SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. S.F.M.*, 2021 NSSC 368

Date: 20210706
Docket: CRH 486708
Registry: Halifax

Between:

Her Majesty the Queen

v.

S.F.M

Restriction on Publication: ss. 486.4, 486.5 and 539(1) *Criminal Code*

VERDICT

Judge:	The Honourable Associate Chief Justice Patrick J. Duncan
Heard:	February 28, March 6, July 21 and 22, October 14 and 29 2020, November 23, 24, 25, 27, 2020; March 11, 22, 23, 24, 25, and July 6, 2021, in Halifax, Nova Scotia
Oral Decision:	July 6, 2021
Written Decision:	March 31, 2022
Counsel:	Alicia Kennedy, for Her Majesty the Queen James M. C. Giacomantonio, for S.F.M.

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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.

Order restricting publication — victims and witnesses
486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information

that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants
(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Offences
(2.1) The offences for the purposes of subsection (2) are

(a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

(b) a terrorism offence;

(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

(d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

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

Application and notice
(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds
(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Hearing may be held
(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

Factors to be considered
(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

Conditions
(8) An order may be subject to any conditions that the judge or justice thinks fit.

Publication prohibited
(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.
2005, c. 32, s. 15; 2015, c. 13, s. 19.

Order restricting publication of evidence taken at preliminary inquiry
539 (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused, make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

NOTE: In reducing to writing the oral decision rendered in this matter editing has taken place to include omitted citations and quotes from secondary sources, and to make changes to format or to grammar for readability. No changes have been made to the substantive reasons for decision.

By the Court (Orally):

[1] We are here today in the matter of Her Majesty the Queen and S.F.M.

[2] The accused, S.F.M., is charged in a five-count Indictment which alleges that he committed three sexual assaults upon his wife. It also contains an allegation of assault and of uttering threats to cause bodily harm or death to her. These offences are alleged to have occurred during their marriage at various times between September 23, 2013, and August 31, 2017.

[3] The prosecution made an application to admit into evidence several instances of S.F.M.'s alleged bad conduct that is extrinsic to the facts alleged as constituting the offences in the Indictment. The defence objected to its admission.

[4] With the agreement of counsel, the entirety of the evidence was received in a *voir dire* with the admissibility of that contested evidence to be determined at the conclusion of the trial. The evidence which I conclude is admissible then will form the evidence of the trial without the necessity of calling that evidence again.

[5] This type of evidence, the so-called "bad conduct", is generally inadmissible as it carries a significant risk that the prejudice caused in admitting such evidence will exceed its probative value by creating moral and reasoning prejudice in the mind of the trier of fact. The burden on the prosecution is to establish on the balance of probabilities that the proposed evidence outweighs its prejudicial effect. There are a number of recognized bases upon which courts have agreed to admit such evidence. I refer to the decisions in *R. v. D.S.F.* [1999] OJ 688 (ONCA) and *R. v. T.J.D.* 2005 OJ 1444 (ONCA), among other cases briefed by the Crown on this application, for a list of those circumstances.

[6] In short, when assessing the probative value of evidence of extrinsic misconduct, I am to consider:

(i) the strength of the evidence that the extrinsic acts occurred.

(ii) the connection between the accused and the similar acts and the extent to which the proposed evidence supports the inferences the prosecution seeks to establish; and

(iii) the materiality of the evidence.

[7] I will refer, at this point, to the case of *R. v. Z.W.C.* (February 25, 2021, Doc. CA C65451, 2021 CarswellOnt 2361 (Ont. C.A.)). There are, according to the

defence, 13 items of evidence that the prosecution intends to lead and to which the defence objects on this ground. In the course of my review of the evidence, I will respond to this application, keeping in mind the legal principles which I have just referenced.

[8] The accused is charged:

> 1. that he between the 23rd day of September, 2013 and the 25th of August, 2017 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on [S.K.], contrary to Section 271 of the *Criminal Code*.
>
> 2. AND FURTHER that he between the 1st day of September and the 30th day of September, 2016 at the same place aforesaid, did unlawfully commit a sexual assault on [S.K.], contrary to Section 271 of the *Criminal Code*.
>
> 3. AND FURTHER that he between the 1st day of May and 31st day of August, 2017 at the same place aforesaid, did unlawfully commit a sexual assault on [S.K.], contrary to Section 271 of the *Criminal Code*.
>
> 4. AND FURTHER that he between the 23rd day of September, 2013 and the 25th day of August, 2017 at the same place aforesaid, did unlawfully assault [S.K.], contrary to Section 266 of the *Criminal Code*.
>
> 5. AND FURTHER that he between the 23rd day of September, 2013 and the 25th day of August, 2017 at the same place aforesaid, did unlawfully utter a threat to [S.K.] to cause bodily harm or death to the said [S.K.], contrary to Section 264.1(1)(a) of the *Criminal Code*.

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

[10] The burden of proof rests with the Crown and never shifts. There is no burden on S.F.M. to prove that he is innocent.

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

[12] I must decide looking at the evidence as a whole whether the Crown has proved S.F.M.'s guilt beyond a reasonable doubt.

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

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

[15] To the extent that there are any concerns about reliability based on the passage of time, it is self-evident that such allegations are capable of belief. Some events are so memorable that even when the surrounding details are obscured by the passage

of time, the principal allegations can be accepted as proven beyond a reasonable doubt.

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

[17] In this case the defence argues that the complainant's testimony lacks credibility and reliability. A court must assess all of the evidence and consider that which may tend to support or undermine the reliability or even the credibility of any witness' testimony. While stated by the court in the context of a civil trial, the following statement in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at paras. 9 and 10, is a reminder of some of the factors a judge should be alert to in making findings as to credibility. In making this reference I am clear in my mind as to the different standard of proof that exists in a criminal case than exists in a civil case. At paras. 9 and 10 the court said:

> 9 If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the

> evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, *see Raymond v. Bosanquet* (1919), 59 S.C.R. 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> 10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. . . .

[18] In *Baker v. Aboud*, 2017 NSSC 42, Justice Forgeron summarized principles governing credibility assessment[1].

> [13] Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:
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> • Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (S.C.C.), para.20. … "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.
>
> • There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and

[1] Includes omitted text.

may attach different weight to different parts of a witness's evidence, *Novak Estate, Re*, *supra*.

• Demeanor is not a good indicator of credibility: *R. v. Norman* (1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.

• Questions which should be addressed when assessing credibility include:

a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re*, *supra*;

b) Did the witness have an interest in the outcome or were they personally connected to either party;

c) Did the witness have a motive to deceive;

d) Did the witness have the ability to observe the factual matters about which they testified;

e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;

f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.);

g) Was there an internal consistency and logical flow to the evidence;

h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and

i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[19] A related principle to credibility is reliability. The relationship between the two concepts is explained in the case of *Cameco Corporation v. The Queen*, 2018 TCC 195. At para 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 CanLII 3387 (ON CA), [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. . . .

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

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

[22] S.F.M. testified in this case. When a person charged with an offence or offences testifies, his evidence must be assessed in the same way that the testimony of any other witness would be assessed. I may accept all, part or none of S.F.M.'s evidence.

[23] If I believe the testimony of S.F.M. that he did not commit the offences charged, then I must find him not guilty.

[24] However, even if I do not believe the testimony of S.F.M., if it leaves me with a reasonable doubt about his guilt, then I must find him not guilty of the offence.

[25] Finally, even if the testimony of S.F.M. does not raise a reasonable doubt about his guilt, if after considering all of the evidence I am not satisfied beyond a reasonable doubt of his guilt, then I must acquit.

