

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Elgebeily*, 2021 NSSC 97

Date: 20210304

Docket: CRH 474876

Registry: Halifax

Between:

Her Majesty the Queen

v.

Hossameldin Elgebeily

D E C I S I O N

Restriction on Publication: *Criminal Code* ss. 486.4 & 486.5 – any information that will identify the Complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the ban stipulated in these sections.

Judge: The Honourable Justice Glen G. McDougall

Heard: January 28 – February 2, 2021, in Halifax, Nova Scotia

Oral Decision: March 4, 2021

Written Decision: March 31, 2021

Counsel: Sarah Kirby, for the Crown
Eugene Tan, for the Defence

By the Court (orally):

[1] Hossameldin Elgebeily stands charged:

that he on or about the 1st day of April 2017, at, or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did unlawfully commit a sexual assault on [the complainant], contrary to Section 271 of the *Criminal Code*.

[2] An accused person is presumed innocent. The burden is always on the Crown – the prosecution – to prove, beyond a reasonable doubt, that an accused is guilty of any crime that he or she has been charged with.

[3] The accused did not have to testify or present evidence or prove anything in this case. It is Crown counsel who must prove the guilt of Mr. Elgebeily, the accused, beyond a reasonable doubt.

[4] In a situation where an accused person decides to testify, I must approach it in the manner set out in the decision of the Supreme Court of Canada in the case of *R. v. W.(D.)*, [1991] 1 S.C.R. 742. Justice Cory, who was then a member of the Supreme Court of Canada, offered the proper way for a trial judge to instruct a jury which has similar application in a judge alone trial such as the one that is presently before the Court. Justice Cory indicated that:

- i. If I [the trier of fact] believe the evidence of the accused who denies having any sexual contact with the complainant, I must acquit;
- ii. If I do not believe the evidence of the accused, but am left with a reasonable doubt by it, I must also acquit;
- iii. If I do not believe and am not left in a reasonable doubt by his evidence, I must consider whether, on the basis of the evidence which I do accept, that I am convinced beyond a reasonable doubt of his guilt.

[5] This form of self-instruction is meant to guarantee the right that every accused person has to be presumed innocent. This presumption is only displaced when the Crown proves, beyond a reasonable doubt, that he committed the offence of which he has been charged. Then and only then can he be convicted of a crime.

[6] In a case such as the one before the Court, where the accused testifies in his own defence, even if the Court does not accept or believe the denial that sexual

activity ever occurred between him and the complainant, if it raises a reasonable doubt, then an acquittal must follow.

[7] But that is not the end of the matter. As previously stated, in the case of *R. v. W.(D.)*, *supra*, the trier of fact is required to take another step beyond that. If the trier of fact does not believe the evidence of the accused and is not left with a reasonable doubt by it, he or she must then consider, whether, on the basis of the evidence which is accepted, he or she is convinced beyond a reasonable doubt of the accused's guilt.

[8] This squarely then, leaves the burden of proof on the prosecution. The accused is not required to prove his innocence, he is not even required to testify. But, if he does testify, his evidence is made available and can and should be considered along with all the other evidence tendered at trial.

[9] The evidence consists not only of what each witness says in response to the questions asked by the lawyers. The questions themselves are not evidence unless the witness agrees that what the lawyer asked or suggested is correct.

[10] The evidence also includes any things that are tendered and made exhibits during the course of the proceeding. The Court must consider all the evidence before arriving at a just and proper verdict. Anything short of this could result in an injustice.

REVIEW/ANALYSIS OF THE EVIDENCE

[11] I will now begin my review and analysis of the evidence by referring to a recent decision of the Honourable Justice Jamie S. Campbell of the Nova Scotia Supreme Court.

[12] In the case of *R. v. Twinley*, 2020 NSSC 266, Campbell, J., at paras. 20-22 stated the following:

[20] This is a problem faced in many sexual assault cases. There are only two witnesses. The complainant gives evidence about a sexual assault having taken place. The defendant provides a denial that is forceful, internally consistent and consistent with all the other evidence, except that of the complainant. If a "contest of credibility" in that sense, were to be strictly avoided, a not guilty verdict would be required in every such case. But it is not. That is because a "contest of credibility" means a weighing of the evidence of one against the evidence of the other to determine which of the two is more worthy of belief. Simply deciding which of the two witnesses is more believable and making a finding of guilt based on that

determination is faulty legal reasoning. It fails to recognize the burden of the Crown to prove guilt beyond a reasonable doubt.

[21] Assessing the evidence of the complainant against the evidence of the accused and assessing the evidence of the accused against the evidence of the complainant is part of the assessment of all the evidence as required in a criminal case. The purpose is not to determine which is more believable. It is to determine whether the Crown has proven the guilt of the accused beyond a reasonable doubt. An accused person may provide a denial that is, on its face, believable. When considered in light of the complainant's evidence however, it may no longer be as believable. The complainant's evidence may cast doubt on the denial. Trial judges are required to struggle with those competing versions of events in many cases. The issue is not just whether the accused person's denial is less believable than the complainant's evidence, or even if it is quite a bit less believable than the complainant's evidence, but whether it raises a reasonable doubt as to the accused person's guilt.

