SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Webb*, 2020 NSSC 65

Date: 20200219
Docket: CRH 479774
Registry: Halifax

Between:

Her Majesty the Queen

v.

Joshua Adrian Webb

Restriction on Publication: Section 486.4 -Regarding the identity of CJ

Judge:	The Honourable Justice Ann E. Smith
Trial Heard:	January 3, 6, 7, 9, 2020, in Halifax, Nova Scotia
DECISION:	February 19, 2020
Counsel:	Carla Ball, for the Public Prosecution Trevor McGuigan, for the Defendant

Publication ban provision(s)

Order restricting publication — sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

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

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

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

Mandatory order on application

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

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

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

Victim under 18 — other offences

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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

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

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

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

Limitation

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

2005, c. 32, s. 15, c. 43, s. 8; 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18; 2019, c. 25, s. 190.

By the Court:

Introduction

[1] Joshua Webb faces a one-count indictment that he sexually assaulted CJ on November 5, 2017 in Halifax, Nova Scotia.

[2] He has entered a plea of not guilty.

Overview

[3] Mr. Webb and CJ were students and acquaintances at Dalhousie University in the fall semester of 2017. It was the first year of university for both. They were in a study group with four or five other students for some of the classes they both attended.

[4] Mr. Webb attended CJ's dorm room at approximately 7:00 p.m. on the night of November 5, 2017 for the purposes of studying psychology with her. Mr. Webb had never been to CJ's dorm room alone before that night.

[5] Mr. Webb and CJ both testified. Mr. Webb and CJ agree that they did study together for about an hour and that thereafter they talked.

[6] Mr. Webb and CJ then engaged in sexual activity to which CJ consented.

[7] CJ says that she told Mr. Webb that she didn't want to have sex because the last time she had sex was with someone who she wasn't dating and she didn't want to do that again. Mr. Webb agrees that she made this statement. Following the statement, Mr. Webb and CJ engaged in sexual activity, including his digital penetration of her vagina. She consented to that sexual activity. Mr. Webb then, according to his evidence, tried to penetrate her vagina with his penis, but could not do so. He says that CJ consented to this activity, or he had an honest belief that she communicated her consent based on her non-verbal conduct. CJ says that she did not consent to Mr. Webb putting his penis into her vagina. She says that his penis penetrated her vagina on one occasion.

[8] Mr. Webb says that after he tried to penetrate CJ's vagina with his penis, CJ suggested that they "give it more time." He says that CJ consented to further digital penetration followed by a second unsuccessful attempt on his part to

penetrate her vagina with his penis. He says that CJ consented to this second attempt. Mr. Webb says that he asked CJ to get on her knees in front of him, which he says she did and at that point CJ made a comment about not wanting to engage in anal sex. Mr. Webb says that he was turned off by that comment and lost his erection. He says that thereafter CJ tried to kiss him, but he did not respond.

[9] CJ says that there was one instance where Mr. Webb actually penetrated her. She denies that he further tried to digitally penetrate her vagina and denies that he tried for a second time to have vaginal sex with her. She denies that he asked her to get on her knees and denies that she made a comment to him about not wanting to have anal sex.

The Position of the Crown in Brief

[10] The Crown says that it has proven beyond a reasonable doubt that CJ did not consent to Mr. Webb putting his penis into her vagina on November 5, 2017. The Crown says that it has proven, beyond a reasonable doubt, each of the elements required to prove the offence of sexual assault.

[11] The Crown says that if there is an air of reality to Mr. Webb's honest belief that CJ communicated her consent, the Crown has proven beyond a reasonable doubt that that belief was not honest and Mr. Webb did not take reasonable steps in the circumstances to ascertain if CJ was consenting. In short, the Crown says that given CJ's verbal statement to Mr. Webb that she did not want to have sex, which Mr. Webb says he knew at the time meant putting his penis into her vagina, that Mr. Webb needed to do more than rely on non-verbal cues on CJ's part that she was communicating consent to vaginal sex.

The Position of the Accused in Brief

[12] Mr. Webb says he should be acquitted because either there was actual consent to the sexual activity (his penis in CJ's vagina), or at least a reasonable doubt about CJ's lack of consent. Alternatively, he says that he is entitled to rely upon the defence of honest, but mistaken, belief in CJ's communicated consent.

Agreements between the Crown and the Defence

[13] Counsel have agreed that the alleged offence took place in Halifax, Nova Scotia on November 5, 2017 and that the identity of the Accused is not an issue. Counsel also agreed to other matters which I will detail later in this decision.

[14] It is obvious that CJ and Mr. Webb have very different accounts of what transpired sexually between them on the night of November 5, 2017. Of course, this Court's role is not to try to find out what actually took place, but rather to determine whether the Crown has met its burden of establishing each element of the offence of sexual assault beyond a reasonable doubt.

Overview of Basic Principles

[15] This is a criminal trial and therefore the Crown has the burden of proof throughout. The Crown must prove all the elements of the offence charged to a standard of proof beyond a reasonable doubt. There is never any burden on an accused to prove his innocence.

[16] The Supreme Court of Canada has explained in *R. v. Starr*, 2000 SCC 40 and earlier decisions in *R. v. Lifchus*, [1997] 3 S.C.R. 320 and *R. v. Bisson*, [1998] 1 S.C.R. 306 that the phrase, "beyond a reasonable doubt" has a special meaning in a criminal trial. The Supreme Court in these decisions explains that the standard of proof beyond a reasonable doubt is more than proof on a balance of probabilities, which is the standard which applies in civil trials.

[17] Rather, proof beyond a reasonable doubt requires more than proof that the accused is probably guilty. It does not involve proof to an absolute certainty and it is not proof beyond any doubt. Proof beyond a reasonable doubt is logically connected to the evidence or lack of evidence.

[18] As noted earlier, Mr. Webb testified in his own defence. His evidence as to what happened in CJ's dorm room on the evening of November 5th is very different in key ways from the evidence of CJ. Mr. Webb denies sexually assaulting CJ because he says that she consented to the sexual activity at issue, or that he had an honest belief that she was consenting.

[19] I therefore must assess the credibility of each of Mr. Webb and CJ. When an accused testifies, it is not enough for the Court to decide whether to believe the evidence of the accused or that of the complainant. Rather, the Supreme Court of Canada in *R. v. W. (D)*, [1991] 1 S.C.R. 742 said that the test to be applied when

the accused testifies involves a three-step process in light of the burden of proof placed on the Crown. The steps in the *W.D.* process are as follows:

> First, if you believe the evidence of the accused, you must acquit.
>
> Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.
>
> Thirdly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.

[20] In *R. v. N. M.*, 2019 NSCA 4 (N.S.C.A.), Bourgeois J.A. cited with approval a fourth step in the *W.D.* analysis, which arises from Justice Binnie's decision in *R. v. J.H.S.*, 2008 SCC 30 (S.C.C.) where Justice Binnie addressed the consequences when a trier of fact is uncertain "whether to believe the accused's testimony or not" (para. 11 in *J.H.S.*). In *R. v. N.M.*, Bourgeois J.A. refers to this fourth step (at para. 23) as explained by Ferguson J. in *R. v. P.D.B.*, 2014 NBQB 213:

> Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[21] This Court understands the purpose of the *W. (D.)* analysis is to ensure that the trier of fact remains focused on the principle of reasonable doubt. In that regard, I refer to another decision of the Supreme Court of Canada - *R v. C.L.Y.*, 2008 SCC 2 at paragraph 6:

> …This Court has consistently warned that verdicts of guilt should not be based on "whether [triers of fact] believe the defence evidence or the Crown's evidence (*W.(D).*, at p. 757). Rather, the paramount question remains whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused. (*R. v. Morin*, 1988 CanLII 8(SCC), [1988] 2 S.C.R. 345, at p. 361). The following suggested steps in *W.(D.)* are intended to ensure that the trier of fact remains focused on the principle of reasonable doubt.
>
> [emphasis added]

The Relevant Law – Sexual Assault

[22] To be convicted of sexual assault, the Crown must prove, beyond a reasonable doubt:

1. (the *actus reus*), i.e., that Mr. Webb i) intentionally touched CJ; ii) without her (subjective) consent; iii) in a manner that violated her sexual integrity (the first and third factor being assessed objectively);
2. If applicable, that CJ lacked the requisite capacity to consent.
3. (the *mens rea*) that Mr. Webb intentionally touched CJ knowing (i.e., or being reckless of, or wilfully blind to) that she did not consent, or that she was incapable of consenting to the sexual activity.