[26] I must apply this test in assessing each count in the Indictment.

[27] Counsel for the accused says that first and foremost the accused's evidence denying or offering defences to the offences should be believed and that he is entitled to an acquittal, applying the test that I have just stated from the case of *R. v. W. (D.)* [1991] 1 S.C.R. 742.

[28] The accused's counsel has also argued at some length and effect that the testimony of the complainant lacks both credibility and reliability.

[29] The Crown asserts that S.K. is a credible witness whose testimony is confirmed in many respects by the testimony and out-of-court statements of the accused. Based on her evidence, the Crown would say that the accused should be found guilty. The prosecution submits that the accused's testimony demonstrates him to be a controlling, manipulative abuser whose admissions against interest support the complainant's testimony. It is argued that the accused is not a credible

or reliable witness, and no reasonable doubt should exist having regard to the totality of the evidence.

The Testimony

S.K. – Direct Examination

[30] S.K. testified to the history of her relationship with the accused, including the allegations that give rise to the charges.

[31] She met the accused in May 2013 when she agreed to assist S.F.M. with a program offered at a local mosque for persons who were recent converts to Islam. S.F.M. had organized the class and was the principal teacher.

[32] On June 10, 2013, the accused expressed his interest in marrying S.K. She described the various topics they discussed to assess their compatibility. She would be "allowed to work" and have responsibility for the care of the children. He would bear the financial responsibilities of the family.

[33] They underwent a religious marriage ceremony on September 22, 2013 and began cohabiting the same day. At that point, S.F.M. was employed; however, S.K. was not.

[34] Initially things went well. S.K. began to feel, gradually, that he was becoming increasingly controlling of her behaviour. Examples that she provided were corrections he suggested as to how she performed regular household chores such as sweeping and loading the dishwasher. If she did not adopt his preferred way of doing things it would result in an argument.

[35] When asked to describe these arguments she indicated that S.F.M. remained "calm but condescending and he would say things to get [me] fired up…". Her opinion was that his body language indicated anger and an attempt to exercise control.

[36] In time, S.F.M. began to exercise control over her mobility. She testified that she had to ask permission to meet with friends or, on some occasions, to attend work.

[37] Another source of tension in their relationship arose in 2014 and 2015 while he was in a custody and access dispute with the mother of his daughter by a previous relationship. S.K. acted as a messenger between the accused and his former wife during this time. If the complainant said anything contrary to his position in the dispute, he would become angered and it "sometimes turned physical".

[38] She said that he would "stop talking to [her] for 3 days" after an argument. In their faith, three days is the limit for maintaining a grudge after an argument. At the

end of this three-day period, he would ask to speak to her, explain to her what he believed she had done wrong and what was necessary to fix it and that it would eventually end with a sexual act. She testified that, in general, when angry and getting physical, S.F.M. would grab her arm, pin her down, sometimes choke her or slap her across the face.

[39] The first specific incident that she described is alleged to have occurred in December of 2015. The parties were in their apartment on Andrew Street in Halifax. In direct examination, S.K. testified:

> I do not recall what led to this. I remember laying in bed. The room was dark, and the bathroom light was shining in the hallway and he was on top of me. I'm sure I said something that probably upset him and then he just began slapping my face like right hand, left hand, right hand, left hand. I would say 10 to 15 times. And I, during that time, I had obviously asked him to stop and he only stopped once I told him that I could taste, I could taste blood. I could taste blood going down my throat and I think he, he stopped when I spat the blood out on him on his face.

[40] She denied any actions or words that would have provoked the assault. She denied consenting to this application of force upon her. At one point, he stopped and left to go to the washroom. She could not recall asking him to stop nor whether he made any comments at that point. Her only injury was a nosebleed [sic], and she did not require medical attention.

[41] In cross-examination, S.K. admitted that she did not include this allegation in a December 2017 summary she had prepared for Family Court proceedings nor a

statement to the police in March of 2018. The first time it was alleged was in her testimony at the preliminary inquiry held in March of 2019.

[42] The next incident that she spoke to is alleged to have occurred in March or April of 2016. S.F.M. expressed dissatisfaction with their sex life. At this point, S.K. was approximately four months pregnant with their first child. S.K. testified that S.F.M. indicated he had met a woman whom he wanted to take as a second wife. According to the complainant, her function would be to look after the house and the children, and the second wife would be to satisfy his sexual desires.

[43] S.K. testified that prior to their marriage she told S.F.M. that she would not agree to him taking a second wife and that if he decided to do so she would end their relationship.

[44] When S.F.M. raised this issue with her in 2016, she left the house on two different occasions - once for a week and once for approximately one month.

[45] S.K. indicated that they had reconciled after she consulted with the Imam who counselled her that she should do so for the sake of their children. S.F.M., according to her evidence, assured her that his relationship with the other woman had been broken off. However, the complainant remained suspicious of him.

[46] Typically, they shopped together on Saturdays but on one particular Saturday, I think from the evidence, in April of 2016, S.F.M. indicated that he would stay home. Because of her suspicions she returned quickly and found him working on his laptop. She confronted him, wanting to know whether he was continuing to have contact with the other woman. He expressed his desire to be with the other woman, more so than with S.K. She grabbed his cell phone in an effort to find out what they were talking about and ran to the washroom with it. She attempted to lock the door and was searching the contents of the phone when S.F.M. entered. He repeatedly asked to have her return his phone which she refused. He then put her in "bear hug". He was standing behind her with one hand across her chest and the other hand on her mouth and nose, making it difficult for her to breathe. She dropped to the floor taking him with her. She testified that she pounded on the wall and the ground to get someone's attention but unsuccessfully.

[47] The accused let go of her and she grabbed his "private parts", squeezing until he fell to the floor.

[48] She then called her parents and one of them came to pick her up.

[49] S.K. testified that she had not threatened or assaulted S.F.M. prior to him putting his arms around her as she described. She testified that she did not consent

to him touching her in this way. She also testified that she did not suffer any injuries as a result of this incident.

[50] Their daughter, N.K., was born on September 19, 2016. By this time, the couple had moved to Parkland Drive. The prosecutor asked S.K. the following question:

> **Q.** Were there any other physical incidents with S.F.M. during your pregnancy with [N.K.]?
>
> **A.** Physical incidents? No, not that I can remember.

[51] The pregnancy was described as difficult, and the baby arrived six or seven days past due. There was three days of labour, and a caesarean section became necessary. As a result, S.K. was in hospital with her baby for an extra week. When discharged from hospital she was very weak and required to exercise caution to allow the stitches to heal properly.

[52] She expressed some resentment that S.F.M. had not stayed at the hospital with her at the time of the birth.

[53] S.F.M. picked her up at the hospital and when they returned to the apartment, she found him to be "quite distant". On a couple of occasions, he changed the baby's diapers but otherwise did not offer much help.

[54] She testified that shortly after returning home from the hospital in the latter part of September 2016 there was an occasion when the baby had a large bowel movement and needed a change of clothes. She asked S.F.M. to get the change of clothes but he instead indicated that he would change the diaper and that the complainant should get the clean clothes. S.K. testified that she did but as the clothing was on the lower shelf in the closet it was necessary for her to get down to the floor, and then, as a result of her physical condition, she was unable to get back up. She called for the accused's assistance, and he was dismissive. She began to cry, then pulled herself up and walked over to the bedroom saying that she was "done" and that she was "unable to continue in this way".