[22] That process can become problematic when a trial judge accepts the evidence of the complainant and puts an unspoken onus on the accused person to disprove that evidence. That process can also be problematic when the trial judge simply accepts a denial on its face without testing it against the other evidence in the trial, including the evidence of the complainant. Evidence is not assessed in a hermetically sealed compartment and only tested for internal inconsistencies. It is tested against all the other evidence and doing so does not create a contest of credibility. If a denial is assessed against all the other evidence and raises a reasonable doubt the accused person should be found not guilty. A denial that raises a reasonable doubt, standing on its own, without being assessed against the other evidence, has not been properly assessed.

[13] Justice Campbell cautions that a trial involving sexual assault allegations does not boil down to simply a "contest of credibility". To simply decide which of the two witnesses (the complainant or the accused person) is more believable and then making a finding of guilt or entering an acquittal based on that determination results in faulty legal reasoning. According to Justice Campbell, that approach fails to recognize the burden on the Crown to prove guilt beyond a reasonable doubt.

[14] All of the evidence offered at trial must be taken into consideration.

[15] As with all cases involving an allegation of sexual assault, the prosecution case relies primarily on the testimony of the complainant. The case before the Court is no exception.

[16] The complainant testified as to the events leading up to and including what she says happened in the back seat of the taxi cab that transported her and a co-

worker and the accused to various drop-off locations in the early morning hours of Saturday, April 1, 2017.

[17] Any reference to the complainant will be anonymized by the use of initials in any publication of this decision in an effort to protect her identity.

[18] The complainant testified that she began working for [the restaurant] (henceforth referred to as [the restaurant]) in September 2016. She was first employed as a member of the front line staff. By the time these alleged events took place she had been promoted to a supervisor's role.

[19] Initially she worked mainly at the [X] location but she eventually moved to the restaurant's outlet at [Y]. Due to a staff shortage she was temporarily assigned to the [X] location. This is where she first met the accused, Mr. Elgebeily.

[20] Mr. Elgebeily was undergoing training in preparation for opening a new [the restaurant] franchise location in Cape Breton. The complainant testified that she only worked side by side with the accused for about an hour in the week leading up to the alleged assault. This combined with the time they spent together at the [pub] along with a co-worker – JR – during the late evening of Friday, March 31, 2017 and into the early morning hours of April 1, 2017, were sufficient for her to be able to identify Mr. Elgebeily as the person she says sexually assaulted her. It should be noted that the identity of the accused is not in issue.

[21] The complainant testified that she received a telephone call from JR inviting her to join JR and Mr. Elgebeily at the [pub] to celebrate the completion of his successful week of training before heading off to open a new restaurant in Cape Breton.

[22] According to the complainant, another supervisor was supposed to accompany JR and Mr. Elgebeily but she had to cancel at the last moment. This led to JR calling her to join the group. Although somewhat reluctant, the complainant agreed to accompany Miss R.

[23] The complainant's then boyfriend drove her to JR's place of residence on [...] Street. She and JR then walked to the [pub] and joined Mr. Elgebeily who was awaiting their arrival.

[24] Over the course of the next several hours they chatted, had drinks and occasionally danced. They also went outside at least once to smoke a cigarette.

[25] The complainant testified that she drank two cranberry vodkas along with two additional shots of liquor and probably two beer. She added that she did not finish either beer – one of which included one of the shots of liquor.

[26] The complainant indicated that she switched to drinking water when she began feeling a buzz. She testified that she was back to herself by the time she and her two companions left on foot to get something to eat at [the restaurant] location on [...] Street.

[27] After finishing their meal they then walked to another late-night bar [...]. [This bar] was not allowing any new patrons to gain access so they all decided to call it a night and go home.

[28] The complainant first called for a cab and then hailed one that happened to be near-by. JR sat in the front passenger seat and the complainant and Mr. Elgebeily sat in the back. The complainant sat in the seat directly behind the cab driver. Mr. Elgebeily sat opposite her directly behind JR.

[29] Since JR resided closest to where they took the cab, she was dropped off first. The complainant recalled that JR instructed the cab driver to take the complainant to her residence in the [...] area before driving Mr. Elgebeily to where he was staying at what she thought was a nearby hotel, near to where the training was taking place at [the restaurant] in [...].

[30] According to the complainant, JR told her to call when she arrived home to make sure she got home safely.

[31] After dropping JR off, the taxi driver continued on. He passed his cellphone back so his remaining two passengers could input the address they each wanted to be driven to. The complainant testified that Mr. Elgebeily put in his address and then handed the cellphone back to the driver. The complainant was concerned that the cab driver would not first drop her off before taking Mr. Elgebeily to where he was staying.

[32] She said she moved towards the middle of the back seat and told the driver to first take her to her place of residence on [...] in the [...] area.

[33] The complainant further testified that Mr. Elgebeily attempted to persuade her to accompany him to where he was staying. She said she told him that she had to go

home as her mother would be waiting for her. The complainant further testified that Mr. Elgebeily attempted to kiss her. She pulled away and told him to stop.

[34] The complainant further testified that Mr. Elgebeily called her an asshole for not kissing him. The complainant further testified that Mr. Elgebeily reached over and placed his left hand under her right leg which she had crossed over her left leg where she sat in the back seat directly behind the cab driver.

[35] The complainant said Mr. Elgebeily placed his hand up against her vagina. She testified that she had not asked him to do this nor did she consent to allowing him to do this or to kiss her. The complainant said she pushed him away at least twice and told him to stop when he tried kissing her.