[23] On the evidence before the Court there is no suggestion that CJ was incapable of consenting to the sexual activity. In this case, the sexual nature of the touching (Mr. Webb's penis inserted into, or attempted to be inserted into, CJ's vagina) would constitute sexual assault, if CJ did not consent to that touching.

[24] Section 273.1(1) of the *Criminal Code* defines 'consent' as:

> Means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[25] Section 273.1(2) provides that no consent is obtained, for the purpose of section 271 where:

> …
>
> (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.

[26] Subsection (3) of section 273.1 provides that nothing in subsection 2 "shall be construed as limiting the circumstances in which no consent is obtained."

[27] Section 273.1 outlines the circumstances where an accused's belief in the complainant's consent is 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 form the accused's
>
> (i) self-induced intoxication, or

> (ii) recklessness or wilful blindness; or
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Credibility of Witnesses

[28] Credibility is often equated with honesty. Here, the credibility of CJ is challenged by the Defence and the credibility of Mr. Webb is challenged by the Crown. These were the only two witnesses to testify at the trial, but this Court received an agreed statement of facts relating to the evidence of KH, (a girlfriend of CJ), JM (also a girlfriend of CJ), Jill Leon (a sexual assault nurse examiner) and Constable Antoine Varin (who spoke with CJ on November 12, 2017).

[29] The Nova Scotia Court of Appeal in *D.D.S. v. R.*, 2006 NSCA 34 addressed the trial judge's place and responsibility in assessing credibility. At paragraph 77 of the Court of Appeal's decision, Saunders J.A. stated:

> …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 or 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 appropriate standard of proof in a civil or criminal case?

[30] Saunders J.A. went on at paragraph 78 of the Court's decision to refer to what he called the "lucid observations" of Justice O'Halloran in the "oft-cited" case of *Faryna v. Chorny*, [1951] CanLII 252 (B.C.C.A.), [1952] 2 D.L.R. 254 at 356:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of

> the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions…

[31] Saunders J.A. in *D.D.S.* noted that, although the comments of Justice O'Harroran in *Faryna v. Chorny* were not expressed in the context of a criminal trial, "observations similar to Justice O'Halloran's have often been emphasized in criminal cases, with suitable allowance for the different standard of proof."

[32] Having reviewed the burden of proof in criminal cases, the elements of the offence of sexual assault, the principles articulated in *W.(D.)* and the trial judge's role in assessing credibility, I now turn to a review of the evidence.

The Evidence of CJ

[33] I start with the evidence of CJ because she was the first witness to testify. CJ testified behind a screen. On December 9, 2019 this Court heard the Crown's motion that CJ be permitted to testify behind a screen, pursuant to section 486.2 of the *Criminal Code*. The Court allowed the motion for reasons given to counsel on December 30, 2019.

[34] CJ testified that she was 18 years old on November 5, 2017. She was 20 years old when testifying at this trial.

[35] CJ attends Dalhousie University ("Dalhousie" or the "University") and is a student in the nursing program. During the fall term of her first year at Dalhousie (September - December 2017) she was a student in the Bachelor of Science program. CJ has since transferred to the nursing program.

[36] In the fall of 2017, CJ had a dorm room in a townhouse affiliated with Dalhousie, near the University. There were other students who lived in other dorms within that townhouse.

[37] CJ said that her room was a "normal" dorm room, with a single bed, a desk and a closet. She said that there was a shared kitchen and bathroom in the townhouse. She moved into her dorm the day before the start of classes in September 2017. She lived alone in her dorm room.

[38] A diagram of her dorm room, that CJ had previously prepared, was entered as an exhibit at the trial. In her oral testimony she pointed to a desk with a lamp and a chair, a bedside table with a lamp, a closet and a fireplace where she had

placed string lights. The desk with the chair had an LED light built into it on the top. There was also an overhead light.

[39] CJ was asked by Crown counsel about her state of health in November 2017. She said that she had no difficulty with her vision and drives a car without prescription eye- glasses. She testified that she does wear glasses to see "up close", but she wears the corrective glasses all the time. She requires no correction to her hearing. She was not taking any prescription medicine that would affect the way she saw or heard in November 2017.

[40] CJ does have a speech impediment which she said gets worse when talking to a crowd and when she is stressed, but on "one to one" with a friend, her speech is a lot clearer.

[41] In November 2017 she estimated her height to be approximately five feet, two inches and her weight as approximately 120 lbs.

[42] CJ's evidence was that she met Mr. Webb at the start of classes in the fall of 2017. She said that Mr. Webb was in at least three of her classes - chemistry, biology and psychology as well as her chemistry lab. She characterized her relationship with Mr. Webb as his being a friend from school and someone to study with. Her evidence was that prior to November 5, 2017 she had not had any one-on-one time with Mr. Webb.

[43] CJ said that she had spent time with him as part of a group that did work for school. She said that she recalled on two occasions that Mr. Webb was part of a group who went to her dorm room to do work and make food.

[44] CJ estimated Mr. Webb's height in November 2017 to be five foot, ten inches and his weight to be close to 200 lbs.

[45] CJ was asked by Crown counsel if she knew if Mr. Webb was in a relationship that fall and she replied that, to her knowledge, he was. She provided the name of the person who she thought was his girlfriend but added that she had never met that person. CJ's evidence was that she thought that Mr. Webb and his girlfriend had broken up before November 5, 2017 on the basis of a shared Snap Chat she read earlier in the week of November 5, 2017, with November 5th being a Sunday.

[46] CJ said that that fall she was friends with KH (a female). She met KH at the same time that she met Mr. Webb at the University that fall. CJ thought of KH as

a friend from school. She said that they would do work together and go to classes together. She had never been to KH's home before November 5, 2017.

[47] CJ also gave evidence about another girlfriend, JM. She said that she and JM were in grade ten together and were good friends by their first year in University the fall of 2017. JM was also in some of her classes and in the same study group with her, as was KH.

CJ's Account of the Events of November 5, 2017

[48] CJ said that at about 6:20 a.m. on November 5, 2017 she read a text from Mr. Webb which he had sent around midnight the night before. She didn't see the text until she woke up on November 5th . She was up early that day because she was attending a ski patrol course for the day. Her evidence was that she replied by text to Mr. Webb when she saw his message and they made plans for him to come over to her dorm once she returned to it following the ski patrol course. The plan was that Mr. Webb would come to her dorm later that day once she was back and he was finished working. CJ's evidence was that she returned to her dorm around 6:30 p.m. that night and she texted Mr. Webb to let him know that she was back. She received a text from Mr. Webb that he had arrived at her dorm and she went to the door to let him in. Her evidence was that he arrived at her dorm at approximately 7:00 p.m. The plan was that they would work on their psychology lab. She said that she and Mr. Webb were in the same psychology class.

[49] CJ's evidence was that she was alone in her dorm and Mr. Webb arrived alone. CJ had not consumed any alcohol that day. She described her mood as fine and normal. Her evidence was that Mr. Webb appeared to be sober and fine.

[50] CJ said that once they were in her dorm room they both sat on the bed to do work. They took out their laptops. She said that she and Mr. Webb just naturally went together to sit on the bed with their laptops because there was only one chair in the room which was in front of her desk.

[51] CJ's evidence was that she and Mr. Webb did work for about an hour. They were sitting close to each other on the bed with their backs toward the wall. CJ testified that once they had completed their work they continued to sit up on the bed. They talked for about an hour about school, friends and family. CJ testified that they then started to kiss. Then they laid down on the bed and continued to kiss. She was "Okay" with the kissing. Her evidence was that after they continued to kiss and were laying down, Mr. Webb took off the leggings she was wearing.

At the same time as her leggings were removed, her underwear came off. When asked by Crown counsel if she was "okay" with her pants coming off, her answer was "I was."

[52] CJ said that Mr. Webb then put her hands onto his belt. She undid his belt. She said that Mr. Web undid his pants. He was wearing boxers and his boxers stayed on. At that point, she said that a condom package fell to her side on the bed. Her evidence was that she instantly sat up on the bed and they paused kissing and she told him that she didn't want to have sex and the last time she did was with someone she was not dating, and she didn't want to do that again. When asked by Crown counsel to describe her voice when she told Mr. Webb that she didn't want to have sex, she replied that her tone was still fine, was assertive, but normal.

[53] CJ testified that after she told Mr. Webb that she didn't want to have sex, and why, he nodded. They continued to kiss. She said that she believed that she then took off her sweater, but not her bra. They continued to kiss.