[55] She described S.F.M. changing the baby's diaper while N.K. was on the bed and he was kneeling on the floor. He looked at the complainant at this point and said in an angry voice, "if you leave with her, I will kill you". She did not reply.

[56] Later, on the same night, according to her testimony, at around 2:00 or 3:00 a.m., S.K. was preparing to breast-feed her daughter on the bed. She testified that S.F.M. entered the room, picked up N.K. and walked to the living room telling S.K. to come to the living room with him. The baby is alleged to have been crying as she had not yet been fed.

[57] When they gathered in the living room, S.F.M. asked the complainant to sit on the couch. He is alleged to have stood in front of her, unzipped his pants, pulled his penis out and pressed it against her lips, saying "do your job". She tried to negotiate with him saying that if he gave N.K. to her she could feed her and then put her back to sleep; then she would do whatever he wanted. She testified that the accused refused to do this and continued to hold N.K. in his arms. S.K. repeatedly refused to do as he asked and clenched her jaw shut. He persisted. Eventually she gave in and performed oral sex on him until he ejaculated. At that point he turned N.K. over to her and he went to the bedroom. S.K. slept on the couch.

[58] She testified that she had not consented to this sexual activity and expressly communicated her lack of consent to S.F.M..

[59] In the morning, S.F.M. left to go to school. Later he texted her asking if she was "mature enough to end our marriage without fighting". She replied yes and that she would be gone by 5:00 p.m. She called her mother and later that day left the house.

[60] S.K. stayed with her daughter at her parents' residence from the end of September 2016 to mid December 2016. During that time there was frequent communication between the parties. Over time they discussed conditions for returning to the home and eventually in mid December she did.

[61] S.K. testified that she and S.F.M. met to discuss the conditions for her return to the house. They included increased liberty to travel with N.K., to participate in work and study, to dress as she chose and to spend more time with her friends.

[62] She told him as well that she would not be willing to engage with him sexually until she felt safer with him.

[63] She said that he agreed to these conditions and so she returned.

[64] S.K. testified that S.F.M. felt that it was her "duty to satisfy his sexual needs at any time whenever he asked for". She alleges that he told her that this was the reason that he had her in the house.

[65] The prosecution asked whether there were other incidents of sexual activity to which S.K. had not consented, prior to this conversation in December 2016. She replied that any time the parties had a disagreement or an argument, she was to make up for her "disobedience" by performing a sexual act or to have a sex act with him, often in a "quite aggressive and non-consensual" manner.

[66] S.K. characterized these in general terms as circumstances where there would be an argument in the evening and the next morning, he would announce that they were going to have sex later that night after he returned. She expressed concern over the aggressiveness of the sex and pain that she would have on those occasions.

[67] She testified that she always went to bed before he did. He would stay up working on his laptop and come into the bedroom while she was asleep, press his body against hers and begin to pull her pants down. She would say something like "no" or "I'm sleeping". He would continue to do this and would say that if [she] did not do what he wanted then "the angels would be angry with [her]". These incidents involved intercourse.

[68] There are instances where this was painful, and she would ask him to stop. He responded by indicating that he would do so as soon as he was finished. She said that that occurred at least twice a month before December 2016. The sensation was of burning in her vagina.

[69] She acknowledged that they had discussed this, and he thought that fibroids were causing the problems, but she disagreed with that. She described having a uterine fibroid and that there would be a little bit of bleeding on occasion.

[70] When asked to describe a specific incident among these general allegations of sexual assault, she referred to one after she came back in April 2016 and when she was pregnant with N.K. She said that she was asleep and that she felt his body against hers. The pants came down and she recalled saying "No I'm sleeping" or saying "No". She said this was typical, that he pulled her pants down and put his

penis inside her vagina. He told her to stop crying so that he could finish. She says this occurred at the Parkland Drive apartment and that she did not consent.

[71] In cross-examination, she admitted that she had not made this allegation either in her letter prepared for Family Court nor to the police – the first time she made this allegation was at the preliminary hearing in March 2019. When asked to explain why this was, she testified that she was recalling new memories as a result of a counselling process.

[72] I note that the testimony about this incident in April 2016 was not compared to her earlier statement that I quoted, which was given in direct examination, that there had been no physical incidents during the pregnancy with N.K.

[73] In January 2017, about three weeks after the reconciliation, there was another disagreement. The couple went into the bedroom of the Parkland apartment to be away from N.K. and the accused's daughter, A. S.K. testified that S.F.M. pushed her into the closet and put his hands around her throat. She slapped his face, and he slapped her back, after which she slapped in a quick motion. He then pushed her onto the bed and sat on top of her holding her mouth and nose. He said: "Oh my God, oh my God" and moved away saying that she was going to have a black eye.

[74] S.K. could not recall what the argument was about. She does recall that when they got in the room the "first thing" she said was for him to "fuck the other girl" at which point he pushed her into the closet and put his hands on her throat. That then led to the mutual slapping. She says that she slapped him to get him away from her. She denies having otherwise assaulted him. She did not consent to being pushed into the closet.

[75] The level of force used to push her into the closet did not cause her to fall to the ground and generally she could not recall the degree of force. His slap hit her quite hard, she said.

[76] It all happened very quickly and stopped when he realized that she could have suffered a black eye. He got ice for the eye, and she did eventually have a black eye. Photographic evidence of this was introduced. The photograph was taken at her mother's house in January 2017, a few days after this incident took place. The first-in-time photograph is apparently not entirely accurate as she had applied makeup to the injury. The second photograph was taken five days after the first photo. That photograph shows some discolouration under the right eye.

[77] She was asked by her mother about the injury, and she made up a story suggesting that it was accidental.

[78] In cross-examination, S.K. acknowledged that the first time she made this allegation was in her police statement; however, it did not include the allegation that he had choked her. That was added in her preliminary hearing testimony in March 2019. She agreed that this additional detail came to her in her counselling.

[79] She testified that the relationship after that altercation in January 2017, was "okay" and that they were trying to get their relationship back on track. There was limited intimacy until the summer of 2017. Generally, she satisfied his needs by performing oral sex. She said that these instances were consensual.

[80] Notwithstanding these comments, the complainant went on to say that there were instances on two or three occasions of non-consensual sexual acts in 2017. She was unable to remember exactly when or how they came about.

[81] She could only describe these instances of non-consensual sex as being the same. She could not offer detail to distinguish one from the other. She alleges that they would be in bed and the accused would pull her pants down. She would say "no". He would engage in intercourse with her. These instances took place at the Parkland apartment. She is unable to say definitively how often they happened other than the estimate of two to three times.

[82] The complainant described the period of January to August 2017 as "normal", although she felt restricted from visiting with friends and family as much as she wanted.

[83] She alleges that, in order to see people outside of their home, she would sometimes have to perform analingus on the accused. She told him that she did not want to do that, but he would make it a condition of her getting permission to see her family.

[84] She estimated it occurred on five occasions and my understanding is that she is adding that to the list of misconduct in 2017.

[85] I will state now that I am not admitting this evidence into the trial. Having regard to the prosecution's overall submissions on the admissibility of extrinsic misconduct evidence, I take their argument to be:

- That the prosecution is not relying on these allegations as facts of the offences charged in the Indictment.

- That as a case of "domestic abuse" it is difficult for the court to understand without the context of the relationship evidence.

- That this is evidence of the accused exercising control over the complainant which, together with other evidence, is relevant to issues of a delay in reporting, to explain the dominant position of the accused and to provide context.

- That evidence of control may also be relevant to rebut any suggestion of recent fabrication.

- That the probative value of this evidence is greater than the prejudicial value.