[36] She further testified that he eventually moved his hand away from her vaginal area and then placed it on her thigh. She said his hand was resting closer to her knee than her upper thigh area, so she did not try to remove it or push his hand away. As she explained it, she thought it better there than where it had just previously been.

[37] Eventually the cab driver arrived at the complainant's residence and dropped her off. Before exiting the cab, the complainant said that Mr. Elgebeily moved over towards her and tried to kiss her. She said he put his right hand on the left side of her face and jaw and attempted then to kiss her. She said she resisted. At no time, she said, did Mr. Elgebeily seek her permission, nor did she consent to his advances. The complainant got out of the cab and thanked the driver. She then went inside the apartment building and after entering her apartment she locked the door and then called JR. She told JR some of the details of what had happened to her after JR was dropped off at her residence.

[38] After this conversation, the complainant then went to bed to try to get some rest. The complainant testified that when she woke up the next morning, she did not feel any ill effects of drinking and being out late the night before.

[39] The complainant testified that she did not speak to anyone else about what had happened during the cab ride home until the following day. Her aunt – her mother's sister – came over for a visit on Sunday and that is when the complainant shared her story with her aunt.

[40] On Monday morning, April 3rd, the complainant called another one of her supervisors at [the restaurant] – BM – and arranged to meet with her outside [a coffee shop] which is located just across the street from [the restaurant] location in [...].

[41] After discussing things with BM and authorizing her to speak with the owners of [the restaurant] about what had happened, the complainant reported for work at the [Y] location.

[42] Later that day, the complainant was informed by BM that the owners of [the restaurant] told her there was nothing they could do since the alleged events had not taken place on [the restaurant] premises or on restaurant time.

[43] The complainant decided then that she no longer wished to work in an environment where she was not supported. A few days later she reported the incident to the police.

[44] The Crown also called the complainant's two co-workers, BM and JR.

[45] BM was the complainant's supervisor. She trained her when she first started working for [the restaurant] in September 2016. BM testified that the complainant was a very good employee. She also indicated that the complainant was not prone to shows of emotion.

[46] BM first became aware of the allegations the complainant made against Mr. Elgebeily during a telephone conversation she had with JR early on the morning of Saturday, April 1st, 2017. She said JR called her sometime between 3 a.m. and 4:30 or 5:00 a.m. that morning, she was not sure exactly when.

[47] BM indicated that JR wanted her to know what the complainant alleged had happened because BM had to work that day with Mr. Elgebeily. It was apparently his last day of training at the restaurant.

[48] BM described Mr. Elgebeily as being very quiet all that day but she said it could have been because of what he and the others had consumed by way of alcohol the night before.

[49] BM further testified that she was contacted by the complainant on Monday morning and was asked to meet with her before work. The meeting took place at [a coffee shop] which was located across the street from [the restaurant] in [...].

[50] BM described how upset the complainant appeared. The complainant shared with her some of the details of what she alleged Mr. Elgebeily did to her during the cab ride home on Saturday morning.

[51] BM had never seen the complainant in this kind of emotional state before. She said the complainant had always appeared strong but on this morning, she could hardly stand up. She said the complainant wanted her to speak to the owners so they would have a better idea of what kind of person Mr. Elgebeily was.

[52] BM also encouraged the complainant to report the matter to the police. BM indicated she spoke to one of the owners of [the restaurant] but was told there was nothing they could do about it.

[53] BM testified that the complainant had provided her with some of the details of what was alleged to have occurred. She said the complainant told her that Mr. Elgebeily had tried grabbing her “boobs” and that she cried while in the cab. She also testified that the complainant told her that she kept telling Mr. Elgebeily “no” and “to stop”.

[54] Since this happened, BM indicated she has had very little contact with the complainant. She thought she might have met with her when the complainant turned in her work uniform.

[55] The complainant’s other co-worker – JR – also testified that she planned to go out for drinks with Mr. Elgebeily and BM to celebrate the end of Mr. Elgebeily’s first week of training at [the restaurant]. When BM backed out, JR called the complainant and persuaded her to join them since she did not know Mr. Elgebeily all that well and was not comfortable going out with him alone.

[56] JR testified that the complainant was dropped off at her residence at [...] Street and from there she and the complainant walked to the [pub] which was not all that far away.

[57] JR described the events that took place from the time they arrived at the [pub] around 11:30 p.m. until she was dropped off by the cab driver at her residence later the next morning. JR testified that they were all drinking alcohol and beer while at the [pub]. She recalled that the complainant started drinking water sometime before they all left the [pub] to walk to [the restaurant] on [...] Street. After getting some food they then went to [...]. JR thought this was around 3 a.m. because she knew that [...] had a cabaret licence and could stay open later than some of the other bars.

[58] JR testified that they could not get in and decided to go home and call it a day. She described first calling a cab and then seeing one approaching but another party took the first cab. She then hailed another cab which stopped and they all got in.

[59] JR recalled getting into the front passenger seat while Mr. Elgebeily got in the back and sat directly behind her. She testified that the complainant had to walk around behind the cab and sat in the rear seat directly behind the driver.

[60] JR testified that she was the first to be dropped off since she lived closest to where they were picked up. Before getting out JR told the driver to drop off the complainant first before taking Mr. Elgebeily to where she thought he was staying at a hotel in Bayer's Lake. She also told the complainant to call her as soon as she got home. JR said she was concerned that the complainant not be alone in the cab with just the driver as there had been a number of alleged incidents involving taxi drivers and their female passengers in the Halifax area around that time.

