nothing which suggested he had been having sex with a woman who was menstruating. Moreover, he had observed no blood of any sort by that point, nor did he observe any later that evening.

[265] He returned to the room, and observed only Mr. Ball and SH there. Mr. Williams testified that he again asked SH if she was sure that she wanted to have the threesome and, hearing her say yes, he took the lead and removed the blanket that had been covering her. SH spread her legs and he started to perform oral sex upon her again. He testified that by this point he did not think that he would have been physically capable of having any more vaginal sex with her.

[266] While doing so, she responded in exactly the same way that she had responded to the oral sex when the two of them had been alone, except that he did not get the opportunity to perform it for a long enough interval for her breathing to pick up. Mr. Williams also testified that while he was doing this, he believes that she was performing oral sex on Mr. Ball. He had his eyes closed while performing oral sex.

[267] They were interrupted by more knocking on the door. SH remained under the covers on the bed and the two men took a minute or so to "get decent". It was MMK. She came right in the door and went over to SH, trying to get her to leave. SH told her friend that she was totally fine and MMK left. She had been there for under a

minute.

[268] The three of them then spoke about how odd this was. SH told them that she felt that MMK was overreacting and that they should continue. They resumed and after a short time had passed there was more knocking on the door.

[269] Mr. Williams opened the door and saw some RA's. LB was one of them. He was told that she had to check on the girl in the room and was asked to leave, so he did. He did not know where Mr. Ball went, if anywhere

[270] LB went into the room and spoke to SH. Afterward, she came out and said, "everything's fine, you can go back in". So he did. The three of them had another conversation about how odd or weird this was. While they were conversing there was another knock at the door. They had not resumed sexual activity at this point.

[271] It was MMK again, and this time she went directly past Mr. Williams (after he opened the door), and started repeating to SH "do you remember what happened"? She said this multiple times, and SH began getting upset. He heard SH repeat "Jonah doesn't know" more than once. By the time she left his room, Mr. Williams testified that SH's crying had gotten out of control.

[272] He reiterated that all of the slapping, spanking and grabbing/holding of Ms. H took place while the two of them were alone, and that he probably did cause the bruises or discolorations shown in Exhibit 1 during this time, but that this and all other activities between them that evening were consensual.

[273] Mr. Williams insisted that he never had vaginal intercourse with SH while Mr. Ball was in the room with them, at no time did he ever pin her hips down to hold her in place, and at no time did SH ever convey to him in words or gestures that she was not consenting. In fact, he testified that she explicitly expressed her consent to the sexual activities in which they all participated on each of the occasions to which he testified. He testified as to what the word "threesome" meant to him – pretty much any sexual activity as long as three people were engaging in it. He did not observe any bruising on SH that night.

[274] Of final note is that he acknowledged on cross that there were a number of different possible sexual acts encompassed in the word "threesome", which might include oral, vaginal, anal, or digital penetration, voyeurism (two participants engaging in sexual activity with the third merely watching) and others. On redirect he affirmed that he would never have performed oral sex upon SH had he been advised by her that she was menstruating.

C) LC

[275] On November 17, 2017 LC was in her second year of a business program at St. FX University. She knew and considered herself to be a friend of both SH and MMK, as well as Mr. Williams. While she had consumed some alcohol (white wine) that evening, she did not consume very much. She recalled specifically having a drink spilled on her sometime around 8:30 or 9:00 p.m., and returning to her room to clean it off. After doing so, she did not consume any more alcohol. All told, she felt she might have had between 2 to 3 glasses at most. She did not consume other intoxicants.

[276] The first time she had contact with MMK that evening, the latter was explaining that she wanted to try to keep SH away from Mr. Williams that night because she thought SH liked him, and SH had been involved with "someone" back home.

[277] The second time the two young women had contact that evening was by the second floor staircase. She recalled speaking with MJ and MMK, when AM came up and told them that SH was in a room with the two accused. MMK became very concerned and said something to the effect that SH would not want to be in that situation. LC encouraged her to the effect that if she felt her friend would not want to be there, then she had every right to go get her out of the situation.