[86] I have concluded that this testimony is of questionable relevance to proving the allegations in the Indictment. To the extent that some of the other extrinsic misconduct evidence goes to context or narrative in this case, the prejudicial effect of this specific evidence significantly outweighs any probative value it might have. As such, I will not be making further reference to that allegation.

[87] Continuing now with my examination of her testimony, S.K. said that she conceived their second child in July 2017 but that it was in a non-consensual act. She provided no further details of that allegation.

[88] S.K. next testified that on August 24, 2017, following a normal day, the couple fell asleep watching TV while in bed. At this point, she was approximately one to two months into her pregnancy with their second child. S.F.M. attempted to take down her pants and she told him not to do this. She testified that she was concerned

about the risks to her pregnancy of having intercourse at that time. The complainant told him to "get off" of her. The accused made a comment that she could not recall and then, using both feet, he kicked her in the left hip or thigh, and she fell off the bed and onto the floor.

[89] She denies assaulting him or threatening him in any way. She also did not consent to him kicking her off the bed. There is no evidence of actual harm although at the time she was concerned for the fetus.

[90] S.K. left the room and went to sleep in another room with her daughter. The next day was Friday, August 25, 2017, and she had long-standing plans to meet a friend for lunch. She alleges that the accused told her that she was not going to be permitted to go and directed her to the bedroom where he commanded her to sit in a very specific place at his side. She refused and S.F.M. became upset. He went to the washroom saying "…when [he] came back if you're not sitting here one of us is leaving".

[91] While he was in the washroom, she took their daughter and left. They went to her mother's house. This was the end of the couple's cohabitation.

[92] In cross-examination S.K. did not agree with the defence suggestion that she refused sex on that occasion due to it being close to prayer time and they would have

to clean themselves. She also rejected the suggestion that the accused did not kick her off the mattress/box-spring and onto the floor.

[93] She was referred again to a period of time when she described marital discord between the accused and his ex-wife. She said that it was during this time that there were other physical incidents that included pulling her arms, shoving her, pinning her down on the bed and holding her mouth and nose. These incidents would occur when they were having an argument. She described that S.F.M. would grab her and tell her that she needed to relax and that he would let go when she did.

[94] She denies having assaulted him or consenting to his application of force to her in this way. She did not have injuries in these incidents.

[95] The prosecution sought to introduce a series of emails alleged to have been exchanged as between the accused and the complainant after their separation in August 2017. The defence objects to the admissibility of this evidence.

[96] I have concluded that they contain relevant information, that they are admitted by the parties to have been authored by them respectively and at the times indicated thereon. In my view they are admissible as statements of the accused against interest, although subject to a determination of the weight to be attached to them. The emails are too lengthy to recount in this decision. They are listed as:

Exhibit VD 2 - 2 – Email Dated November 27, 2017

Exhibit VD 2 - 3 – Email Dated November 30, 2017

Exhibit VD 2 - 4 – Email Dated December 19, 2017

Exhibit VD 2 - 5 – Email Dated January 21, 2018

[97] During her direct examination, the prosecution drew S.K.'s attention to specific passages from these various emails. Those portions, attributed to the accused and which were read into the record, were statements of the accused expressing regret for various failings such as inability to financially support the family, "the anger and the pain", the "fighting", and a general apology for having "hurt" her. It also contains many statements of his love for her and his wish for a better future for them and the family. He repeatedly asks to talk with her which she rejects in her emails in clear terms.

[98] The email of December 19, 2017, at 10:53 a.m. from S.K. to S.F.M. describes one incident between the parties and also a statement of allegations that would be consistent with the allegations that she has made in her testimony in the trial. In an email at 11:55 a.m. of the same date, alleged to be from S.F.M., he acknowledges that her email was "devastating", and he said, "I'm acknowledging that a lot of our problems were my fault. A lot of everything that you’re saying is true. I won't deny it". He continues to describe his feelings on the last night together, when they woke up and had their last argument. He said:

> … When I woke up beside you that evening, [S.K.] I was more in love with you than I had ever been. Hence, why I wanted to be with you, and show that to you. … "Get off of me!" those were your words, and I was rejected by the only woman that I loved. In that moment everything that we had gone through flashed before me. Everything that I was striving for fell away. And everything I thought we could be just shattered. And it broke me, [S.K.]. The next morning, telling you not to go out was just my way of saying that I wanted you to stay. …

[99] The last exhibit, an email dated January 21, 2018, is again from the complainant to the accused in which she again sets out allegations against him to which she has testified in this trial. She also states categorically that she is not prepared to resume the relationship. In S.F.M.'s reply, he attributes the problems of their marriage as a shared responsibility. He continued to plead for a reconciliation. He concludes as follows:

> In the end, [S.K.], I am sorry that I have not always been the husband that you wanted, if I ever was. But I am willing to do that, so I can be the father that your children deserve. But it is up to you. You're in control. You're in the driver seat here. I am just asking you to slow down, before you make any brash decisions. Because if we still have that chance, then we owe it to our children to try, and to commit and succeed. Once that chance is gone, we can never undo it and give it to them, no matter how much we will want to.

[100] The statements made by S.K. in her emails are largely self-corroborating of the allegations that she has testified to at trial and, therefore, are afforded no evidentiary weight in their own right. S.F.M.'s responses are often general and do not reply to the specifics of the allegations made in this trial. I will revisit this, however, when I return to S.F.M.'s testimony.

[101] The complainant acknowledged that there had been various contacts with the police during the course of the marriage but that it was only in February 2018 when there was a dispute about S.F.M. failing to return N.K. to her on time that S.K. disclosed these allegations to the police, ultimately triggering the investigation and the instigation of these charges.

[102] She confirmed that she had not described the problems of her marriage to anyone in her family during the time of cohabitation. She said that she felt that she should "protect her marriage".

[103] The final comment I will review from her direct examination is that S.K. testified that she is allergic to penicillin. S.F.M. knew that to be the case. She alleges that he made a comment on one occasion, when she believed him to be angry, that he was having thoughts of giving her food poisoning by putting mold in her food.

S.K. – Cross-Examination

[104] I am going to turn now to the cross-examination of S.K. which began with a review of those emails that I just spoke of.

[105] In direct examination the complainant indicated that the accused had not previously made a number of his comments on their relationship that are in his emails. She was challenged on this.

[106] She agreed that the sentiments he expressed in the emails about the difficulties in their marriage and their co-responsibility for the problems were expressed by S.F.M. during the marriage. When asked why she did not say this in direct examination, she replied that she had interpreted the prosecutor's questions too narrowly. She was saying that he never used those precise words during their marriage but the sentiments they expressed had been made previously. This was one example of where the complainant appeared to be minimizing evidence that might have been favorable to the accused.

[107] As she was questioned on them, this is a list of instances where the complainant set out her allegations against the accused on three occasions prior to trial:

> 1. In a December 2017 letter to her lawyer, that was prepared for the Family Court dispute over custody issues and which was then provided to the police at a later date;
> 2. A statement that she made to the police on March 2, 2018; and
> 3. During her testimony at the preliminary inquiry on March 26, 2019.

[108] Counsel for the accused cross-examined the complainant on the circumstances causing her to report the subject allegations to the police and which led to his arrest.

[109] S.F.M. had N.K. with him for the day on February 24, 2018. He was to return her to S.K. at 6:00 p.m. When he did not do so, she called the police.

[110] S.K. made her first allegations to the police that night, that S.F.M. had physically and psychologically abused her. She could not recall whether she had made allegations of sexual abuse at that time. She unsuccessfully sought an Emergency Protection Order that same evening. S.K.'s understanding is that the conduct she complained of was too dated to permit the granting of an Emergency Protection Order.