[54] CJ testified that Mr. Webb then "fingered her" which she said meant that he put his fingers into her vagina. Her evidence was that at that point she made a sound like "ow." She said that she told Mr. Webb that she was tight and dry. When asked by Crown counsel what response, if any, Mr. Webb gave, she said that he pulled his fingers out and they continued to kiss. She said that she was okay with Mr. Webb putting his fingers into her vagina, but she didn't want him to do it again. She was also okay with them continuing to kiss.

[55] At that point, she said that Mr. Webb was on top of her. She was laying on her back with her legs opened up. Her evidence was that Mr. Webb's mid-section was touching her mid-section. She said that Mr. Webb's hands at that point were on the bed laying over her.

[56] CJ's evidence was that Mr. Webb then pulled down his boxers and penetrated her vagina with his penis. Her evidence was that she said "Ow." She said that the penetration lasted about 10-30 seconds. CJ said that Mr. Webb didn't say anything when he put his penis in her vagina. Her evidence was that Mr. Webb then pulled his penis out. CJ's evidence was that she said that she felt terrible "and stuff."

[57] When asked by Crown counsel if she was okay with Mr. Webb putting his penis into her vagina, she said that she was not okay with that.

[58] CJ's evidence was that after Mr. Webb pulled his penis out of her vagina, they laid on the bed. She said that Mr. Webb went onto his phone. CJ's evidence was that he said, "I shouldn't have done that" a few times. Her evidence was that she said that she felt terrible. CJ said that they then put their clothes back on. CJ testified that she had her bra on throughout these events and Mr. Webb had a shirt and boxers on, until he pulled his boxers down. He did not take his shirt off.

[59] CJ's evidence was that Mr. Webb was still on his phone once they were dressed. She said that Mr. Webb told her that he had to go home because his mother needed him to do so. CJ testified that she couldn't say who said it first, but either she or Mr. Webb said that they should forget what went on. Mr. Webb then packed up to go and gave her a "light hug." Mr. Webb left a few minutes after they were dressed. When asked about this "light hug" by Crown counsel, CJ testified that she didn't want to make a scene. She said that she gave Mr. Webb a light hug back; she wanted him to leave the dorm and be on his way. Her evidence was that she felt there was no harm in a hug and it would have taken longer for him to leave if she had got upset.

[60] CJ's evidence was that she agreed that they should forget about what happened because she didn't want to remember what had happened and also so that he would be on his way. She said that at that point she didn't feel well. Her evidence was that she felt wronged.

[61] CJ's estimated that about 10 to 15 minutes passed between when she and Mr. Webb started kissing on the bed to the point where he pulled his penis out of her vagina. She testified that the time that passed between Mr. Webb putting his finger in her vagina to when he pulled his penis out was very quick, "maximum one to one and a half minutes."

[62] CJ was asked by Crown counsel how she felt mentally when Mr. Webb's penis was in her vagina. She said that she was shocked at what was going on and felt pain. She said that she was very dry and not turned on. CJ testified that she was "shooken up and scared."

[63] CJ testified that throughout the kissing on the bed she touched Mr. Webb's back, head and arms, but did not touch him below the waist. Her evidence was that prior to Mr. Webb putting his finger into her vagina, he had not touched her vagina.

[64] CJ was asked by Crown counsel whether the condom that she said fell to the bed was used. Her response was that she didn't recall the condom being put on. She said that she didn't put it on or touch it, even when it was in the wrapper. CJ's evidence was that she saw a red condom wrapper.

[65] In terms of the lighting in the dorm room during these events, CJ's evidence was that when they were doing work, the lamp on her bedside table and on her desk were on. At some point while they were doing work, her evidence was that she told Mr. Webb that she wanted to change the lights because her eyes were strained and hurt. At that point, she turned off the ceiling light.

[66] CJ's evidence was that a few minutes after Mr. Webb left, she called her friend KH. The purpose of the call was to tell KH what had just happened. CJ said that she wanted KH to pick her up from the dorm so that she could spend the night at KH's house. CJ said that she was upset, but able to call KH. When she was on the phone with KH she said that she was crying and shaking. CJ's evidence was that KH got a ride to her dorm room and arrived about 20 minutes after they spoke on the phone. It was then about 10:00 p.m. CJ's evidence was that she then packed up her belongings in preparation for spending the night at KH's house. She slept the night at KH's house.

[67] CJ testified that at that point, she had not made contact with the police. She said that the word, "rape", didn't come to her mind and that no one, to that point in time, had brought up with her the idea to tell the police. Her evidence was that up to that point in her life, the word "rape" meant something like a man jumping out from behind a bush or being kidnapped and raped and because none of that happened that evening with Mr. Webb, she didn't think that what had occurred was rape.

[68] CJ's evidence was that on Monday, November 6, 2017 she woke up in KH's house. She then took a long shower. She testified that she and others in her study group had previously made plans to have the study group meet in her dorm to work on a math project. Her evidence was that she and KH returned to her dorm room around noon hour on November 6th. November 6th was the start of reading week at the University. She thought that there were no classes until the following Monday, November 13th.

[69] CJ testified that the study group met at her dorm. KH, JM, two other male students and Mr. Webb participated. When asked by Crown counsel how she felt about Mr. Webb being present with the study group, CJ said that she didn't feel

great, but knew they had to get work done and she wouldn't be alone. She said that she felt safe enough to be able to do the work which she said was due that week and counted a lot towards their grade. CJ said that she had had no contact at all with Mr. Webb during the time between when he left her dorm on the evening of November 5th until the study group met at her dorm at noon the following day. Her evidence was that the study group lasted for about three hours. She said that during that time frame, she may have talked about schoolwork with Mr. Webb, but she tried to avoid talking with him. She said that he didn't mention what had happened the previous evening and neither did she.

[70] Crown and Defence counsel submitted the following agreed facts concerning KH. KH did not give evidence at the trial. The agreed statement (with deletion of this witness' name, address and with reference to the Complainant by her initials) is as follows:

> Ms. H's date of birth is June 5, 1999. She attended Dalhousie University in 2017. She was in her first year and met a person named CJ and became friends with her. She had known a person named Joshua Webb prior to Dalhousie but they weren't friends. He became KH's lab partner in chemistry, and they became friends during that first semester of school.
>
> On Sunday Nov. 5 CJ called her around 10:30 p.m. CJ was distraught on the phone and needed to talk and asked KH to come over. CJ sounded as though she was crying and she was upset. Her voice was catching in her throat when she was trying to talk. CJ disclosed the allegations of what was alleged to have occurred on Sunday November 5, 2017 between her and Joshua Webb. KH arrived at CJ's dorm; CJ was red in the face and was crying. KH invited CJ to sleep at her house and she did. CJ had never been at KH's house before. KH lived in [place name omitted] which was about a 25 minute drive from CJ's dorm. KH recalls having a study group a day or so after.

[71] CJ testified that when the study group ended on November 6th, she went by herself to a walk-in clinic at Dalhousie to get a STI test done. She said that she did this because she didn't see a condom go on Mr. Webb's penis. She wanted to get herself checked. When asked by Crown counsel whether she felt she had any injuries, she said that there was a small amount of blood when she urinated, but that was it.

[72] CJ testified that later on Monday following her attendance at the Dalhousie walk-in clinic, she and JM started to drive to CJ's cabin in Wentworth. They had made plans before the events of November 5th to go there to get away from the University and do work. CJ said that on the way to the cabin she told JM what had

happened on the evening of November 5th. CJ said that JM's mother is a nurse, although not currently working, so they called her. As a result of the conversation with JM's mother, CJ said that they called 811, which she said was a hotline for nurses. She said that they spoke with someone who told her to get checked out. As a result, CJ said that she and JM went to the emergency department at a hospital in Truro.

[73] At the hospital, CJ said that she saw a doctor and a nurse. She said that they didn't have sexual assault nurses at that hospital and she and JM were directed to go to New Glasgow so that CJ could be checked out there. CJ testified that she and JM arrived in New Glasgow at around 1:00 a.m. on Thursday, November 9th. There she was seen by a nurse. She said she was asked to tell a brief story of what had happened and STI and pregnancy tests were carried out. She said that she was treated for STIs, but since Mr. Webb didn't ejaculate and she was taking the pill, there was no "Plan B." She said that she was examined from head to toe and was at the hospital for about four hours.