[278] LC, RL and MMK then all went to Mr. Williams' room. One or more of the others knocked on the door. Two R A's (a white female and a black male – she thought the latter's name was "Abel") then approached them and asked them what was going on. LC left around this time and went to a friend's (KK's) room.

[279] A short time later (on cross-examination she thought 30 minutes might have elapsed) and while still in KK's room, LC heard a commotion in the hallway and, upon looking out, saw MMK yelling at Mr. Williams to stay away. He promptly left.

[280] She then went to the room that MMK and SH share, and saw the latter sitting on one of the two beds hysterically sobbing. She thought JA might have been beside her at this point. She heard SH say something to the effect that Jonah didn't know about her past. She also testified that she heard SH say that she (SH) had consented "... until MMK walked into the room and then she realized it was a bad idea." At the time she heard and witnessed this, it was approximately 12:30 in the early morning hours of November 18, 2017, and she was quite sober.

[281] LC then went to speak with Mr. Williams "to get his side of the story". He

seemed pretty sober, and after hearing him LC advised him to wait until the morning before speaking with any of the principals involved, when everyone was sober. She also recalled telling him that she felt everything had been blown out of proportion, and was likely to be fine.

[282] Later on, when she saw Mr. Williams being arrested, she experienced "shock" and "surprise" that this had happened, because she had heard SH say that she had consented until MMK entered the room.

The Law – generally

[283] Assault is constituted by the mere touching of a complainant without the latter's consent. Sexual assault is committed in circumstances where the touching is of a sexual nature, and section 273.1 of the Criminal Code contains a definition of consent within the context of a sexual assault charge.

[284] That section provides:

Meaning of *consent*

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

Consent

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

Question of law

(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

No consent obtained

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

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

(a.1) the complainant is unconscious;

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

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

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

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

[285] Section 273.2 offers the following clarification:

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
 - (i) the accused's self-induced intoxication,
 - (ii) the accused's recklessness or willful blindness, or
 - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (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; or
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[286] There are four elements to the offence of sexual assault, and they may be broadly outlined as follows:

- (a) the application of force
- (b) the absence of consent
- (c) knowledge of the accused of the absence of consent; and
- (d) circumstances of a sexual nature.

[287] Much of the argument in this case has revolved around the issue of consent: was it present or not? If present at any point, was it withdrawn? Both accuseds argue that SH consented to participation in the threesome activities. Secondly, they also argue that, if this court should find against them on the issue of consent, they should still be acquitted on the basis of their honest but mistaken belief that SH had communicated her consent to participation in those activities. Obviously, all of the parties concede that force was applied to SH in circumstances of a sexual nature.

Issues

[288] Consequently, the issues resolve themselves into the following:

- I. Has the Crown proven beyond a reasonable doubt that SH did not consent to the sexual activities involving both of the accused?
- II. If yes, in the circumstances of this case, is the Crown also required to prove beyond a reasonable doubt that the accused did not have an honest but mistaken belief in SH's communicated consent?

Discussion and analysis

I. Has the Crown proven beyond a reasonable doubt that SH did not consent to the sexual activities involving both of the accused?

[289] First of all, we must clarify that what we are interested in, at this stage of the inquiry, is SH's subjective internal state of mind. Obviously, she says she did not consent to the impugned activity. This is a credibility question.

[290] It is trite to observe that there is no “presumption of honesty” which clothes anyone. Indeed, each witness' evidence must be scrutinized carefully when their credibility and/or reliability is ascertained. The totality of the evidence thereby gleaned must satisfy the court beyond a reasonable doubt that all of the constituent elements comprising the offence have been made out by the Crown.

[291] The words "beyond a reasonable doubt" reflect a standard of proof that is fundamental to our system of criminal justice. It is inextricably bound up with the presumption of innocence enjoyed by every accused person. The case of *R v. Lifchus*, [1997] 3 SCR 320 is routinely cited in elaboration upon this principle, to the following effect:

The term "beyond a reasonable doubt" has been used for a very long time and is part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a

standard of proof is impossibly high.

In short, if based upon the evidence before the court, you are sure that the accused committed the events you should convict since his demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[292] Given that both accused have testified, the equally well known case of *R v. W.D.* (1991) 63 CCC (3d) 397 (SCC), at p. 409, augments and clarifies the above principles:

First, if you believe the accused, you must acquit.

Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Thirdly, even if you are not left in doubt by the evidence of the accused you must ask yourself whether, on the basis of the evidence that you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[293] The foregoing is not a litany or “magical incantation” (see, for example, *R v. Mah*, [2002] N.S.J. No 349 (CA), per Cromwell, J.A.). Mere recitation does not ensure that the principles were correctly applied. Similarly, the failure to state the test in the familiar terms set out above does not mean that the proper considerations were not employed.

[294] What must be grasped is that I am not here to resolve the broad factual issue of what, exactly, happened on the night of November 17-18, 2017. Rather, what I must determine is whether the Crown has proven beyond a reasonable doubt the essential elements of sexual assault against one or both of the accuseds.

[295] It is also helpful to remain mindful throughout of the following principle, which has been stated a number of different ways in the jurisprudence, but always to the same effect. In *R v. B.D.*, 2011 ONCA 51, at para 96, it was expressed thus:

As a general rule, the standard of proof beyond a reasonable doubt is not to be applied piecemeal to individual items or categories of evidence. The Crown is not required to prove or disprove beyond a reasonable doubt any single fact, or any item of evidence, unless that fact or item is an element of the offence or an element of a defence.

a) Some elaboration upon section 273.1

[296] So, to return to the issue of consent, from *R v. Hutchinson*, [2014] 1 SCR 346 (para.4), we know that considerations with respect to its presence or absence involve a

two-step process. At the first stage of scrutiny, the Court's focus must be on whether the Crown has demonstrated beyond a reasonable doubt that there was no voluntary agreement on the part of the complainant to enter into "the sexual activity in question" under section 273.1 (1).

[297] In particular, I must be sure that SH did not voluntarily agree to:

- i) the touching;
- ii) its sexual nature; or
- iii) in this case, the identity of both sexual partners.

[298] If I am satisfied that she consented, or am left in reasonable doubt about her lack of voluntary agreement, I must then move on to a determination of whether, under sections 265 (3) and 273.1 (2), there are any circumstances that may vitiate her consent (for example, if initially given, was it withdrawn, or did it involve a coercive exercise of authority on the part of either or both of the accused, or incapacity on the part of the complainant, or fraud on the part of either accused?).

[299] Only those factors carrying an air of reality need be considered at this second stage. Among other things, this second step specifically recognizes that a complainant retains her autonomy: she may require that a sexual partner (or partners) cease what started out as voluntary sexual activity, at any time.

[300] To state it even more clearly, consent is an ongoing requirement. The focus must always be upon whether it has been demonstrated that the complainant, at any given point in time during the sexual activity in question, was not a consenting participant.

b) Some elaboration upon the assessment of credibility

[301] At this juncture, recourse is often had to what at least one authority has called the "venerable" case of *Faryna v. Chorney*, [1952] 2 DLR 354 (BCCA). At paragraphs 9 and 10 thereof, we find:

9 Counsel for the appellant further argued that since Shostak remained uncontradicted by evidence when he testified that he did not know the common Ukrainian word for confinement and that he did not know that the woman referred to in the letter referred to Nancy Faryna his evidence ought to be accepted, and in that event he submitted there was in law no publication of the libel. But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the Judge may have remarked favourably or

unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; and cf. *Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138 at pp. 141-2.

10 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, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. 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.

[302] I am aware, of course, that *Faryna* was a case decided upon a civil standard of proof, one which differs significantly from that which must be employed here. I continually keep this difference in mind. Nonetheless, it is often cited in both civil and criminal cases, because the non-exhaustive statement of principles involved in the determination of credibility contained therein is invariably helpful, whatever the context.

[303] Justice Saunders' comments in *R v. DDS*, 2006 NSCA 34 are also worth bearing in mind:

[77] Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil

or a criminal case?