[111] On February 25, she said the police accompanied her when she went to pick up N.K. and that it took place without incident. On the same day, a child protection agency worker met with S.K. at her house. The worker recommended that S.K. go to the police station to meet with a Victim Services Worker, which the complainant did on the following day, February 26.

[112] When she attended the station, she was directed instead to the officer who initially responded to her call. There was what appears to have been an informal interview following which the officer asked if S.K. wanted to have criminal charges laid and she confirmed that she did. As a result, a formal statement was taken from her on March 2 by another police officer.

[113] It was suggested to the complainant by counsel for the accused that her decision to go to the police was to use the criminal investigation to "gain leverage" in the custody dispute with the accused. She denied this, indicating that she went to

the police station solely because she had been advised by both Child Protection and the police to seek out the assistance of Victim Services. S.K. testified that she did not realize that the complaints that she was making were assaults.

[114] S.K. sought counselling in January 2018. In cross-examination, she indicated that that had continued into March 2019.

[115] At the Preliminary Hearing in March 2019, she added allegations not previously told to the police or in the "emails". These included:

- An accusation that the accused choked her when he hit her in January 2017 causing the black eye; and

- That he had non-consensual sexual intercourse with her in April 2016.

[116] S.K. agreed that her perspective on her relationship with the accused was altered in her counselling sessions.

> Q. But I'll suggest that through the process of the counselling relationship you came to see your relationship with S.F.M. in a different way than you had before? You had a new perspective from counselling?
>
> A. Yes, I would say so, yes.
>
> Q. And I'll suggest that as, that one of the things that emerged from, from your counseling relationship was that you had decided, that you had come to the conclusion as a result of the relationship that much of your sexual relationship with S.F.M. was in fact non-consensual? That he had been sexually assaulting you?
>
> A. Yes.

[117] In the conclusion of her cross-examination, the complainant acknowledged that she had added details to her allegations at each stage of the proceedings: in her police statement, at the preliminary hearing and in the trial. S.K. maintained that she made her best efforts at each stage to be complete. She explained the differences or additions as being her responses to questions that required increasing levels of detail.

[118] S.K. agreed that there may be a need for a husband's permission to work or go to school which can be part of a marriage contract in their faith. She said that the parties discussed this in 2013. She testified that prior to the marriage, the accused told her she was mature enough to make her own decisions. However, during the course of the marriage it was expected that she would ask for his permission to leave the house to visit friends or family on her own.

[119] S.K. answered in cross-examination that on August 25, 2017, being the last day of cohabitation, S.F.M. told her he was not pleased with her and that she was not permitted to go out to meet her friend for the long-planned lunch date. She did not agree with the defence assertion that this was the only time that S.F.M. limited her freedom to see her friends.

[120] She maintained, in the face of questioning, her position that he tried to control what she wore, how often she should change her pajamas or use a towel. She also

agreed that some of these allegations of controlling behaviour were first made during her direct testimony in the trial.

[121] She also alleged other examples of controlling behaviour including how to sweep the floor or wash the dishes. When these comments were made, they often ended up in arguments but not necessarily in a physical altercation. She added that when there were physical altercations the arguments usually started over something "small and petty". She agreed that the allegation that these arguments led to physical altercations was new information only introduced during the cross-examination in the trial.

[122] Evidence was led as to the accused's infidelity with another woman. I am permitting some of this evidence to be introduced for the limited purpose of setting context for the argument that led to the complainant suffering a black eye in January 2017. It is evidence of extrinsic misconduct that is otherwise prejudicial and holds little probative value in relation to the proof of the offences charged.

[123] S.K.'s understanding is that the accused's involvement with another woman began in the fall of 2015 but that she only learned of it in March 2016.

[124] The accused and complainant separated for the first time in March 2016 for about a week.

[125] At this point counsel presented a series of questions to the complainant that were intended, I think it was obvious that it was intended, to conform to the rule in *Browne v. Dunn*, (1893) 6 R. 67 (H.L.), that is, presenting her with alternate explanations or theories in relation to her allegations that might be subject to evidence presented by the defence at a later time in the trial. I will review those for completeness of the record.

[126] In relation to the threats of penicillin, the complainant had testified in direct that after they reconciled in March 2016, the accused told her that he had, in the past, thought about putting mold in her food to trigger her allergic reaction and make her sick. She denied a suggestion that he told her this was a dream that he had had and that it had upset him.

[127] She was cross-examined on the alleged threat in September 2016. She testified that "It wasn't really a fight. He walked away when she needed help getting up from the floor". She said, "I'm done" and accused said, "If you leave with her, I'll kill you."

[128] She disagreed with the suggestion that the refusal to help her up happened the night before the oral sex and that there was no threat.

[129] In relation to the incident in March or April 2016 involving the so-called "bear hug", it was suggested to her in cross-examination that:

- she was angry with him as she found photos showing the naked breasts of the other woman on his phone;

- that he tried to take the phone from her, and she attacked him; and

- that he held her in a bear hug to keep her from attacking him.

[130] The complainant denied this, alleging that there were two separate incidents - one in March, prior to leaving to stay with her mother. On that occasion there was an argument after she searched his phone and discovered the photos. She testified that there was no physical altercation on that date. The bear hug in the bathroom occurred, as she described it in her direct testimony, in April, after she returned to the home from her mother's.

[131] Counsel for the accused put an alternate scenario to the complainant in relation to the allegation that he caused her a black eye in January 2017.

[132] In cross-examination, S.K. agreed that she did not tell the police that the accused choked her on this occasion. It was a new allegation brought up in her evidence at the preliminary inquiry. She agreed, as well, that she did not tell the

police that she had slapped him prior to his having slapped her. That too was omitted until her testimony at the preliminary inquiry. She maintained that both of these statements, first introduced at the preliminary inquiry, were true. The complainant also continued to maintain her evidence that he had pushed her onto the bed during this incident.

[133] Counsel suggested that the accused and the complainant were arguing about the other woman. This took place in the bedroom, with the door closed and the children in another room. During the argument the complainant was alleged to have said that he should "go fuck Emma" and it was then that he backhanded her with his right hand leaving the mark on her cheek. She disagreed with that description of the events.

[134] The complainant confirmed in cross-examination that she could not recall what caused the accused to strike her 10 to 15 times in the face in December 2015. She agreed that although that he slapped her numerous times there were no bruises. He contrasted this with the January 2017 incident where a single strike left her with a blackeye. The complainant maintained that the 2015 incident occurred but was still unable to provide any further detail.

[135] In cross-examination the complainant reaffirmed that on multiple occasions during the course of the marriage he pinned her on the bed using two hands to hold

her arms down while he straddled her outside of her legs with his body parallel to hers.

[136] In cross-examination it was suggested to the complainant that he had covered her mouth and nose on only two occasions: the first posed by counsel for the accused was alleged to have occurred on Andrew Street in 2014 when she hit him with her hands and his response was to pin her to the bed. The second was in April 2016 during the "bear hug" incident. She disagreed with this proposition.

[137] In my view, evidence relating to the April 2016 allegation is relevant. The balance, however, of this information with respect to the various arguments that they were alleged to have had and what had happened is prejudicial and of limited value. It is clear this was a troubled relationship in which there were sometimes volatile exchanges. Evidence of frequent pinning of her, to my mind, has limited evidentiary value in assessing the specific conduct that is the subject of these charges. To properly explore these, as one would do if they were the subject matter of the charge, would take much more time in trial – it is not warranted to lead extensive evidence debating these particular issues. In my view, it does not amount to judicial efficiency for the probative value that could be attached to them.