[74] Crown counsel and Defence counsel submitted the following agreed statement of facts concerning sexual assault nurse examiner Jill Leon (with initials used for the Complainant). Jill Leon did not testify at the trial:

> Jill Leon is a sexual assault nurse examiner at the Antigonish Women's Resource Centre and Sexual Assault Services Association. She is able to give opinion evidence in the area of sexual assault examination, identification and treatment of sexual assault injury, and in the identification and collection of forensic evidence. On November 9, 2019, Jill Leon got called in to work at the Aberdeen Hospital in New Glasgow sometime before midnight to conduct a sexual assault examination. She met with CJ. The procedure commenced at approximately 1:00 a.m., and completed at approximately 4:30 a.m. The examination includes a discussion about what happened and the patient history; a head to toe examination - which includes an external examination and an internal vaginal examination with a speculum; evidence collection, and providing any medication required for treatment. Injuries were noted as follows: the left labia minora had a 2 mm hematoma noted; and the cervix had purple bruising with uneven borders approximately 1 cm by 1 cm in size at the 7 o'clock position. The cause of the injury to the cervix would require penetration of the vagina which could include fingers or a penis. The injuries were relatively fresh and could have occurred on November 5, 2017. See attached "genital and anal area notes" which was a page reviewed and confirmed by Jill Leon at the time of the examination. (page 8 of the Physician's guide and Record of Examination".

[75] CJ testified that once the examination was over, she and JM drove to her cabin in Wentworth arriving at about 6:00 a.m. on the morning of November 9th.

She and JM slept for most of that day. Once they got up, she said that she contacted Dalhousie to see what they could do for her. She clarified that what she meant was to see if Mr. Webb could not be in her classes and labs. She said that whoever she talked to at Dalhousie directed her to the Avalon Centre.

[76] CJ said that she and JM stayed at the cabin until Sunday, November 12th in order to take time to talk to Dalhousie to see what resources they had and also to try to get a bit of work done.

[77] CJ's evidence was that on Sunday when she returned to Halifax, she told her family what had happened. She said that her mother had a friend who is a police officer. Her mother asked this officer to come over, and she did, although the officer was not on duty. This officer talked to her about what it entailed to make a report. CJ said that the officer called to have another police officer who was working come to the house. Another officer did arrive and talk to her that Sunday, November 12th. That officer was Constable Antoine Varin. Counsel submitted an agreed statement of facts concerning Constable Varin (with initials used for the Complainant):

> Cst. Varin is a police officer with the Halifax Regional Police and was so on November 12, 2017. On November 12, 2017, he attended to meet with CJ at her family's home. She answered preliminary questions but did not obtain a formal statement from her. He referred this to (sic) file to the Sexual Assault Investigative Team ("SAIT") who take formal statements in this regard.

[78] CJ's evidence was that she had thought about calling the police while at the cabin in Wentworth with JM and that she and JM had talked about doing so, but she wanted to do so when she was at home. She also wanted to see what Dalhousie could do for her.

[79] Counsel for the Crown and Defence also submitted an agreed statement of facts concerning JM. JM did not give evidence at the trial. That statement of facts is as follows (with omissions of names, apart from the Accused):

> JM's dat (sic) of birth is Feb. 26 1999. She met CJ in high school and has been really close friends with her. She attended Dalhousie in the fall of 2017.
>
> On November 8, 2017 JM had contact with CJ. They drove together to Wentworth on their reading week. CJ disclosed the allegations that she said occurred the Sunday night with Joshua Webb. She was quite upset during the disclosure. They called JM's boyfriend, and mother. J's mother is a nurse. As a result of the phone call to her mother, they called 811, then went to Truro hospital

> and then went to the hospital in New Glasgow to see a SANE nurse. They were at the hospital from about 10 pm to 1 a.m.
>
> At some point between Sunday evening Nov. 5 and Wednesday Nov. 8 there was a study group. JM, KH, AQ, Joshua Webb and CJ were there. They were in both CJ's dorm and in the TV room. CJ did not seem like herself; she's often chatty and tries to keep people on track but she was not doing that that date.

[80] CJ said that on Monday, November 13th, she received texts from Mr. Webb. She had not seen nor spoken to Mr. Webb nor had any social media contact with him since the study group on November 6th. When asked to describe the texts by Crown counsel, CJ said that she believed that Mr. Webb sent her three texts saying that he was sorry for something he'd said to upset her, that he wanted to know what was wrong and that he wanted to stay friends. CJ did not respond to any of these texts.

[81] The three texts, which appear to have been sent in quick succession on November 11 at 9:20 p.m., read as follows:

> Hey. I'm pretty sure you won't see this. I just wanted to say I'm sorry. I'm pretty sure I know what this is about. But I want to fix this and not losing someone I see as a good friend. Only if you want that
>
> If not I'll leave you alone. I'm just really sorry
>
> If it's what I think it's about. I'm sorry and I never should have said what I said. If not I just want to know what it was and fix it

[82] CJ said that she didn't know what Mr. Webb was talking about when he referred to something that he had said that he was sorry about.

[83] CJ testified that she did not see the condom package again, after she saw it fall to the bed during her interaction with Mr. Webb on November 5th. She said that she didn't want to continue living in the dorm after what had happened, so when the semester came to an end she moved to another dorm. As she was packing up her room to move, her mother found a condom wrapper on the floor. Her mother took a picture of the condom wrapper and CJ later delivered both the photo and the actual condom wrapper to the police, the latter in a paper bag.

[84] In cross-examination, CJ said that the decision to sit on the bed after Mr. Webb arrived at around 7:00 p.m. on the night of November 5th just happened naturally. Nothing was said by either CJ or the Accused about sitting on the bed. She agreed with Defence counsel that they sat on the bed, with their backs toward the wall. She said that at some point while they were studying, she turned the

ceiling light off, but the other three lights remained on. She agreed that after they finished working, they put their laptops away; she didn't recall whether they were on the floor or on her desk.

[85] CJ was asked in cross-examination whether she had socks on. Her evidence was that she couldn't recall. She maintained in cross-examination that they began kissing while both were sitting up on the bed. CJ agreed that while they were talking for about an hour, the conversation gradually became more intimate. They were talking about their fathers.

[86] CJ confirmed in cross-examination that she agreed to the kissing. She said that she kissed Mr. Webb back when he kissed her. She said that they were touching while kissing, with their arms, back and heads, but neither touched the other below the waist. The kissing while seated on the bed lasted for a few minutes.

[87] Also, in cross-examination, CJ repeated her evidence in direct that after a few minutes of kissing they laid down on the bed, with Mr. Webb on her left side. She agreed that they were each propped up on their sides facing each other. CJ said that she couldn't remember if their legs were intertwined, but they could have been. CJ said that at that point she was "okay" with everything.

[88] Defence counsel put to CJ that her direct evidence had been that then clothing was removed, i.e. her pants. She agreed. He suggested to CJ that her sweater was the first clothing removed. Her response was that she was sure that Mr. Webb took her pants off first, not her sweater. She said that Mr. Webb used both his hands to take her pants/leggings off and at that point he was no longer laying down, but had shifted his weight to be up over her, with her on her back.

[89] CJ agreed with Defence counsel that she was "okay" with her leggings being removed.

[90] CJ did not recall, as suggested by Defence counsel, that when her leggings came down towards her feet, they were caught in the socks that she was wearing.

[91] She denied laughing a bit at that point, as suggested by Defence counsel. She agreed that her underwear came off at the same time as her leggings and she was "okay" with that.

[92] CJ agreed with Defence counsel that after her leggings and underwear were removed, there was more kissing.

[93] CJ also agreed with Defence counsel that the next item of clothing removed was Mr. Webb's pants. He was wearing jeans and a belt. CJ agreed that she undid the belt buckle.

[94] Defence counsel put to CJ that her memory of whether she undid the belt buckle has not been the same over time. CJ agreed, saying that she had reviewed her prior statements and realized that at the preliminary inquiry she said that she did not undo Mr. Webb's belt buckle.

[95] Defence counsel put to CJ that when she spoke to Constable Vernon on November 12, 2017 she told the officer that she undid Mr. Webb's belt buckle. CJ also agreed that she filed a written complaint with Dalhousie concerning Mr. Webb on November 16, 2017. In that complaint, CJ also said that she undid the belt buckle. CJ also agreed that on November 16, 2017 she gave a formal oral statement to the police which was recorded and transcribed, where she also said that she undid Mr. Webb's belt buckle. However, when she gave evidence under oath in direct examination by Crown counsel at the preliminary inquiry on August 8, 2018, CJ testified that she did not undo Mr. Webb's belt buckle. In cross-examination she maintained, initially, that she did not undo the belt buckle. Counsel then directed her to her prior statement and comments to Constable Vernon, and CJ indicated that she thought the prior statement was a misprint. When more questions were asked by Defence counsel, CJ agreed that she must have undone the belt buckle. Her trial evidence was that she undid the buckle, but not the button to his jeans.