[61] JR testified that about half an hour or 45 minutes after she got home she received a telephone call from the complainant. She said the complainant told her that Mr. Elgebeily had tried grabbing her. She said the complainant seemed to be in shock.

[62] After speaking to the complainant, JR then immediately called BM to tell her what she had been told by the complainant. JR said she called BM because she was upset by the complainant's call and did not know how to handle the situation. She said she trusted BM and felt she should know what was alleged to have happened since BM was scheduled to work with Mr. Elgebeily later that day.

[63] JR could not be sure if she spoke to the complainant again that weekend but thought they might have communicated with one another by text or Snapchat. She did recall speaking to her in person on Monday. She was aware that the complainant quit her job at [the restaurant] after closing the [Y] location later that day on Monday, April 3rd. JR chose to leave her employment at [the restaurant] as well on Friday of that same week.

[64] JR was also aware that the complainant and BM had met outside [a coffee shop] across the street from [the restaurant] location in [...] on Monday morning of that week.

[65] On cross-examination, JR was asked about the quantity of alcohol that was consumed when she and the complainant and Mr. Elgebeily were at the [pub]. She described the complainant's level of intoxication as being about six out of ten, with ten being highly intoxicated.

[66] JR testified that after leaving [the restaurant] she had very little contact with either the complainant or BM. She did recall receiving a telephone call from Mr. Elgebeily just prior to the preliminary inquiry during which he asked her what she was looking for. He added “Is it an apology you want?”

[67] The final Crown witness was Halifax Regional Police Constable Kaven Daneault. Officer Daneault was dispatched to meet with the complainant who had made a complaint of sexual assault. Constable Daneault met with the complainant April 6, 2017. He said he met her outside the apartment building where she resided.

[68] Officer Daneault testified that the complainant was very upset so he suggested she might prefer to write down what had happened to her. She said she could do that. Officer Daneault was not qualified to take a formal statement given the nature of the allegations. He took what she had written down and passed it along to the Major Crimes Unit to continue the investigation.

[69] After the close of the Crown’s case, the Defence elected to call evidence.

[70] Mr. Yaser Al-Sayyed testified by video link from Medina City, Saudi Arabia. The assistance of a translator – Mr. Issam Khoury – was arranged to assist the court and the witness who spoke Arabic and some English. As things turned out, Mr. Al-Sayyed had a very good grasp of English and Mr. Khoury’s talents did not have to be relied upon to any great extent.

[71] Mr. Al-Sayyed was the cab driver who picked up JR, the complainant and Mr. Elgebeily outside [...] Bar early on the morning of Saturday, April 1, 2017. He recalled one of the women got in and sat in the front passenger seat of the cab that he had operated on behalf of Casino Taxi. He recalled her wearing a red dress.

[72] He further recalled that the two other passengers sat in the back seat. The other woman sat behind him and the male passenger sat next to her. He testified that they sat close to one another – not one on one side and the other on the other side but, rather, next to one another.

[73] Mr. Al-Sayyed also remembered all three passengers appeared to have been drinking. He described that people who have been drinking speak with a “heavy tongue”.

[74] Mr. Al-Sayyed recalled dropping off the woman who sat in the front passenger seat first. The location where he dropped her off was not all that far from where he picked her up along with the other two passengers, outside of the [bar].

[75] After dropping off his first passenger, he then proceeded in the direction of Mount St. Vincent University. He recalled turning left at a set of lights and proceeding to where he dropped off the second woman.

[76] From there he continued on and eventually his last passenger – a male – was dropped off. Mr. Al-Sayyed thought he dropped off the male who was Mr. Elgebeily at a house. He said that since Mr. Elgebeily was the last of the three passengers to be dropped off, he paid for the cab fare.

[77] Mr. Al-Sayyed remembered the two passengers in the back seat of his cab were kissing. He did not notice anyone shoving anyone else nor was he alerted to any problems happening behind him. He could not remember if the complainant leaned forward to tell him where she wanted to be taken. He also could not remember if he had passed his cell phone back so his passengers could input the location where they wished to be dropped off.

[78] Mr. Al-Sayyed testified that he did not look back to see what was going on in the back seat. He further testified that he could not see where Mr. Elgebeily's hands were.

[79] Mr. Al-Sayyed left Canada and went back to Saudi Arabia about three months after these events allegedly took place. The police did not contact him to discuss the allegations before he departed Canada to return home.

[80] Mr. Al-Sayyed testified that shortly after his arrival in Saudi Arabia he received an email from someone at Casino Taxi. He replied, giving a telephone number where he could be reached if anyone wanted to talk to him.

[81] Eventually, Mr. Al-Sayyed was contacted by Mr. Elgebeily on "WhatsApp". He requested Mr. Elgebeily send him a photograph but said it was difficult to remember what had happened three months previous to being contacted. He said what triggered his memory was when Mr. Elgebeily mentioned [the restaurant]. He then recalled that the conversation he had overheard that night "pissed him off" because it seemed that Mr. Elgebeily was showing-off about how much money was involved in establishing his business.

[82] Mr. Al-Sayyed also recalled hearing kissing sounds from the back seat. He said that he felt that they were being disrespectful by doing this. He indicated that he did not say anything to them about it because he did not want to cause a problem.

[83] Mr. Al-Sayyed testified that Mr. Elgebeily's first lawyer sent him a serious of questions by email back in 2017. He said he answered the lawyer's questions.