[138] In cross-examination the complainant reaffirmed her version from her direct testimony that she was required to perform oral sex on S.F.M. while he was holding N.K. in September 2016.

[139] Defence counsel then put the following question to her: that the date of that incident was September 30, 2016; that N.K. woke up and the accused picked her up to soothe her; that the took her out to the living room and she became quiet; that the complainant asked to have N.K. and the accused refused, thinking that N.K. was quiet and that they did not want to her wake up; that S.F.M. further suggested that since N.K. was not screaming or crying, he wanted his wife to perform oral sex on him. It was suggested to her that he used both hands to hold N.K. and that S.K. voluntarily opened S.F.M.'s pants and performed oral sex on him.

[140] S.K. denied this version of events, suggesting instead that S.F.M. was holding the baby with one arm and that he unzipped his pants with the other. She did not accept the other aspects of the proposed scenario.

[141] S.K. was cross-examined on her assertion that there was non-consensual intercourse twice per month. Her evidence was very non-committal as to when or for how long this took place. Questions posed by counsel for the accused set up a process of eliminating dates after which she agreed that it was "at least" from September 2015 to September 2016.

[142] The complainant testified that every time they had an argument, she was forced in some way to have sex against her will. Further, that in every instance she communicated that she was not consenting to this behaviour. When asked, she acknowledged that she had not previously indicated that sex as punishment would follow every fight they had.

[143] S.K. answered that S.F.M. did not use the word "punishment" but that he would say things like she was doing something wrong and that she would have to make it up by having sex with him. When defence counsel suggested that this was new information that she had not shared when asked by counsel or anyone else, she indicated that she takes questions literally and so was not asked whether he had used other language than sex as punishment; hence the way she answered.

[144] The complainant testified that these instances of non-consensual oral or vaginal sex, which occurred the day after an argument, were a form of "reconciliation".

[145] S.K. agreed that she conceived N.K. in December 2015. She had previously had a miscarriage. It was suggested to her that because of fears of another miscarriage, the couple did not engage in intercourse from the time when they became aware of the pregnancy with N.K. until she was born in September 2016.

Counsel for the accused actually posed the proposition that they had not engaged in intercourse at any time in 2016. S.K. denied this.

[146] She was asked whether she recalled engaging in sex that resulted in conception on the day following their return from a vacation in Ontario in July 2017. She replied that she could not remember.

[147] Counsel for the accused posed the following questions:

> Q. …. I'll suggest that it happened in the morning and that S.F.M. expressed happiness at being together after a long trip and a nice summer and he came on to you and you had consensual sex?
>
> A: I, I don't remember, I'm sorry.
>
> Q: You don't remember. Is it possible that that happened?
>
> A: I mean, we had, we did have a good summer. We did have a, the trip was, was really good but I don't remember. I really don't remember.
>
> Q: So, is it possible then that you had consensual vaginal sex that day whether or not it resulted in [A.K.'s] conception??
>
> A: I was still not prepared to be having vaginal sex with S.F.M..

[148] I will observe that it was surprising that S.K. could not provide any details of a non-consensual act of intercourse that she believes resulted in pregnancy, when her evidence is that it was one of only two or three such instances in a period of several months and only one month before she left her husband for good.

[149] There was cross-examination on the allegation of non-consensual analingus. For reasons previously noted, I will not be reviewing that evidence further.

[150] S.K. testified that she left the marital home on four occasions including the last time in August 2017. Earlier separations had occurred in March, April and September.

[151] S.K. testified that she did not fear that S.F.M. would take N.K. away. When asked whether she had made that suggestion to him, she replied that she could not recall saying that to him.

[152] She testified that she did not disclose allegations of assault to her family at any time. However, after the last separation, her mother and friends recommended that she see a counsellor as they believed she was having difficulties with the marital breakdown. As at the time of trial she believed that her mother now knew some things about the allegations. To her knowledge, her mother did not know the allegations involving sexual assault. Upon giving this evidence she was cross-examined against her testimony at the preliminary inquiry in which she had indicated that she had given some detail about the physical aspects of her allegations to her mother in August 2017.

[153] The complainant denied having reviewed her mother's statement to the police. She was unaware that her mother had told the police in May 2018 of the sexual allegations made by S.K. against her husband. The complainant indicated that she could not recall providing those types of details to her mother.

[154] The complainant testified as well to the accused's use of a "Find my iPhone" app to keep track of her in September 2016. She agreed that when they first acquired the app that it was a two-way sharing of each other's locations. However, he later turned off her ability to find his iPhone with the tracking app. She could not recall specifically when this took place. The prosecution led this evidence to support its contention that the accused sought to control her. It is, in my view, of limited value but I will address it again at a later point.

[155] S.K. was asked about certain interactions she had with the police in relation to this matter.

[156] On September 30, 2016, S.F.M. called the police after she had left with the baby to go to her parents. The police called to conduct a well-being check on her. It was suggested that her mother had also made a call to the police. She did not know whether that was the case.

[157] She agreed that she did not tell the police that she had been forced to perform oral sex on the accused while he was holding the baby the night before the police interviewed her. She testified that she felt safe with her family at that point and that she gave no thought to reporting any of his behaviour to the police.

[158] A well-being check by the police on October 2 was also made. She again did not file a complaint against the accused of having physically harmed her.

[159] On March 5, 2017, she called the police to complain that she had been kicked out of the apartment and that her daughter, N.K., was still inside. She recalled the police speaking with her and her husband separately which resulted in the negotiation for N.K. to be returned to her. Again, she did not report acts of alleged violence.

[160] On August 13, 2017, just 11 days prior to the end of her relationship with the accused she called the police. She had again left the apartment without N.K. and sought the assistance of the police to get N.K. She testified that S.F.M. would permit her to enter the apartment, but he did not want her to leave with the child. She left to go home that night without N.K. She acknowledged that the police had escorted her to the apartment so that she could gather some clothing to take back to her mother's where she would be staying. She denied the suggestion that she told S.F.M., "If you don't give me the baby, I will tell the police that you assaulted me". She acknowledged that he told the police she said that to him, but she denies having actually made that comment. She said that the police had offered her, before going into the apartment, to tell them if she had been assaulted but that she had denied that there were any assaults.

[161] The last police interaction that defence counsel addressed with the complainant was made on August 25, 2017. She testified that either her stepfather or her mother had called the police that day, after she had left her apartment. This is the day that she indicated that she had had enough. She is unaware of what information her parents provided to the police about the situation. However, the police did come to question her in response to their complaint. She agreed that she told the police officer (who made a note of it) that she and her daughter were safe and that she did not feel threatened physically by the accused. She advised that she and her daughter were going to spend a few days with her parents.

[162] S.K. concluded by agreeing that S.F.M. was a frustrating husband and a difficult person to live with. She felt they had an unhealthy relationship. She agreed that they had fought about the household chores. She testified that she had told him on many occasions that sex was physically uncomfortable for her. She agreed that there had been fights about the tension that existed between his desire for sexual relations and her hesitancy due to the discomfort caused by sex. He would from time to time say that it was her "duty" to engage in sexual activity with him as her husband.

[163] S.K. denied that she would agree or reluctantly agree to have sex with him or alternatively that he would stop if she asked him to. She said that she had no choice but to let him finish when he initiated sexual activity.