[304] I adverted earlier to one of the relatively unusual features of this case, namely, that evidence was provided from witnesses other than the actual participants. These were people who actually entered the room at intervals throughout the evening. Although none of these "other" witnesses observed any sexual congress occurring while they were there, their evidence provides a somewhat independent yet contemporaneous perspective which is often lacking when charges of this nature are being considered.

c) Credibility and reliability assessments

[305] I remain fully cognizant that "credibility" and "reliability" are different concepts. My assessment of a person's credibility essentially boils down to whether I believe that they are telling me the truth. My assessment of a person's reliability comes down to, notwithstanding the fact that I believe the person to be making an honest attempt to tell the truth, whether their memory may be relied upon. Either way, I may accept none, some, or all of a particular witness' evidence, depending upon my assessment of their testimony. Ultimately, what I seek in every instance, is evidence upon which I feel that it is appropriate to rely.

[306] There are two primary factors which could potentially impinge upon the reliability of even the most well-intentioned witness in this case. These factors consist of both the passage of time (almost 2 years), and the varying amounts of intoxicants consumed (and the timing of that consumption) by almost everyone who testified.

[307] Aside from the SANE nurse (AJ), unique among the witnesses was the unquestionable state of sobriety of LB at the relevant time. She had consumed no alcohol or other intoxicants that day, as was commensurate with the duties that she undertook as RA later that evening. She was completely sober.

[308] Moreover, LB was bound by no particular "ties" to any of the participants which might distort either her observations that evening, or her recollections of them afterward. Her testimony was clear, coherent and consistent. I attached a great deal of weight to the evidence that she provided.

[309] With respect to AJ (the SANE nurse), the same observations could be made, however my conclusions were slightly more nuanced. I accept the things to which she testified. This was her last case as a SANE nurse, and it stood out in her mind for

that reason.

[310] In particular, she acknowledged that one written form (the trauma gram) was in error in at least two respects, because it indicated that neither fluorescent lighting or a speculum had been used to examine SH. AJ testified that, in fact, both were used during the course of SH's examination.

[311] AJ was, consequently, a witness confident enough in her specific recollection of what was said and done to point out errors in the documents almost 2 years later. I was mindful of this when she testified that the notation on the form, which indicated that SH had told them that she had been subjected to anal penetration during the activity with the two accused, was accurate in terms of what the complainant actually said at that time (November 19, 2017). Given that she was not too reticent to point out errors on the forms in other instances, I attached significant weight to this testimony.

[312] There was also the statement attributed to SH by AJ that Mr. Williams had put his hands around her throat to hold her in place during the sexual assault. This testimony, if inaccurate, would have had to have been made up by AJ out of "whole cloth", so to speak. I was satisfied that she would not have done such a thing. She certainly had no motive to do so, and it would have been contrary to the ethics of her profession (to say nothing of her obligation to the court) had she done so. Her testimony on this point was both credible and reliable, as was the rest of it.

[313] As to CG and JM, I accepted that they attempted to provide their recollections of what had occurred to the best of their abilities. To the extent that they were able to testify with respect to particular occurrences, I was satisfied that they did so accurately, for the most part. It is true that they had consumed alcohol (CG probably less than JM) and that there were certain details upon which they differed. For example, Mr. M said they came back to the room which he shared with Mr. Williams to get more alcohol, whereas Mr. G said they went there to take some photographs. Such differences were inconsequential- both perceived purposes were consistent with what actually occurred.

[314] In the case of MMK, my assessment of her was much more guarded. In her own words, she was quite intoxicated that evening and remained so throughout. She did not recollect significant portions of events to which many others testified. For example, she did not recall anyone being with her when she went to the room for the first time that evening to check on SH. Nor did she have much recollection of the intervention of the RA's on at least one occasion, of telling AM to keep an eye on SH for her and let her know if she was alone with Mr. Williams, of SH's "boy at home",

much of what she said to SH when she entered the room for the final time, and she denied calling Mr. Williams a rapist afterward, an occurrence to which several of the other friends who had congregated at her room (after the incident) had commented upon. This is to cite merely some examples.

[315] I also felt that she attempted to downplay the extent of her dislike of Mr. Williams, which seems to have been significant. It appears that this antipathy predated the events of November 17-18, 2017. Whether it was due to the evident protectiveness that she felt toward SH, or some other factor(s), was not determinable. Before accepting any of MMK's testimony, I looked for other evidence to corroborate it.