[84] Mr. Al-Sayyed testified that he last communicated with Mr. Elgebeily and his lawyer by text messages in November 2020.

[85] When asked if he could identify Mr. Elgebeily in the courtroom he said he could not. Back in 2017 when Mr. Elgebeily sent him his photograph he said he could identify him because it was not all that long after the alleged events happened.

[86] Mr. Al-Sayyed said he could not recall anyone arguing about where to go because it was a normal ride, as he described it.

[87] After hearing Mr. Al-Sayyed's testimony, the defence called Mr. Elgebeily to the stand. Mr. Elgebeily testified that he came to Canada in June of 2016. He has an Engineering degree as well as a Masters of Business Administration.

[88] Mr. Elgebeily has a brother who is a medical doctor in North Sydney. He and his brother decided to get into business together. Since neither one of them had any experience in operating a restaurant they decided to seek out a franchise. They wanted to introduce [...] style food to the Sydney area. They approached the owners of [the restaurant] – the [...] family – and persuaded them to open a franchise in Cape Breton. Mr. Elgebeily and his brother now have a second franchise in Truro and are in the process of opening a third location in Moncton, New Brunswick.

[89] Mr. Elgebeily testified about the first week of training he went through before opening the Sydney restaurant. He indicated that he worked quite closely with BM and JR all that week. They worked together from about 9 a.m. to 9 p.m. each day.

[90] Mr. Elgebeily said he briefly worked with the complainant as well. Mr. Elgebeily testified that on the last day of training that week, JR suggested that he and her and BM should go out for drinks to celebrate. Later on he found out that BM could not join them for some personal reason.

[91] Mr. Elgebeily further testified that he took a cab from where he was staying on [...] to the [pub]. He was the first to arrive. This was at approximately 11 p.m.

that evening. He got a table and was drinking a beer when JR and the complainant showed up about a half hour later.

[92] Mr. Elgebeily described what he remembered happening after that. All three of them were drinking. He drank beer because he is familiar with the number of calories in beer which is important to him because he is a diabetic and this enables him to better control his blood sugars.

[93] Mr. Elgebeily's description of what took place is consistent with what the complainant and JR earlier testified to.

[94] When asked about their levels of intoxication he estimated that JR was a "five or six out of ten" whereas he and the complainant were around a "seven". He recalled that the complainant stopped drinking alcohol and switched to water prior to leaving the [pub].

[95] Mr. Elgebeily further testified about leaving the [pub] and walking to [the restaurant] on [...] Street. He recalled JR walking ahead while he and the complainant followed behind. He said that he and the complainant held hands and had their arms around each other's shoulders.

[96] After having some food at [the restaurant], they decided to go to [the bar]. He said the complainant wanted to get something more to drink. Since they could not get into [the bar] they decided to call it a night. At first, Mr. Elgebeily intended to take a cab by himself but he said the complainant approached him and asked where he was staying. She then told him that since they lived close together perhaps they could carpool.

[97] Mr. Elgebeily testified that all three of them got into a cab with JR sitting in the front seat and with him sitting behind her in the back seat. He said that the complainant also sat in the back seat directly behind the driver.

[98] Mr. Elgebeily recalled having a friendly chat with JR and the complainant. They discussed the cost of [the restaurant] franchise and the cost to construct a restaurant. He said that JR was the first to be dropped off since she lived closest to where they were first picked up.

[99] Mr. Elgebeily recalled being handed the phone by the driver so he could input his destination. He said he could not recall the complainant ever taking the driver's phone to put in her address.

[100] Mr. Elgebeily testified that he remembered placing his hand on the complainant's thigh when he moved to the middle of the back seat to take the driver's phone.

[101] He said he placed his hand on her right thigh. He also tried to give her a kiss but she leaned back and he missed. He also remembered asking her to come home with him but she said "no – my mother is waiting for me".

[102] Mr. Elgebeily said he only put his hand on the complainant's leg to be friendly. He said he did not put his hands on her in any other way. In answer to his lawyer's question about this he said "**absolutely not**". He also rather emphatically denied placing his hands on the complainant's private areas.

[103] Mr. Elgebeily testified that the complainant provided instructions to the driver about where she wanted to be dropped off. He said that nothing else happened between them the rest of the way. He said that before the complainant got out of the taxicab he asked her for her phone number so he could call her the next day. He said she put her number on his phone and after she exited the cab the driver took him to where he was staying on [...]. He said he had rented a house on Airbnb to stay in during his period of training.

[104] Mr. Elgebeily testified that he did not attempt to call the complainant the next day as he indicated he would. He further added that when he first became aware of the complainant's allegations, he did not think it would be appropriate to try to call her.

[105] Mr. Elgebeily further testified that after being contacted by the police and being told that he was going to be charged with sexual assault he hired a lawyer in Sydney. It was that lawyer who advised him to track down the cab company and the driver who drove him and the complainant home after dropping JR off at her residence.

[106] After obtaining the driver's telephone number and email address, Mr. Elgebeily spoke to him but on the advice of his lawyer he did not share any of the details of what was being alleged against him. Mr. Elgebeily recalled sending a photograph of himself to Mr. Al-Sayyed and being asked "are you the one who had been speaking about [the restaurant]". When he told the driver that he was that person, he said Mr. Al-Sayyed then remembered him. He recalled Mr. Al-Sayyed stating that no sexual assault happened in his cab.