[164] When he asked for sex and she rejected him, the accused would say, according to her, either that it was her duty or that the "angels would be angry with her" if she refused. This latter comment was a religious reference known to both of the accused and the complainant.

[165] Notwithstanding these comments, she testified that she would not agree to sex with him.

[166] S.K. acknowledged that she stayed during his access visits with N.K. during the period of October to December 2017 and that she occasionally, during that period, drove S.F.M. to school. By December the visitation schedule with N.K. was in dispute, with S.F.M. wanting greater access and S.K. refusing it or offering a different schedule that was not satisfactory to him. It was in that month that she wrote the letter to her lawyer setting out the history of abuse in the relationship.

[167] She agreed that the access dispute continued from December 2017 until the police became involved in February 2018. It was during this time period that she sought out legal advice and counselling.

S.K. – Examination on Redirect

[168] That concluded the cross-examination. In a brief redirect, she said, among other things, that the reference to wearing pyjamas and limiting the number of towels that were used were included in her November 30, 2017 email to her lawyer; that no questions were asked of her at the preliminary inquiry or in the police station about the "corrections", therefore she did not mention it; that the sex for punishment complaint was alleged by her to the police in her statement and in her testimony at the preliminary hearing; that while unsure, she felt that she was able to use the location app to track S.F.M. for "a few months"; and, finally, that on August 25, 2017 the police report mentioned that she was tired of being treated like a child and that the accused and she had been arguing.

[169] This concludes my review of the testimony of the complainant, S.K.

M.K.- Testimony

[170] M.K. is S.K.'s mother. She confirmed that on different occasions between September 2013 and August 2017 her daughter came to live with her. She provided the following testimony:

- that she observed her daughter with a black eye on one occasion. When she asked how it happened, she was told that it was a result of a fall.

- she offered her opinion that on one occasion she observed what she felt was the accused's failure to provide proper physical and emotional support for her daughter after the birth of the first baby.

- she described her daughter's physical condition as being weak with a grey complexion after N.K.'s birth.

- that her daughter underwent physical and behavioural changes during the course of the marriage.

- that she called the police on the day of their last separation between the parties to this matter.

- in cross-examination she was asked whether she had received information from her daughter relating to the allegations in the trial. She testified that she learned a couple of details only.

[171] My observation is that M.K. is obviously a devoted mother who did not approve of the accused. Her observations of the physical condition of her daughter and the changes she observed during the course of the marriage are noted.

S.F.M. - Direct Examination

[172] S.F.M. testified on his own behalf. He began by describing, much as S.K. did, their period of courtship and marriage. He said that while they had some passing contact beginning in 2010, they got to know each other beginning in April or May 2013. At the time she was 33 years old, unmarried and living with her mother and stepfather. She was employed as the principal in an Islamic school. Both were very active in their community as volunteers.

[173] They discussed a number of topics and eventually agreed that they would like to marry. In keeping with their religious beliefs, he sought permission of her family to marry S.K. It was made clear to him by her mother and other family members that they did not approve of the proposal.

[174] Notwithstanding this opposition, the couple participated in a religious marriage held on September 22, 2013. S.K. moved into his apartment located at Andrew Street in Halifax.

[175] He described their relationship in the latter part of 2013 and into 2014 as difficult. He was working full-time; however, S.K. was no longer employed. Her family had cut off contact with her. She missed her mother and was unhappy and depressed. In some respects, the social ostracization brought them closer together. It was March of 2014 when S.K. went back to work, and the latter part of 2014 when S.K. suffered a miscarriage.

[176] The couple moved to an apartment on Parkland Drive in Halifax on December 27, 2015.

[177] S.F.M. testified in direct examination that S.K. left the family home on three occasions leading up to the final separation of August 25, 2017.

[178] The first was in late March 2016. She was gone approximately four weeks, returning to the home on May 5, 2016. S.F.M. admitted that he had met another woman in 2015. He acknowledged that he was unhappy in the marriage due to a lack of communication and lack of intimacy. S.K. discovered the relationship and did not agree with his position that he wanted to take a second wife which he expressed was a "right given to him by God". The accused told S.K. that she was free to leave if she did not agree to this.

[179] He testified that the second separation occurred on September 30, 2016 and continued until mid or late December of that year.

[180] The third separation occurred in August 2017 for one night and the final one, as indicated, was August 25, 2017.

[181] In general, according to S.F.M., arguments resulted in the marriage because of a communication problem. He described himself as speaking "frankly" and that S.K. did not appreciate that as she was a "sensitive" person.

[182] Within the first charge of sexual assaults between 2013 and 2017, there were three aspects raised. The first is this. The testimony of the complainant alleges that throughout the course of the marriage the accused consistently required her to engage in vaginal intercourse against her expressed will. It was characterized as typically occurring when she was in bed, that he would approach her physically and pull her pants down to which she would say no. He would pursue intercourse over her objection. Her testimony was that this occurred approximately twice per month during the course of the marriage.

[183] In response to this allegation, S.F.M. testified that there had always been difficulties with vaginal penetration, which had been recognized from the beginning of their marriage as a problem. He attributed this to the size of his penis and what he understood to be a fibroid issue that caused S.K. pain during penetration.

[184] He testified that in the beginning they were very physically active, trying different ways to reduce her discomfort. He was aware that intercourse could cause her pain and so continually asked her what she wanted: to let him finish or to stop. If she said stop, he did and then she would pleasure him - typically with oral sex or masturbation. He denied forcing her to complete intercourse when she objected due to pain or burning. S.F.M. described it as a negotiation as to whether or how they

would engage in sexually intimate acts. In his mind, he testified that he did not act without her consent.

[185] He testified that after her 2014 miscarriage they had intercourse very rarely and when they did, she often complained of pain and burning during penetration.

[186] He said that over the course of the four years that they were together it was rare that they engaged in full penetration. He estimated that they had intercourse between 12 and 24 times over the period of four years. He testified that on any of these occasions he always sought her permission to finish, which I took to mean to come to a climax or to ejaculate.

[187] The second aspect of this count was the complainant having provided a specific example alleging that when she was pregnant with N.K., he penetrated her without consent and while she was crying.

[188] This allegation was first disclosed in her preliminary inquiry testimony. He denies this allegation. S.F.M. testified that after her return to the home in May 2016, they agreed to try more "adventurous" activities such as role playing, an S&M relationship and oral sex. He acknowledged that he had had an interest in having intercourse with her and that he may have been "between her legs" at one point, but that she was not crying. He denied penetration.

[189] S.F.M. testified that while obtaining intercourse was always a negotiation, S.K. did not resist or complain about performing oral sex. In his testimony any such act was always consensual and never used as a form of punishment.

[190] He added that he did not exercise control over her and so there would be no reason for her to believe that sex was being used as punishment for a failure to obey him. He also denied forcing her to perform oral sex by holding her head on his penis.

[191] When asked the open-ended question as to whether in the period alleged in Count #1, he forced S.K. to engage in sexual activities, S.F.M. testified that while he may have "persisted", he never forced himself on S.K. to have sex and he reiterated that oral sex was consensual and without complaint.

[192] In relation to Count #2, the allegation of a sexual assault in the month of September 2016, S.F.M. testified that S.K. has conflated two different incidents into one and further that she misrepresented what had actually occurred.

[193] He testified that on September 29, 2016, at about 12:30 a.m., N.K. was sleeping between her parents. S.K. woke him and said that N.K. needed to be changed. He said that he would change the baby while she got the baby's clean clothes. He said that he changed the baby, S.K. got the clothing, and he went back to sleep. At approximately 9:30 p.m. on September 29, the baby began to stir and

both he and his wife got up. He picked up N.K. and began to rock her back and forth while he was in the living room. S.K. asked for the baby and he said to go back to sleep because she was stressed and needed to relax. A conversation ensued. She complained that he was not helping with the baby enough to which he replied that he would try to do better.