[316] With respect to MJ and AM, they each appeared to have a consistent and accurate recollection of the events to which they testified, and were unshaken on cross-examination. By and large, I accepted their evidence as reliable, except that A.M.'s attendance at Mr. Williams' room appears to have occurred approximately 2 hours later than she recollected, given the general timelines to which many of the others witnesses testified, and when juxtaposed with the times shown on the video footage (Exhibit 11).

[317] As to JA, once again I felt that she had made her best efforts to recollect what went on the evening in question. Some portions of her evidence differed from that to which other witnesses testified (for example, JA recollected that it was she who went directly to SH, who was fully dressed and standing near the door when she entered, and led her out of the room). I formed the impression that she had a better grasp of what went on after SH was led out of the room than the events which had led to that action.

[318] RL was similar to JA in many respects. For example, she appeared to conflate the two trips to Mr. Williams' room during which she accompanied MMK, recollecting that MMK was removed from the room by them on the earlier occasion when the RA's had knocked on the door. She recalled SH as standing up when the door opened, and that all the occupants of the room were dressed (the men may have been in suits – she did not recall). Like JA, her recollection appeared to be clearer with respect to what occurred after SH had been extricated from the room, rather than with respect to what preceded it.

[319] With respect to the complainant, SH, it is accurate to observe that her evidence was, at times, incomplete and spotty. In evaluating it, I remind myself of the "rape myths", only some of which are enshrined in the legislation.

[320] For example, there is no legal principle which prevents me from convicting on a complainant's unsupported evidence. Indeed, if corroboration of a complainant's testimony was a necessary precondition (in all cases) to a conviction, it would suggest that a complainant's testimony is invariably worth less than that of other witnesses. However, as I mentioned earlier, it is also accurate to observe that neither SH or any other witnesses took the stand shielded by a presumption of veracity, either.

[321] Another myth is the antiquated and discredited notion that somehow all victims of sexual assault react in a uniform manner, such that a departure from the "norm" is indicative of fabrication. Not so. There are myriad ways in which victims might react to such a traumatizing and dehumanizing experience. I was particularly mindful, in considering SH's evidence, that one manner in which such trauma could manifest itself might result in lacunae in her memory.

[322] Another difficulty which was evident throughout the course of this trial was posed by the often graphic nature of the evidence being examined. Some amount of reticence on the part of SH, and indeed any of the other witnesses discussing it, would not be unusual. I was certainly alive to this as well when I evaluated her testimony.

[323] Throughout the entire course of her testimony, I was struck by how well SH remembered certain events of the evening of November 17-18, 2017. For example, after she had arrived at EF's around 6:00 p.m. she described the making of the marihuana brownies, the extraction of the oil from the drug, what items of clothing she changed when she returned to the residence, the consensual sex involving herself and Mr. Williams, including the various positions which were adopted during the sex with him alone. I contrasted this with how little she claimed to retain from the time the four other men entered the room for the rest of the night.

[324] In particular, I made note of the fact that she appeared quite evasive (as opposed to forgetful) when challenged on cross about her recollections (or lack thereof) of interaction with the RA's in general and LB, specifically, that evening. She also appeared evasive when discussing her specific lack of much (if any) communication with either of the two accused when she was alone with them.

[325] Added to this was the fact that, on more than one occasion, SH attributed her lack of interaction with the two accused (this is to say, after Mr. Ball had entered the room) to her being "frozen with fear". I contrasted her description of herself with the descriptions offered by some of the other witnesses, who observed her while in the room with both men. AM described her as smiling and laughing. LB described SH as

interacting well during the course of their 4 to 5 minute conversation (after Mr. Williams had left the room and, based on Mr. Ball's testimony, after he had done so as well) and telling LB that her evening was going well, that she did not want to leave, and that the friends who were concerned about her welfare were "overreacting". SH exhibited absolutely no signs of discomfiture.

[326] I also contrasted her description of what the two men did with her in the room (at trial), with the way she described it to the SANE nurses only two days after the actual event. In particular, she told the nurses that she had been penetrated anally and held down by the throat, two things which she specifically and emphatically denied on cross examination had ever happened

[327] The foregoing reasons are not exhaustive. However, they do suffice to explain why before accepting her evidence in preference to that offered by another witness, I looked for independent evidence to back it up.