[96] CJ denied Defence counsel's suggestion that she changed her evidence at the preliminary inquiry from her previous statements that she had undone the belt buckle, to not undoing the buckle because she knew that that evidence made it more likely that she was agreeing or consenting to do more, sexually, with Mr. Webb.

[97] CJ denied the suggestion of Defence counsel that she tried to remove Mr. Webb's jeans, but couldn't get past his knees. CJ maintained in cross-examination that at that point Mr. Webb only removed his pants, not his underwear. Her evidence was that she remembered that he was wearing grey or black boxers.

[98] CJ agreed with Defence counsel that she didn't know if the condom package fell from Mr. Webb's pocket or his hands onto the bed beside her. She said that she didn't have a memory of a condom in his hand.

[99] CJ maintained in cross-examination that when the condom package fell to the bed, that it fell silent until she told Mr. Webb that she didn't want to have sex, that she had sex with someone she wasn't dating and didn't want to do that again. She said that when the condom fell, she sat up and so did Mr. Webb.

[100] CJ's evidence in cross-examination was that the reason she said that she didn't want to engage in sex was because she saw the condom. She said that most men she knew didn't carry a condom in their pocket. This made her think that he wanted to have sex. That's why she said she didn't want to. CJ said that Mr. Webb then nodded.

[101] CJ said that she didn't know what happened to the condom, including the suggestion that Mr. Webb had placed it on the bedside table. She didn't notice if Mr. Webb did so. CJ said that the condom had a red wrapper, but she did not see the brand.

[102] CJ agreed that at that point, she removed her sweater, with Mr. Webb assisting. She was "okay" with that. CJ agreed that at the preliminary inquiry, her evidence was that she was unsure of when her sweater came off. However, CJ said that since her preliminary inquiry evidence, she had reviewed her statements and the time line came back to her memory.

[103] CJ's evidence in cross-examination was that when Mr. Webb digitally penetrated her, Mr. Webb was laying beside her and somewhat on top of her. She maintained in cross-examination that she said "Ow" or some word for pain. That was when she told Mr. Webb that she was 'tight and dry.' She denied the sound she made was an "enjoying or moaning" sound. Defence counsel put to CJ that her evidence at the preliminary inquiry was that about five seconds passed between the time Mr. Webb digitally penetrated her vagina with his fingers and when he pulled his penis out of her vagina, whereas CJ's evidence in direct examination was that this time interval was a maximum of a minute to a minute and a half.

[104] CJ described this inconsistency between her evidence at the preliminary inquiry that the time span was five seconds and her evidence-in-chief that it was one to one and a half minutes as being consistent with it being "very quick." She said that she didn't know the exact time frame. She said a minute because it was "more quick than all the other advances." CJ repeated that what stood out for her was how quick it was between the digital penetration and the vaginal penetration.

[105] Defence counsel also put to CJ in cross-examination typed notes made by Ms. Anderson, the Dalhousie University investigator, which Ms. Anderson sent by email to CJ on December 18, 2017. The notes were based on an interview between CJ and Ms. Anderson on December 7, 2017. Ms. Anderson asked CJ to advise if there was anything that was not captured accurately in these notes. CJ agreed in cross-examination that she responded on December 18th saying that Ms. Anderson's notes were accurate. Ms. Anderson's notes record that "CJ stated she was okay with making out. She stated that he proceeded to try to have sex with her." Ms. Anderson's notes also record, "CJ stated that eventually he just stopped trying to have sex with her." Ms. Anderson's notes further record, "CJ thinks he said this because she had indicated that she didn't want to have sex and he tried anyway."

[106] CJ's explanation for the words, "try, trying and tried" was that she did not want to use the word "rape", that having sex meant something both wanted to enjoy, so she used words like "tried" and that she would not use the word 'tried' now. Her evidence in cross-examination was that it was not consensual sex. She said that it was not enthusiastic or enjoyable, and that it was "rape."

The Evidence of Mr. Joshua Webb

[107] Mr. Webb testified on his own behalf. He was 20 years old at the time of the trial. He lives in Halifax with his father.

[108] At the time of the alleged sexual assault, Mr. Webb was 18 years old. He was enrolled in the first year of a Bachelor of Science degree program at Dalhousie University in Halifax. He met CJ in September 2017 through mutual friends. They were in psychology and biology classes together. Mr. Webb described his relationship with CJ as being friends, studying a lot together and becoming close friends as the months went by (September, October and November 2017).

Mr. Webb's Account of the Events of November 5, 2017

[109] Mr. Webb testified that he texted CJ just past midnight on November 5, 2017 to ask CJ if he could go to her residence and study for a psychology lab. His evidence in cross-examination was that he texted CJ because he realized that evening that his psychology lab was due in a few days, that he was running out of time and wasn't doing well with it.

[110] Mr. Webb's evidence was that he met CJ at her residence at roughly 7:00 p.m. the evening of November 5th. He and CJ were alone. He had never been to her dorm room with her alone before that evening. His evidence was that in the past he had been to CJ's dorm for study groups of about 4-6 people.

[111] In cross-examination, Mr. Webb agreed that he was sober when he arrived at CJ's dorm and had taken no drugs, including prescription drugs that day. He had no hearing or vision difficulty. His weight at the time was about 190 - 200 lbs and he is five feet 11 inches.

[112] In cross-examination, Mr. Webb agreed that he knew that CJ had a stutter but said he was able to understand her. He said that he picked CJ to study with that evening because, compared to other members of the study group, she was the one who was the most diligent about finishing work.

[113] Mr. Webb's evidence was that soon after he arrived, they sat on her bed in her dorm room and started to do their psychology lab. They had their laptops on their laps and were typing. This lasted about one hour.

[114] They then put their laptops away and started talking. He said that they talked about personal matters, including their fathers. At this point they had their backs against the wall and were sitting on her bed. He testified that he had blankets draped over him at first, but then CJ grabbed the blankets and put them over both of them.

[115] Mr. Webb said that CJ had Christmas lights all around the room, an LED around her desk and possibly a lamp light on. He had no trouble seeing.

[116] His evidence was that after about 45 minutes, he and CJ laid down side by side on the bed with their legs intertwined. They continued to talk for about five to ten more minutes after they laid down.

[117] At that point, Mr. Webb said that he was wearing jeans and a black shirt. He said that CJ was wearing a cashmere-like sweater and black leggings. His evidence was that he then leaned over and started to kiss CJ. She kissed him back. The kissing went on for about ten minutes.

[118] Mr. Webb testified that then CJ's sweater came off. He tried to take it off, but CJ propped herself up and lifted her arms to help him. Then he started to take off CJ's black leggings and thong. He said that CJ brought her lower body up to help him, but the leggings were stopped by her socks. He said that CJ laughed

when her leggings got stuck and they stopped kissing for a moment. CJ then took her socks off. Mr. Webb was fully clothed at this point.

[119] CJ then began to undo Mr. Webb's belt buckle and started taking off his pants. When she got to her knees, he propped himself up; she took his pants down to his knees and he took them off the rest of the way. His evidence was that his underwear came off at the same time as his pants. At this point he was over top of CJ.

[120] Mr. Webb testified that they kissed for a bit longer and then he went into his wallet in his pants pocket which had a condom in it. His pants were at the foot of the bed. Mr. Webb's evidence was that when he went to CJ's dorm that night, he didn't plan to engage in sexual activity with her. He said that the reason he had a condom was because he was with his girlfriend until very recently and he always had a condom in his wallet.

[121] Mr. Webber said that he brought the condom up and showed it to CJ, and said, "do you want to do it" or something along those lines. He agreed that he could not remember exactly what he said. He didn't use the word "sex." He said that CJ then said that she had a previous sexual interaction with someone she wasn't dating and it didn't go well, so she didn't want to do it. In cross-examination he agreed that CJ was telling him that she didn't want to have vaginal sex. He said that he said "okay" and nodded and placed the condom on her lamp desk. The condom was in a wrapper. He denied in cross-examination that CJ sat up in the bed when she said that she didn't want to have sex.

[122] Mr. Webb said that they began kissing again. At this point they were laying down facing each other with their legs intertwined. He said that after kissing, CJ started to giggle under her breath. His evidence was that he asked her what was up and she said that she was happy that this was happening. They started kissing again and did so for about ten minutes. At that point they were touching each other's body, back, hair and lower body with their hands. He agreed in cross-examination that up to this point CJ had not touched his penis, but he said that she had touched the surrounding area.