[107] Mr. Elgebeily testified that he spoke to the driver a second time to ask him if he would be willing to testify at the trial. He again reiterated that he did not provide any details about the allegation.

[108] Mr. Elgebeily was asked about JR's testimony in which she said she received a call from him just before the preliminary inquiry. Mr. Elgebeily said that he intended to call another person who had the name "J" but dialed JR's number by mistake. He said that when he realized he was talking to the wrong J, he apologized for his mistake.

[109] On cross-examination by Crown counsel, Mr. Elgebeily again admitted putting his left hand on the complainant's right thigh near her knee. He also added that he very quickly rubbed her thigh.

[110] He said that this only lasted about four seconds. He said that he simultaneously leaned over to kiss her but the complainant leaned back to avoid his kiss and said "no, no ... I can't ... my mother is waiting for me." Mr. Elgebeily said he took that to mean "not now" as in "don't kiss me now".

[111] When further questioned by Crown counsel, Mr. Elgebeily acknowledged that he did not ask for the complainant's permission before putting his hand on her leg nor did he ask for permission before trying to kiss her. He also agreed with the Crown lawyer's suggestion that the complainant had not asked him to do either of these things. Mr. Elgebeily said that he thought she would be receptive to his advances. He also agreed with the suggestion that he did these things as a way to "test the waters" so to speak.

[112] When asked about this on re-direct, Mr. Elgebeily explained that by "test the waters" he meant that he thought the complainant would be receptive to a kiss and might want to go home with him. He added that he had no expectations and immediately backed off when the complainant said her mother would be waiting for her.

[113] Mr. Elgebeily further explained that he was too busy at work the next day and the day after that to give the complainant a call. And when the allegation first came to light he did not want to try to make contact with her after that.

[114] That concludes the summary of the evidence heard at trial. I believe my summary covers the more relevant aspects of what was said. It is not intended to

capture everything that was offered during the course of the trial. As such, some things might have been missed in the narrative that has just been provided.

[115] I will now focus my attention on how the evidence relates to the offence of sexual assault.

[116] In the course of analyzing the evidence I will make findings of fact which will require me to decide on credibility. And, as defence counsel argued in his closing submissions, reliability is also a significant factor in this case.

[117] In the case of *R. v. Slatter*, 2019 ONCA 807, Pepall, J.A., in dissent, said this in regard to reliability at paras. 117 and 118:

(3) Reliability

117 Although they share certain attributes, credibility and reliability are different concepts. Credibility deals with a witness's veracity or truthfulness, while reliability addresses the accuracy of a witness's testimony. Accuracy engages consideration of a witness's ability to accurately observe, recall, and recount: *R. v. H.C.*, 2009 ONCA 56, 241 C.C.C. (3d) 45, at para. 41.

118 Like credibility, reliability is a factual determination. It is within the province of the trial judge. It is the trial judge who has the opportunity to hear and observe all of the witnesses. This reality anchors the principle that when reviewing reasons for sufficiency, an appellate court should start from a stance of deference towards a trial judge's perception of the facts:

The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law.: *R.E.M.* at para. 56.

[118] Although the *Slatter* case dealt with an allegation of sexual assault involving a relatively young complainant who suffered from certain developmental challenges, the decision as it relates to reliability still has relevance to the case now before this Court. I should also point out that the Supreme Court of Canada reversed the Ontario Court of Appeal primarily for the reasons provided by Justice Pepall, in his dissent.

[119] Earlier I referred to the decision of Justice Jamie S. Campbell in *R. v. Twinley*, *supra*, in which he recognized that in many cases involving allegations of sexual assault “there are only two witnesses” [Reference to para. 20 of *Twinley*].

[120] In the present case, there was a third individual present. The taxi driver, Mr. Yaser Al-Sayyed, was in the driver's seat when the alleged sexual assault was taking place in the seat just behind where he sat.

[121] Although he did not turn around to see what might have been happening behind him nor did he look in his rear view mirror to observe what he said was the sounds of two people kissing – something he felt was disrespectful – he testified he did not hear anyone saying “no” or “stop” as the complainant testified she had.

[122] Mr. Al-Sayyed, not surprisingly, did not see the complainant pushing Mr. Elgebeily away when he tried kissing her or when he touched her leg and vaginal area as she testified he had. How could the cab driver see it if he, as he says, did not turn around to watch what was happening behind him.

[123] As for not hearing the complainant, that might not be all that surprising either. When the complainant testified she indicated that she did not raise her voice when she told Mr. Elgebeily to “stop” or to say “no” in an effort to rebuff his overtures of affection or attempt to just “be friendly” as he described it in his testimony.

[124] I have real concerns about the reliability of Mr. Al-Sayyed's testimony as it relates to what actually happened that night in the back seat of the cab he was driving.

[125] I need only look to the evidence of the accused who admitted placing his hand on the complainant's thigh and attempting to kiss her without an invitation and without her permission. As he put it – he was simply testing the waters.

[126] Mr. Al-Sayyed's evidence helps in establishing that there was at least some kissing going on in the back seat but it does little to raise a reasonable doubt about the commission of the offence charged.