[328] The accused, Mr. Williams, also offered testimony that differed in some respects from that provided by others. Merely a few examples will suffice. The first consists of his recollection that he had been inside the room when he opened the door to allow CG, JM, JC and Mr. Ball to enter. I preferred the evidence of CG, Mr. Ball, and JM on this point, both because of the quality of their other recollections that evening, and because it seemed to fit the timelines in LB's testimony as to when she saw Mr. Williams pass her in the hallway clad in a towel. Moreover, Mr. Williams did not seem to recall AM entering the room after the other men (besides himself and Mr. Ball) had left.

[329] In addition, Mr. Williams placed MMK's first entry into the room to check on SH as having occurred while she was in the room with both accused. I considered it much more plausible that this first visit occurred while SH was in the room only with Mr. Williams, because of MMK's observed reaction when AM advised her (by the staircase) that SH was participating in a threesome with the two men.

[330] It is also fair to observe that Mr. Williams was very quick to discount the effects that his ingestion of cocaine (earlier in the evening) had had upon him. I also did not believe him when he said that he did not know (or had forgotten) the name of the person who supplied him with it. Much like the case with the complainant, before accepting his evidence in preference to that of another witness, I looked for other reliable evidence to back it up.

[331] With respect to Tyler Ball, it is clear that he had consumed a not insignificant amount of fortified white wine (about one half of a larger than normal sized bottle)

over the course of the evening. That said, the video footage shown of him at various intervals that night, and particularly, that from approximately 23:58 on November 17, 2017, shows him to be relatively agile coming down the flight of stairs in pursuit of JC, and being clearheaded enough to attempt to prevent his friend from being involved in fisticuffs.

[332] Mr. Ball's description of the sequence of events whereby he and the three other young men went to Mr. Williams room shortly thereafter (in other words, around midnight), seems to be borne out by AM's recollections (except for the time at which she thought it occurred) of attending that room herself, while searching for JM, and seeing the two accused there with SH. I say this because the footage at roughly 0: 19 on November 18, 2017, as captured by camera 11, shows AM and JM together by that point, so AM had obviously left the room and located her boyfriend by then. AM's evidence of Mr. Williams' positioning when she thrust open the door also coincides with what Mr. Ball says his co-accused was doing (performing oral sex on SH).

[333] Mr. Ball's timing also lines up with LB's testimony – she did not come on duty until 11:00 p.m. on November 17, 2017. His evidence was given in a straightforward and (at times) almost a self-deprecating manner. It seemed to coincide with most of the evidence that I accepted from other witnesses. I found him to be (mostly) credible and reliable.

[334] LC was the final witness in this proceeding. Her evidence was clear and reliable, and she was unshaken on cross-examination. Although she had had maybe 2 to 3 glasses of wine, I accepted her testimony as to when she stopped drinking that evening (8:30 - 9:00 p.m.) and why (with the drink having been spilled upon her) she would have retained a fairly accurate recollection of when that occurred. By the time that the events to which she testified had transpired, I accept that she was more or less sober. I also accept that she was friendly with all of the individuals who testified for the Crown (including SH) as well as the two accused, and had no motive to fabricate any of the testimony that she offered. She was both credible and reliable. I evaluated her testimony accordingly.

Synthesis

[335] Any attempt to come up with a definitive account of what actually took place on the evening in question is fraught with peril and doomed to failure. As I indicated earlier, my task is to examine the evidence, and determine whether it convinces me beyond a reasonable doubt of the guilt of the two accused. In a sense, therefore, my task becomes a search for “reasonable doubt”, rather than the truth itself, which latter often is not fully discernable in any event.

[336] I consider the evidence of Mr. Ball and Mr. Williams that the only activities in which the three participated at the same time was oral sex (Mr. Williams on SH, SH on Mr. Ball). I also reflect upon SH’s strident denial that she would ever allow someone to “go down” upon her while she was on her period, and Mr. Williams’ agreement that if she were menstruating, he would not want to do so either. I consider AJ’s evidence that on November 19, 2017, SH was either “just starting” or “just ending” her period, the lack of evidence of blood on the sheets when AM assisted in washing them the next day, Mr. Ball’s failure to observe any blood on his co-accused or anywhere else that evening, indeed, the complete absence of any evidence of any blood anywhere that evening offered by anyone. When coupled with what she told the SANE nurse, AJ, I received what SH said had occurred (at trial) when she was alone with the two men with a great deal of reservation.