[123] Mr. Webb's evidence was that after the kissing, he began to finger CJ. By fingering, he said he meant that he put two fingers into CJ's vagina. At that point CJ was lying on his right side and he was propped up on his side. He said that he heard CJ let out a moan, which he said wasn't negative but sounded positive and pleasurable. He denied in cross-examination that CJ made any sound or comment

that was a complaint about his fingers being in her vagina or that he heard a sound that indicated pain. He said that she was "minorly lubricated" at this point. He said that he had no trouble inserting two fingers into CJ's vagina. Mr. Webb's evidence was that at that point CJ's hands were touching the back of his head and lower body, but not his genitalia. The digital penetration lasted a couple of minutes.

[124] Mr. Webb said that the next thing which occurred was that he rolled over and got on top of CJ. Her legs at this point were already open. His knees were in between her legs and he used his arms to prop himself up on the bed. CJ's hands were at her side. Mr. Webb's evidence was that he then stopped kissing CJ, grabbed the condom that was on the lamp desk, brought it to his face, gave her a look and raised his eyebrow and smiled at CJ. The condom was in his right hand next to his face. His evidence was that CJ smiled. He said that he made sure she acknowledged what he was doing. He said that CJ gave him a smile back, continued to kiss him and brought him in closer by putting her hands on his back and bringing his entire body closer to her. Mr. Webb's evidence was that at this point he had no concerns that CJ could not see him when he held the condom up and looked at her. He agreed in cross-examination that CJ did not verbalize anything about wanting to have sexual intercourse, after she had previously said she didn't want to have sex.

[125] At this point they were still kissing. Mr. Webb's evidence was that he then went to his knees and propped himself up in order to open the condom package. He opened the package with both hands and put the condom on his penis. They began to kiss again and he then tried to have sex with CJ. He said that CJ was in the missionary position, lying on her back with her arms on his back. Mr. Webb's evidence was that he was unsuccessful in penetrating CJ with his penis. Mr. Webb testified that he believed that CJ was okay with what had happened based on the non-verbal cues she had given him, i.e., smiling when he brought the condom out, kissing him and bringing his entire body closer to her. He maintained in cross-examination that he had had no difficulty digitally penetrating her vagina with two fingers, but could not penetrate her vaginally with a lubricated condom on his penis. He denied in cross-examination that he knew that CJ didn't want him to put his penis in her vagina, so he did so quickly before ejaculating.

[126] Mr. Webb said that he had tried to penetrate CJ for a moment, but afterwards CJ said that they should give it more time. He said in cross examination, that his penis did not go into her vagina to any degree at all. By giving it more time, Mr. Webb took that to mean that CJ was too dry and tight at the moment, so try to

give it more time to see if it would work. He denied in cross-examination that CJ herself said that she was tight and dry. He agreed in cross-examination that he didn't ask CJ what she meant by "give it more time", for example whether she meant more time in that moment, or more time over a couple of months to date.

[127] Mr. Webb's evidence was that he got off her and began to digitally penetrate her again. This lasted a few minutes. He said that he had no problems getting his fingers into CJ's vagina. He said that she continued to make moans that he deemed were pleasurable.

[128] Mr. Webb's evidence was that he then rolled back on top of CJ and tried, unsuccessfully, to penetrate her again. She was lying on her back touching his back and the top of his head. His evidence was that he believed that CJ was still okay with what was happening. She didn't interrupt him, was touching him in a sexual manner and showed no negative emotions. This second attempt to penetrate CJ after she had said (according to Mr. Webb), "let's give it more time" lasted about 15 seconds. In cross examination when asked what non-verbal cues he received from CJ at this time, he said he didn't really have cues but rather he rolled over on top of CJ, they began kissing and CJ wrapped her arms around his mid-back area and pulled him in closer. He agreed in cross-examination that he didn't verbalize anything to CJ before trying to penetrate her vaginally for the second time.

[129] Mr. Webb testified that he thought that if they tried a different position, it might work. He said that he told CJ to turn around and get on her knees and she did so. He was behind her on his knees. Before they tried to engage in sexual activity, i.e., his penis in her vagina, CJ said that she didn't want to "have anal." He took that to mean that CJ didn't want to engage in anal intercourse. He said that it had never been his intention to engage in anal intercourse. He said that he found CJ's comment that she didn't want to have anal to be a very "odd" and "gross remark." He was very turned off and lost his erection. Mr. Webb denied in cross-examination that CJ at no time said, "no anal."

[130] He laid down on the bed on his back. His evidence was that CJ tried kissing him for a bit, but at that time he wasn't kissing back. They laid on the bed side by side. He said that CJ's head was on his chest and her leg was over his leg. They laid there for about 30 minutes.

[131] When asked by his counsel how he was feeling at this point about what had occurred, Mr. Webb's evidence was that it was an awkward situation at first and he

thought it over. He said that he did not like how soon it was after his first girlfriend and he had broken up; he also thought that the awkwardness and embarrassment of it jeopardized his friendship with CJ. His evidence was that he mumbled to himself a few times in relatively quick succession, "I shouldn't have done that."

[132] His evidence was that prior to his mumbling "I shouldn't have done that", CJ said that she was sorry that it hadn't worked out, even though she wished it had. He said that he nodded and acknowledged what she had said. However, his evidence in cross-examination was that he mumbled "I shouldn't have done that" a few times and it was then that CJ said that she was sorry that it hadn't worked out but that she had wanted it to.

[133] In cross-examination Mr. Webb maintained that when he said, "I shouldn't have done that" a few times, he meant that he should not have engaged in any sexual activity with CJ, including kissing, touching her and penetrating her vaginally or digitally. This was because it was so soon after he had broken up with his girlfriend and his desire to maintain his friendship with CJ.

[134] Mr. Webb's evidence was that they then laid on the bed, relaxing, without talking. They then put their clothes on. Mr. Webb's evidence was that the condom was still on his penis. He said that he forgot about it until he got home. He then flushed the condom down the toilet.

[135] Mr. Webb denied in cross-examination that he never took the condom out of the package, saying that that made no sense. He maintained that he put his underwear and jeans on over his non-erect penis with a condom on it and left CJ's dorm. His evidence was that he did not discover the condom for another 30 minutes until he went to the bathroom at his father's house.

[136] His evidence was, after they put their clothes on that he told CJ that he wanted them to remain friends and forget about what happened. He said that CJ said "yes." He then gave her a hug and left.

[137] Mr. Webb's evidence was that he saw CJ the next day at her dorm room. A group of about six was there studying for a calculus project that was due that Wednesday. His evidence was that nothing out of the ordinary occurred.

[138] Mr. Webb's evidence was that on November 11th he received an email from Dalhousie University saying that he was not to contact CJ anymore. He acknowledged in cross-examination that he received this email from

Lyndsay Anderson, Manager Student Conduct at Dalhousie, telling him to stop contacting CJ in any way outside of classes. When he received this message, he said that, he was very confused and didn't know what to think. His evidence was that after he received this email he messaged CJ, apologizing.

[139] In cross-examination Mr. Webb agreed that, from his perspective, the email from Dalhousie was the first time that he knew that anything was wrong or that anyone had suggested he could potentially face a consequence or a sanction for whatever had gone on the night of November 5th. In cross-examination he denied that he was nervous when he received the Dalhousie email, saying that he thought that it just seemed that he was not to contact CJ and it was not going to progress any further than that.

[140] Mr. Webb acknowledged sending CJ three text messages after he received the Dalhousie email at 9:20 p.m. (as set forth earlier in this decision). When directed to the third of these text messages by his counsel which read, "If it's what I think it's about. I'm sorry and I never should have said what I said" and when asked what he was referring to, Mr. Webb testified that he was grasping for straws to see what was going on. He said that he thought that the comments that he had made to CJ at the end of their interaction had offended her in some way and he thought that CJ was taking it hard. His evidence was that he did not receive a response from CJ to these texts. In cross-examination he agreed that he thought that by contacting CJ he hoped he would put some tension to rest.

[141] Mr. Webb was asked in cross-examination about the first sentence of the three texts on November 11th, i.e., "Hey. I'm pretty sure you won't see this." He said that he thought because of the email from Dalhousie, that CJ might have blocked him. He was also asked in cross-examination about saying, "I just wanted to say I'm sorry. I'm pretty sure I know what this is about." He agreed that he was referring to what had happened on the evening of November 5th. When asked in cross-examination what he felt that he needed to apologize for, Mr. Webb said that it was how he left things that evening, when he said that he just wanted to remain friends and when he mumbled, "I really shouldn't have done that." He said that he thought that he had really hurt CJ's feelings in some major way and he was hoping to reconcile that. He agreed that he hadn't reached out to CJ after Sunday night, November 5th, until after he received the Dalhousie email on November 11th.