[127] In a relatively recent case from this Court, Justice Joshua M. Arnold, in the case of *R. v. Maessen*, 2020 NSSC 256, set out the elements of sexual assault beginning at para 66 on p. 27 of his decision. Justice Arnold stated:

Elements of the offences

[66] The Crown must prove each essential element of the offences beyond a reasonable doubt. In *R. v. Barton*, 2019 SCC 33, Moldaver J., for the majority, reviewed the essential elements of sexual assault:

[87] A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the *actus reus* and had the necessary *mens rea*. A person commits the *actus*

reus of sexual assault "if he touches another person in a sexual way without her consent" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). The *mens rea* consists of the "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*, [1999] 1 S.C.R. 330, at para. 42).

[67] The *actus reus* of sexual assault was described in more detail by Major J., for the majority, in *Ewanchuk*:

25 The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour...

[68] As to *mens rea*, Major J. said, "Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement" (para. 41).

[69] More recently, in *R. v. Mawanga*, 2020 ONSC 2350, the court said, "[t]he *mens rea* for sexual assault requires the Crown to prove beyond a reasonable doubt that the accused intended to touch the complainant in a sexual manner and knew or was reckless or willfully blind to the complainant's lack of consent" (para. 102).

[128] Justice Arnold's decision also provides an excellent review of the relationship between credibility and reliability. At paras. 77 and 78 he wrote:

[77] A related principle to credibility is reliability. The relationship between the two concepts was explained in *Cameco Corporation v. The Queen*, 2018 TCC 195:

[11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In *R. v. Norman*, [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:

. . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

[78] Care must be taken in differentiating credibility from reliability. In *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, [1995] O.J. No. 639 (Ont. C.A.), Doherty J.A. said, for the court:

33. Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross-examination.

[129] In the *Maessen* case, Justice Arnold also had to deal with an accused person who elected to testify on his own behalf. At para. 85 of the decision he offered the following:

R. v. W.(D.).

[85] In *R. v. W.(D.)*, [1991] 1 S.C.R. 742, Cory J., for the majority, instructed triers of fact in applying the burden of proof where evidence has been led on behalf of the accused. Noting that the "trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses" (para. 27), he set out the following sequence, at para. 28:

“First”, if you believe the evidence of the accused, obviously you must acquit.

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

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

[emphasis, mine]

[130] In reaching the decision in that case, Justice Arnold did not lose sight of the most basic, and the most fundamental element of Canadian criminal jurisprudence. That is, the presumption of innocence and the burden of proof. He also touched on the principles of reasonable doubt. Again, I quote from the decision of Justice Arnold in *R. v. Maessen*, *supra*, where at paras. 72 and 73 he wrote:

Burden of proof and presumption of innocence

[72] Section 11(d) of the *Canadian Charter of Rights and Freedoms* provides that a person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Mr. Maessen is presumed innocent of the charges, unless the Crown proves each element beyond a reasonable doubt. Justice Cory, speaking for the majority in *R. v. Lifchus*, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt, as it should be explained to a jury:

36 ... It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[73] Justice Iacobucci, for the majority, said in *R. v. Starr*, 2000 SCC 40, that "an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities" (para. 242). Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person, in this case Marcel Maessen, beyond a reasonable doubt - which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

[131] I will once again remind myself of what Justice Campbell cautioned against in *R. v. Twinley*, *supra*. A decision in a case involving allegations of sexual assault must not come down to a "contest of credibility". I realize I am repeating myself but I believe the following bears repeating. To simply decide which of the two witnesses – the complainant or the accused person – is more believable and then making a finding of guilt or one of acquittal, based on that determination, results in faulty legal reasoning. It fails to recognize the burden on the Crown to prove guilt beyond a reasonable doubt. In order to decide where the truth lies the Court must take into account all the evidence offered at trial.

[132] I have already alluded to the evidence of the taxi driver, Mr. Al-Sayyed. I previously provided a summary of his evidence. A summary of the evidence of three other witnesses called by the prosecution has also been presented.

[133] In deciding who to believe, the evidence of JR and BM helps to corroborate the testimony of the complainant both before and after the alleged sexual assault took place.

[134] Both witnesses had the opportunity to observe the profound effects the assault seemed to have on the complainant. Officer Daneault was also able to testify about the apparent impact the alleged assault had on the complainant when he first met with her several days after the event happened. She, the complainant, found it too difficult to talk about it so he recommended she consider writing it down on paper which she did.

[135] JR and BM spoke about their conversation they each had with the complainant. In JR's case, the telephone conversation took place very shortly after the complainant got home that morning after exiting Mr. Al-Sayyed's cab. BM testified not only about the conversation she had with JR shortly after JR had spoken to the complainant but she also testified regarding the meeting she had with the complainant on Monday morning, just a few days after the sexual assault was alleged to have occurred.

[136] What was said by the complainant is not relevant. It is the fact that these events happened when the complainant said they did. I am well aware that prior consistent statements cannot be used to buttress the credibility of the complainant. Such prior statements are presumptively inadmissible.

[137] In the case of *R. v. Cooke*, 2020 NSCA 66, Justice Beaton, writing for the unanimous panel that also included Justices Beveridge and Bourgeois, stated the following at para 48:

[48] In *D.K.*, *supra*, the complainant responded to a doctor's question about how she had sustained an injury by replying "forced intercourse". At trial, the Crown argued the utterance was admissible as part of the narrative of disclosure and could be used to assess the complainant's credibility. Trotter J.A. on behalf of the Court set out the law and the exception that may permit use of the prior consistent statement:

[34] Prior consistent statements are presumptively inadmissible. There are several rationales for this rule, including that prior consistent statements (1) lack probative value; (2) are often self-serving; and (3) are hearsay: see

S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds., *McWilliams' Canadian Criminal Evidence*, 5th ed. (Toronto: Thompson Reuters, 2019) (loose-leaf updated 2019), at p. 11-2; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5; and *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36.