[337] I also experienced significant hesitation with respect to her evidence that she said, "stop it hurts" and/or that she pulled Mr. Williams' penis out while he was having vaginal sex with her in the presence of Mr. Ball. Her testimony at trial that Mr. Williams looked shocked and/or stunned when she did this, was cast into considerable doubt when contrasted with the earlier testimony that she had given at the preliminary inquiry which was that, when she was asked, "What was Jonah Williams’ reaction when you grabbed his penis?", her answer was, "I don't remember".

[338] Bear in mind that evidence given by SH or any other witness at the Preliminary Inquiry (or anywhere else except in court) is not “evidence” for the court to consider unless adopted by the witness on the stand. It may, however, reflect upon the credibility or reliability of what the witness does actually say in Court.

[339] To put a finer point upon it, I was left very doubtful that any vaginal sex occurred while both men were in the room with SH. Among other things, such an interpretation is consistent with the testimony that Mr. Ball offered, as well as the observation of AM when she came suddenly into their room (and saw Mr. Williams positioned towards the bottom of the bed). I preferred AM’s recollection of how she

entered the room, to that of Mr. Ball, since he testified that Mr. Williams went to the door and let her in.

[340] I contrasted SH's testimony with that of CG, JM and Mr. Ball as to the fact that SH was asked if she consented to participate in a threesome, more than once, and replied, "sure, I don't care", or "yeah, sure", with her denials that this had occurred. The men's evidence was buttressed by the fact that LC testified that SH said she had consented, but realized that it was something that she should not be involved in after MMK entered the room for the final time.

[341] Moreover, as is evident from my earlier comments, I formed a very favourable impression of LB's evidence. I placed considerable weight on LB's assessment of SH's relative state of sobriety (2.5-3 on a scale of 0-10), that SH appeared well oriented and said that she wished to remain in the room with the two men, and that her friends were "overreacting".

[342] It also appears likely that the complainant's sexual activities with both men had begun shortly after CG, JM and JC had left the room, and before the arrivals of AM, LB, and/or MMK (second visit) which successively interrupted things. SH's demeanour when AM entered the room (laughing and smiling), coupled with that which was exhibited to LB during the course of their approximately five minute conversation, coupled with her answers to LB's questions, cast considerable doubt upon SH's assertion that she was "frozen with fear" while with the two men, and that she did not consent to the threesome activities with them.

[343] Either way, when I revisit the constituent elements of "consent", as set out in s.273.1, I am left in significant doubt that the Crown has discharged its onus and proved that SH did not consent to the specific acts with which the two accused persons have been charged.

[344] Further, I have been left in significant doubt that the Crown has proven that SH did not consent to the identity of the participants in the threesome, on the basis of the selection process to which JM, CG and Mr. Ball testified.

[345] To put it baldly, I have easily been left in reasonable doubt that the Crown has proven that SH did not consent to the threesome activities, whatever they actually were. As I said earlier, SH appears to have been okay with what had occurred up to the time LB spoke with her, and there is no evidence that the activities changed after LB left. In fact, I accepted Mr. Ball's evidence that there were no further such activities after LB left. SH herself could not recall whether the sexual activities commenced before or after the RA's left.

[346] As previously noted, there was also LC's evidence who testified that she heard SH say that that she had consented to what had occurred up to the point that MMK entered the room and took her out.

[347] Nor has it been established, on the basis of the evidence that I accepted, that her consent, once granted, was vitiated or withdrawn. For example, at no point did the Crown argue that SH's participation in the threesome arose out of an abuse of authority on the part of anyone. Indeed, the only (very slim) basis around which such an argument could be constructed would be if it were to be suggested that Mr. Williams abused his position as president of MacDonald House or his resultant authority in Cameron Hall to coerce SH into doing what she did. To its credit, the Crown did not try to advance such a proposition. Moreover, there is no evidence that the complainant was unconscious (as I have indicated earlier), or that she was incapable of consenting to the activity in question for any other reason (including intoxication).