[142] Mr. Webb denied that he sent the statement in the third text of November 11th, "If not I just want to know what it was and fix it" because he knew that the text might be used against him at some point.

[143] When asked in cross-examination about his ex-girlfriend, he said that they had been together for about two years and had broken up about two weeks before November 5th. He said that his girlfriend broke up with him and that he was upset when she did so. He denied that he was angry, testifying that he was lonely, upset and depressed.

[144] Mr. Webb denied in cross-examination that "rebound sex" was going through his mind the night of November 5th. He said that he was hoping to reconcile his relationship with his girlfriend.

[145] When asked what he did with the condom wrapper that he opened on the evening of November 5, 2017, Mr. Webb's response was that he really didn't know what he did with it, but that he did not leave the dorm with it. He said that he believed it was red, but that he was color-blind. He said that the wrapper was shiny and could have been orange. The brand was Trojan.

[146] His evidence was that he did not believe the condom found in CJ's dorm room by her mother, which was purple and blue, was the condom wrapper that he had at CJ's dorm that evening.

The Elements of Sexual Assault

[147] A conviction for sexual assault under section 271(1) of the *Criminal Code* requires proof beyond a reasonable doubt of the *actus reus* and *mens rea* of the office: *R. v. J.A.*, [2011] 2 S.C.R. 440 at para. 23.

[148] The *actus reus* of sexual assault is established by the proof of three elements (*R. v. Ewanchuk*, [1999] 1 SCR 330 at 347):

(i) Touching;

(ii) The sexual nature of the contact, and

(iii) The absence of consent.

[149] Justice Major in *Ewanchuk* explained that the absence of consent for the purpose of the *actus reus* is "subjective and determined by the complainant's state of mind towards the touching at the time it occurred" (para. 26).

[150] The *mens rea* of sexual assault contains two elements: intention to touch, and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched": *R. v. Ewanchuk* at 353.

[151] In this case there is no doubt that the Crown has proven the first two elements of the *actus rea*. The issue here is whether the Crown has proven the third element, i.e., the absence of consent.

[152] In *Ewanchuk*, Justice Major explained that the absence of consent is "subjective and determined by reference to the complainant's state of mind towards the touching at the time it occurred." At paragraphs 29-30, Justice Major made it clear that the accused can still claim the words and actions of the complainant may give rise to a reasonable doubt that the complainant is in her own mind consenting to the sexual activity:

> [29] While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.
>
> [30] The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

[153] At paras. 41-45 of *Ewanchuk* Justice Major explained the *mens rea* of sexual assault and that honest but mistaken belief in consent is a defence to sexual assault. As with the *actus reus*, consent is an integral part of the *mens rea*. However, while the absence of consent for the *actus reus* is subjective and considered from the complainant's perspective, in the context of the *mens rea*, consent "is considered from the perspective of the accused": *Ewanchuk* at para 43.

[154] In this case, Mr. Webb says that the Complainant consented to the sexual acts in question or there is a reasonable doubt that she consented. In the alternative, Mr. Webb says that he had an honest belief in her communicated consent.

[155] In *Ewanchuk* Major J. outlined the two-stage inquiry into whether an accused held an honest belief in consent as follows:

> 64…As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence.
>
> 65. Moreover, to be honest the accused cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advance. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

The Credibility of the Complainant

[156] Defence counsel suggested that CJ's memory of the events of November 5, 2017 was less than clear and accordingly, there is a reason to question the reliability of her testimony.

[157] He pointed to the fact that CJ initially told the police that she undid Mr. Webb's belt buckle, repeated that in her complaint to Dalhousie and in a formal statement to the police, but testified at the preliminary inquiry that she did not undo his belt buckle. CJ's testimony at the trial was that she did undo the belt buckle.

[158] Defence counsel also points to the fact that when asked at the preliminary inquiry about the time period between the digital penetration and the sexual intercourse, CJ's evidence was that it was about five seconds. When asked the same question at trial, CJ's evidence was that the time period was one minute to a minute and a half.

[159] Defence counsel also noted that there was a difference between CJ's evidence at trial and the statement that she had given to the Dalhousie investigator on December 17, 2017. CJ agreed in cross-examination at trial that she had used the language "try, trying and tried" to have sex when describing the sexual encounter with Mr. Webb to the investigator. Defence counsel suggests that that language was used by CJ because it was a more accurate description of what occurred and consistent with Mr. Webb's evidence that he was unable to penetrate her vagina with his penis on two occasions. CJ maintained in her trial testimony that she would not use the language of "tried or trying" now to describe what had

happened but, rather, that Mr. Webb had actually penetrated her vagina with his penis.

[160] In her statement to the Dalhousie investigator, CJ approved the following part of the investigator's statement, "Eventually he just stopped trying to have sex with her." Regardless of CJ's explanation for use of the words "try or trying", the words, he "just stopped trying" seem inconsistent with CJ's evidence that there was one occasion only where Mr. Webb actually sexually penetrated her.

[161] I have carefully considered these inconsistencies in CJ's evidence. Of course, I also observed her demeanour while testifying and the manner in which she gave her evidence. I believe that CJ attempted to tell the truth and was generally credible. However, I am left with concerns, as a result of these inconsistencies, in her evidence with the reliability of her account of the sexual activity between her and Mr. Webb on November 5, 2017.

[162] While it is not important in terms of consent whether CJ in fact undid Mr. Webb's belt buckle, I am concerned that on two occasions close in time to the events of November 5, 2017, CJ told a police officer that she undid Mr. Webb's belt buckle and yet testified under oath at the preliminary inquiry in 2018, that she did not do so, suggesting, at first that her police statement where she said she undid the belt buckle, was a misprint. And further, she testified before this Court that she did undo the belt buckle.

[163] I am left, therefore, with these concerns and with CJ's version of events which is very different than Mr. Webb's account.

The Credibility of Mr. Webb

[164] Mr. Webb maintained a consistent version of the events throughout his testimony. He gave a detailed account of what he said transpired.

[165] In terms of the internal consistency of his evidence, Mr. Webb's testimony in direct examination was that before he mumbled, "I shouldn't have done that", he said that the Complainant had said that she was sorry that it hadn't worked out but that she had wanted it to. In cross-examination he said that he first mumbled, "I shouldn't have done that" and then the Complainant said that she was sorry that it hadn't worked out but she had wanted it to.

[166] This was a minor discrepancy and did not affect my view that Mr. Webb gave a plausible account of events.

[167] He agreed that the Complainant had told him, when the condom first appeared, that she did not want to have sex with him, which he understood at the time to be vaginal sex. Had Mr. Webb wanted to give a completely fabricated account of what happened with CJ that evening, that would be a key area of his testimony where lying would have helped him. He also could have lied about mumbling, "I shouldn't have done that" several times under his breath. However, he agreed with CJ that he had said so.

[168] However, I do not accept Mr. Webb's evidence that, after two unsuccessful attempts to penetrate CJ's vagina with his penis, he put on his clothes with a condom on his non-erect penis, only removing the condom when he went to the bathroom in his father's house a half-hour later. I am entitled to rely upon common sense and my understanding of the world, and in doing so, Mr. Webb's evidence in this regard does not accord with common sense.

[169] Having said that, because I do not believe all of Mr. Webb's evidence, does not mean that the remainder of his evidence as to what happened that evening is not credible.

Conclusion as to the *Actus Reus*

[170] It must be remembered that the question at the *actus reus* stage is whether there was consent in the mind of CJ. CJ testified as to actual penetration of her vagina on one occasion and that she did not agree to that. However, the assessment with respect to subjective consent does not end as soon as the Complainant testifies that she did not consent. Rather, the Court must assess CJ's evidence in light of all of the evidence in the case, including Mr. Webb's testimony, in order to determine whether, in the moment in time when vaginal penetration, or attempted vaginal penetration occurred, she subjectively consented, or there is a reasonable doubt as to whether consent was lacking. If there is such reasonable doubt, Mr. Webb must be acquitted.

[171] I have considered all of the evidence, including the fact that CJ was obviously upset when she called her girlfriend soon after Mr. Webb left her dorm. I have considered that she subjected herself to an intimate examination by the sexual assault nurse late at night a few days after her sexual encounter with Mr. Webb. I have considered that she reported the event to Dalhousie and to the police shortly after November 5, 2017. All of that evidence, however, does not assist the Court in determining whether, at the relevant moment in time, CJ subjectively consented to vaginal penetration, or attempted vaginal penetration.