[35] The overwhelming danger is that a trier of fact may improperly use the mere repetition of a statement as a badge of testimonial trustworthiness. As Hourigan J.A. said for the majority in *Khan*: "[S]uch evidence cannot be used for the prohibited inference that consistency enhances credibility, or the incorrect conclusion that the simple making of a prior consistent statement corroborates in-court testimony": at para. 41; see also *Stirling*, at para. 7; *R. v. Divitaris* (2004), 188 C.C.C. (3d) 390 (Ont. C.A.), at para. 28; *R. v. D.C.*, 2019 ONCA 442, at para. 19; and *R. v. S.K.*, 2019 ONCA 776, 148 O.R. (3d) 1, at para. 90.

[36] The rule against prior consistent statements is subject to a number of exceptions. For example, a prior consistent statement may be admitted for the limited purpose of rebutting an allegation of recent fabrication: *Stirling*, at paras. 5-7.

[37] Prior statements may also be admitted where they are "necessary to the unfolding of the events or narrative of the prosecution": see *Dinardo*, at para. 37. On this basis, a prior consistent statement may be admitted to assist with understanding how the case came before the court or to appreciate the "chronological cohesion" of the case: *R. v. Fair* (1993), 16 O.R. (3d) 1 (C.A.), at p. 18; *Khan*, per Hourigan J.A., at para. 30. To be admissible under this exception, the statement must be "truly essential" to the unfolding of the narrative: *R. v. M.C.*, 2014 ONCA 611, 314 C.C.C. (3d) 336, at para. 91.

[38] Further, prior statements may be admissible under the narrative as circumstantial evidence exception. Admissibility on this basis of such does not hinge on the mere repetition of the same information. As explained by Hourigan J.A. in *Khan*: "A prior consistent statement can be used not to corroborate the evidence of the witness, but to provide the surrounding circumstances and context to evaluate the credibility and reliability of the witness's in-court testimony": at para. 39; see *Dinardo*, at para. 31.

[138] In assessing the credibility of the complainant's testimony, I have also considered the fact that she was so distressed by what had happened and so upset by the failure of her employers to do much of anything to support her, she quit a job that up until April 1, 2017 she really enjoyed. She had worked diligently and responsibly enough to gain a promotion on the very day before she was allegedly assaulted by Mr. Elgebeily.

[139] Similarly, JR followed suit just a few days after the complainant left her job with [the restaurant].

[140] I realize [the restaurant] are not on trial nor has anyone been asked to provide an explanation of why little if anything was done to support their employee, the complainant. BM, who said that when she raised the subject with one of [the restaurant's] principals, he said there was nothing that could be done because it did not happen on company time. I will leave it at that except to say that in all likelihood [the restaurant] lost two very valuable employees as a result of what did or did not happen that particular week.

[141] Previously I referred to the *W. (D.)* case. After hearing the testimony of Mr. Elgebeily, I do not accept his denial that a sexual assault occurred. Indeed, he admits that he placed his hand on her leg and attempted to kiss her. This is plain and simple an admission of guilt no matter how much he tries to trivialize it. Any attempt to downplay it and pass it off as simply testing the water has no merit. It lacks credibility.

[142] But, as I have previously stated, it is not for the accused to prove his innocence. It is for the Crown to prove beyond a reasonable doubt that a sexual assault took place. It is also for the Crown to prove that the complainant did not consent to the impugned conduct.

[143] Again, I refer to the evidence of the accused who admitted in cross-examination that he did not seek permission from the complainant before placing his hand on her leg and before attempting to kiss her. I do not believe Mr. Elgebeily when he denied having done anything more than what he admitted to.

[144] I accept the evidence of the complainant who testified that Mr. Elgebeily not only persisted in trying to kiss her to the point where he grabbed her face in an effort to turn her head so he could kiss her before she exited the taxi cab.

[145] I also accept the complainant's evidence that Mr. Elgebeily placed the fingers of his left hand on her vagina and allowed his hand to remain there for some period of time. No matter how brief the time, it still amounts to a sexual assault – a sexual assault that is much more serious than a casual pat on her leg or an attempted kiss.

[146] My positive assessment of the complainant's credibility satisfies me beyond a reasonable doubt of Mr. Elgebeily's guilt. I am not persuaded of the Defence's argument that I cannot rely on the complainant's testimony to convict Mr. Elgebeily.

Although the complainant had been drinking, I am not persuaded that her recollection of events was significantly impaired by her condition. The evidence establishes that for the last hour or so before the three left the [pub], the complainant had changed over to drinking water. No alcohol was consumed at the restaurant where they stopped to eat. I accept the complainant's evidence that she was back to her normal self by the time she entered the cab for the drive home. In short, I not only find her testimony credible but also reliable.

COURT: At this stage, Mr. Elgebeily I ask you please to stand.

[147] You have heard what I have had to say in my oral decision Mr. Elgebeily, and as a consequence of the foregoing, I am satisfied that the Crown has proved beyond a reasonable doubt that you, Hossameldin Elgebeily, are guilty of the offence of sexual assault and I so find you.

McDougall, J.