[348] Indeed, to elaborate briefly on the point of "incapacity", SH conceded that the earlier sex with Mr. Williams alone was consensual. This constitutes an acknowledgement that she had the capacity to consent to that activity. Since the evidence is that she consumed no alcohol or other intoxicants after this point, or that she became unconscious after that point, her capacity to consent remained unchanged after Mr. Ball entered the picture.

[349] LB's observations of SH are completely consistent with this. After Mr. Ball entered the picture (to repeat) I have not been satisfied by the Crown (beyond a reasonable doubt) that SH failed to render the consent which she clearly had the capacity to bestow.

Some Remaining Evidentiary points

[350] I did not attach any significance to the evidence, no matter who offered it, that they had heard either accused denying doing anything wrong afterward. Testimony in court may not be buttressed by external corroborative (or oath-helping) statements by the two accused. This is for the obvious reason that if something is a lie, it does not cease to be one by virtue of its repetition. As with all witnesses, the credibility and/or reliability of the two accuseds were evaluated on the basis of their evidence as presented in court.

[351] I also did not permit questioning of Mr. Williams (on cross-examination) about steps that he had taken in sexual encounter(s) in the past (with partners other than SH), to ascertain whether they were consenting or not. The objective of this line of questioning appeared to be to elicit the steps taken on those earlier occasions, and compare them with those that Mr. Williams had taken in this case.

[352] Merely because s.276 of the Criminal Code only purports to restrict the admissibility of evidence of a complainant's sexual history, does not make it "open season" with respect to that of an accused. Under the common law, evidence of an accused's prior sexual history was, if anything, always much more restricted than that of a complainant.

[353] Moreover, merely because one accused had taken certain steps with respect to ascertaining consent of a different sexual partner in the past, bears no relationship to whether those steps were sufficient or insufficient in the circumstances of that other sexual encounter. Nor could they possibly inform, in any event, what steps were appropriate to take in this particular case.

[354] Finally, the evidence was not relevant to issues affecting Mr. Williams' ability to discern or recollect the events which occurred in this case.

II. If “yes”, in the circumstances of this case, is the Crown also required to prove beyond a reasonable doubt that the accused did not have an honest but mistaken communicated consent?

[355] My answer to the first issue was “no”, so it is not necessary for me to consider the second one.

Conclusion

[356] There can be no question of SH's capacity to consent in the circumstances of this case. There is no evidence before me that she consumed any alcohol or other intoxicating substance after her arrival at Cameron Hall to get ready for the Catalina wine mixer, and, in particular, after she met up with Mr. Williams at the fourth floor party. Since the two thereupon left the party and engaged in what SH acknowledges to have been consensual sexual congress, and since there is absolutely no evidence that she lost consciousness at any point in the evening, it follows that she at all times

had the capacity to provide her consent to the impugned sexual activity with the two accused.

[357] Having the capacity to do so, I was left (as indicated), in significant doubt that the Crown had proven that she had not consented to the specific sexual activities with the two accused which ensued.

[358] Although it is unquestionably true that SH became hysterically upset when she left Mr. Williams' room with MMK, it also appears accurate to observe that this came after the latter had repeated, "do you remember what happened?" multiple times to her. This was an apparent reference to an incident some years before which had led her to file a complaint against two other males in relation to an incident of a sexual nature. SH had responded to MMK, "but Jonah doesn't know" – it may very well be that it was the fact of being reminded of this earlier incident that caused the complainant to become so upset.

[359] Obviously, something of a sexual nature occurred in the room, one which I very much doubt coincides with SH's testimony at trial. Absent credible evidence from the complainant, it is unsafe to convict.

[360] When I consider all of the evidence, including the observations of LB and AM, and the testimony of LC and AJ, in particular, I concluded that the testimony of the two accused, on the key elements of the offence which the Crown bore the onus to prove, might reasonably be true.

[361] Accordingly, I find Messrs. Williams and Ball not guilty.

Gabriel, J.