[172] Nor does Mr. Webb's mumbling, "I shouldn't have done that" mean, as suggested by the Crown, that Mr. Webb was acknowledging lack of consent on CJ's part. Mr. Webb's evidence was that he felt he shouldn't have engaged in any sexual activity with CJ given how soon it was after his breakup with his girlfriend and that he wanted to continue to be friends with CJ. Nor do Mr. Webb's texts to CJ on November 11th acknowledge lack of consent on the part of CJ. Rather, he was saying he was sorry and never should have said what he said.

[173] As noted earlier in this decision I have found that CJ and Mr. Webb were both generally credible witnesses. I believe that each tried to tell the truth. Their memories, however, differ. The Court is left with two different accounts.

[174] I find that there is a reasonable doubt with respect to whether CJ subjectively lacked consent. As I said earlier in this decision, I generally found CJ to be a credible witness, but I also found Mr. Webb to be a credible witness.

[175] I had concerns about the reliability of CJ's evidence as it related to the undoing of Mr. Webb's belt buckle and her account to the Dalhousie University investigator about Mr. Webb trying to have sex with her and eventually giving up. The reliability of CJ's evidence and her credibility with respect to her lack of consent is undermined when I consider this evidence.

[176] Because I have a reasonable doubt whether CJ subjectively consented to Mr. Webb putting his penis in her vagina, I find that the Crown has not proven this element of the *actus reus* beyond a reasonable doubt.

[177] Accordingly, on that basis alone, Mr. Webb must be acquitted.

Honest But Mistaken Belief in Communicated Consent

[178] The alternative defence put forward by the Accused was that he should be found not guilty on the basis that he had an honest but mistaken belief that the Complainant communicated her consent to the sexual activity (vaginal penetration, or attempted vaginal penetration). Having concluded that I have a reasonable doubt concerning the *actus reus*, it is not necessary for me to deal with this defence. I do so for the sake of completeness because counsel spent a considerable time dealing with this issue.

[179] As noted by Major J. in *Ewanchuk*, not all beliefs upon which an accused might rely will exculpate him (para. 50). Consent in relation to the *mens rea* of the

accused is limited by both the common law and the provisions of sections. 273.1(2) and 273.2 of the *Code*, which provide that:

> **s. 273.1**…
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses by words or conduct a lack of agreement to continue to engage in the activity.
>
> **273.2** It is not a defence to a charge under sections 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from the accused's
>
> (i) self-inducted intoxication, or
>
> (ii) reckless or wilful blindness; or
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[180] Major, J. in *Ewanchuk* outlined the kinds of behaviour which provide no defence to an accused because they constitute a mistake of law on his part:

> [51] For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provide no defence: see *R. v. M. (M.L.)*, [1994] S.C.R. 3 (S.C.C.). Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. An accused cannot say that he thought "no meant yes". As Fraser C.J. stated at p. 272 of her dissenting reasons below:
>
> > One "No" will do to put the other person on notice that there is then a problem with "consent". *Once a woman says "No" during the course of sexual activity, the person intent on continued sexual activity with her must then obtain a clear and unequivocal "Yes" before he again touches her in a sexual manner.*

[Emphasis in original.]

I take the reasons of Fraser C.J. to mean that an unequivocal "yes" may be given by either the spoken word or by conduct.

[emphasis by this Court, Smith J]

[52] Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable…

[181] More recently, in *R. v. Barton*, 2019 SCC 33 (SCC), Moldaver J. (speaking for the majority) reviewed what can and cannot constitute "reasonable steps":

106 Keeping in mind that "consent" is defined under s. 273.1(1) of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question", what can constitute reasonable steps to ascertain consent? In my view, the reasonable steps inquiry is highly fact-specific, and it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps or obscure the words of the statute by supplementing or replacing them with different language.

107 That said, it is possible to identify certain things that clearly are *not* reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law (see *Ewanchuk*, at para. 51, citing *M.(M.L.)*). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see Sheehy, at p. 518). Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants (see Sheehy, at p. 537).

108 It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the

> end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.
>
> 109 Overall, in approaching the reasonable steps analysis, trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Moreover, trial judges and juries should be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Finally, if the reasonable steps requirement is to have any meaningful impact, it must be applied with care – mere lip service will not do.

[182] I now consider, assuming Mr. Webb's evidence to be truthful, whether there is an air of reality to his suggestion that he honestly, but mistakenly believed that, by her conduct, CJ was communicating consent to the sexual activity. There was no suggestion before the Court that CJ would be incapable, for any reason, of consenting to the sexual activity.

[183] At this stage, I must be satisfied only that there is some evidence that CJ communicated her consent to engage in the sexual activity in question and that Mr. Webb believed she communicated that consent, based on the circumstances surrounding the events and the behaviour of the parties.

[184] Mr. Webb's testimony presents, at least to a level of giving it an air of reality, a sufficient basis to require me to examine whether Mr. Webb had an honest, but mistaken belief in the communicated consent of CJ.

[185] Here I note that Mr. Webb is not saying that he believed CJ consented because she was silent, did not resist or otherwise object to what he was doing. Rather, he is saying that he believed that she actively, by her conduct, communicated her voluntary agreement to engage in the sexual activity in question.

[186] Mr. Webb's honest, but mistaken, belief that CJ was consenting, cannot arise from his self-inducted intoxication (not a factor here) recklessness or wilful blindness or from him not taking reasonable steps, in the circumstances known to him at the time, to ascertain that CJ was communicating her consent.

[187] The first act where consent comes into play is Mr. Webb's insertion of his penis (or attempt to do so) in CJ's vagina. The determination of what constitutes reasonable steps is based upon the circumstances that present themselves to the accused and are known to him. There are a variety of circumstances which may be encountered in sexual activity. The circumstances of this Accused was that after

an initial statement by CJ that she did not want to have vaginal sex with him (and why), consensual activity continued. CJ consented to digital penetration of her vagina with his fingers. She consented to kissing. It was in that context that Mr. Webb raised the condom to his face. It is to be remembered that it was the condom's first appearance which triggered CJ's comment that she didn't want to have sex. It is not a crime for someone to raise the issue of having sex with someone again, after she initially said she did not want to, but the onus rests with him to ensure that the complainant has changed her mind before proceeding further.

[188] In that context, the condom reappears, according to Mr. Webb, by his face and for her to see. He says that she smiled and drew his body closer with kissing continuing until he took the condom out of the package and put it on his penis. I do not accept that Mr. Webb was required to verbalize something in order to ascertain CJ's consent at that point. As noted by Major J. in *Ewanchuk*, "an unequivocal 'yes' may be given by either the spoken word or by conduct" (para 51). Of course, this is context specific.

[189] I reject Crown counsel's argument that it was necessary for Mr. Webb to verbalize something prior to attempting to have vaginal sex with CJ given her previous statement that she did not want to have vaginal sex. It is to be remembered that after CJ voiced that she did not want to have sex, she and Mr. Webb had engaged in consensual digital penetration of her vagina with his fingers, with no prior verbal communication of any kind. Mr. Webb then, according to his evidence, held the condom up to his face, where she could clearly see it. The first appearance of the condom was the very thing which had triggered CJ's statement that she didn't want to have sex, but which they both understood, she meant vaginal sex.

[190] A lot had gone on, albeit in a short period of time, since CJ had said that she didn't want to have vaginal sex. I accept that Mr. Webb was raising the question of sex again by putting the condom up to his face, raising his eyebrows and smiling, and that when CJ smiled back and drew his body closer to hers with her hands, in his mind, CJ was communicating her consent to him.

[191] Mr. Webb also testified that after the first unsuccessful attempt by him to penetrate CJ's vagina with his penis, he rolled back to her side and she said, "let's give it more time." He then tried a second time to penetrate her vagina with her penis. If I accept Mr. Webb's evidence that CJ said, "let's give it more time", it makes common sense that she was saying let's give it more time before we try to

have sex again, and not, as suggested by Crown counsel, that she could have meant, "let's give our relationship more time", i.e., let's date for a few months first.

[192] I find that there is therefore a basis for the Accused's belief that the Complainant was voluntarily agreeing to engage in vaginal sex with him on each occasion.

[193] I believe that in this context, Mr. Webb took reasonable steps to ascertain whether CJ was consenting to have sex with him and that he had an honest belief that she was doing so. He was not reckless or wilfully blind in his belief that CJ consented. The Crown has not established that was the case.

Conclusion

[194] In all the circumstances, I find that the Crown has not proven beyond a reasonable doubt that the Accused had the requisite *mens rea* to commit the sexual assault.

[195] The Crown also failed to prove the consent element of the *actus reus* for the reasons stated earlier in this decision.

[196] Mr. Webb is acquitted of the offence of sexual assault.

Smith, J.