[194] S.F.M. said that the baby went to sleep, and he asked S.K. if she would give him oral sex or masturbate him. Initially, she did not want to do that but then, after discussion, she did take down his pants and first performed oral sex on him and then masturbated him. The accused went to the bathroom and when he came out the complainant was in another room feeding N.K. He went to their bedroom and fell asleep. When he woke the next morning, S.K. was still in the other room.

[195] In relation to Count #3, another allegation of sexual assault that was alleged to have taken place between May 1 and August 31, 2017. This refers to the allegations of the complainant that at an unspecified time between - her testimony was between January and August 2017 although the offence date in this case starts on May 1 - that they engaged in non-consensual intercourse on two or three occasions. In making this allegation, as I have indicated previously, the complainant provided no unique detail or specifics as to timing. The complainant did specify one instance of non-consensual intercourse that resulted in pregnancy with her second

child. Again, she provided no particulars of that allegation but assumes that it was in July 2017 as that would have to conform to the date of conception.

[196] In response to this allegation, the accused indicated that there was one instance of intercourse during the time set out in Count #3. The couple had made a trip to central Canada to visit relatives. They returned to Halifax on July 22, 2017. They were tired. The following day, at around noon, he indicated that he and the complainant were in bed, and they began to hug and embrace. He rolled on top of her put his hand under her shirt and she initially protested saying that she had just finished her period. He continued to talk about the trip, which both described as being a positive experience. He testified that they then engaged in consensual vaginal intercourse.

[197] In summary, S.F.M. acknowledges that there was a single act of vaginal intercourse that led to the conception of their son and that it was consensual.

[198] Count #4 alleges an offence contrary to s. 266 of the *Criminal Code*, so-called "simple" or "common" assault during the period September 2013 to August 2017. Again, the factual underpinnings speak to four different incidents that I have been pointed to as possibly amounting to a common assault. The first was S.F.M. was asked to respond to the allegation that on August 25, 2017, he kicked S.K. in the left hip causing her to fall off the mattress and onto the floor.

[199] S.F.M. provided a meandering response with a great deal of irrelevant detail. The most relevant aspect of it was that they slept on a foam mattress that sat on the floor. There was no bed frame. At the end of this long answer, he stated that his feet "never touched her body".

[200] The second was the so-called black eye incident in January 2017. S.F.M. admitted that in the course of an argument with his wife he slapped her causing the black eye. He could not recall exactly what the fight was about. He recalled that his wife had made a statement about the other woman and that his was an unpremeditated strike. This is the only incident that he admits to a non-sexual or so-called common assault upon the complainant.

[201] S.F.M. recalled the date of this incident as being January 7, 2017, and that they were cleaning up after breakfast and before prayer time. He was concerned about his wife running the water too long to which she replied that she "could not take this shit anymore". He told her to watch her language in front of the children. An argument ensued. She was angry and at one point said, as she testified, "Why don't you just go fuck Emma?". S.F.M. said he reacted instinctively and slapped her. She looked at him blankly for a moment and then apologized saying that she realized she had gone too far. He also apologized for slapping her and applied a bag of frozen peas to her face. He expressed remorse for his conduct.

[202] Later in direct examination he was asked to respond to the suggestion made by the complainant that she had slapped him first. He responded that he could not exactly recall this but that she was acting overly aggressive and that it was possible that she slapped him first. He could not commit to whether she had or had not.

[203] The third allegation was that of multiple slaps to her face in December 2015. S.F.M. flatly denies the allegation.

[204] The fourth allegation was that in March or April 2016 he had engaged in giving her a so-called "bear hug". S.F.M. had some detail about this. He recalled this incident as having taken place on March 8, 2016. He confirmed that his wife had found naked images of the other woman on his cell phone and was upset. He was in the bathroom washing his feet in anticipation of prayer when S.K. entered the bathroom and confronted him. He ignored her.

[205] At some point between March 8 and 11 there was a second incident in the kitchen. She took his computer and threatened to throw it off the balcony. He took it from her. She went to the bathroom where she was trying to open up his phone. The door was not locked. S.K. could be heard to be cursing. The accused asked her to return the phone and she refused, still cursing. He reached for the phone and grabbed it while she was hanging on to it pulling it away from him. When he got the phone away from her, S.K. began to wail and beat on his chest. He testified that

he grabbed her arms but that she spun away. He then wrapped his arms around her to get her to calm down. He sat on the toilet with her sitting, I believe, on top of him. She tried to scratch at his arms and thighs. She stomped on his feet, and they ended up on the floor with her kicking at the wall and him asking her to calm down.

[206] S.K. said that she was going to scream if he did not release her, so he put his fingers over her lips together to stop her but without pressure or strength. Although she complained about being unable to breathe, it was evident that she was breathing normally and capable of screaming which caused him to believe that she was okay. She did stop and after about five minutes she became calm. He picked up his phone and walked out. That was the end of that incident.

[207] There were two aspects of the allegation that between September 2013 and August 2017 he uttered a threat to cause bodily harm or death to S.K. The first was the allegation respecting whether he would have thought about putting mold in her food. S.F.M. testified that he did not issue a threat to put penicillin in her food. He did acknowledge telling her that he had had a dream that he had put mold in a sandwich. He explained to her that this upset him and that it was a reflection of his mental exhaustion and stress. He denied any intent to issue a threat to her.

[208] The second incident on September 30, 2016, which was "If you leave with her, I will kill you": S.F.M. denied making the threat. He referred to his earlier testimony about the events of that day which I have already canvassed.

[209] That would conclude his response to the specifics of the five counts before the court.

[210] As previously stated, this trial proceeded by agreement as a blended *voir dire*. The principal reason for this was the prosecution's application to admit evidence of the accused's "extrinsic misconduct". The application was opposed by the defendant. In adopting this procedure, the prosecution was permitted to lead the evidence through its witnesses. The accused elected to respond to the contested allegations. That evidence occupied a considerable amount of time in the examinations of both complainant and the accused. I do not propose to expend a great deal of time reviewing it for reasons that will become evident.

[211] Dealing first with the issues of evidence of controlling behaviour - the complainant had outlined a number of allegations that she felt demonstrated the accused's desire to control every aspect of her life and behaviour. This included:

- how she performed household chores;
- what clothing she wore;

- controlling her freedom of movement including whether she went to work on schedule, visited with friends, or family members;

- a demand to introduce a second wife to the family;

- requiring sexual favours in order to obtain her freedom to visit others; and

- the evidence from the complainant's mother, M.K., suggesting that the accused was dismissive of the complainant around the time of the birth of their first child; that her daughter's mood and appearance had changed during her relationship with S.F.M.; that S.F.M. sometimes disparaged the complainant and finally that S.K. visited with her less frequently after she was married and generally did not stay long.

[212] In response to these various allegations, S.F.M. testified that:

- He did suggest to her different practices with respect to how to carry out various household chores but viewed these as discussions and the provision of guidance but never perceived it as an exercise in control. In his view, S.K. is an adult and entitled to choose her own path. He pointed out that in the same spirit she would correct him, for example, in his study of the Koran.

- He could only recall one instance where he suggested the complainant change her clothes – it was when she was wearing a scarf which in his opinion did not match

the outfit that she was wearing. Otherwise, he was content that she dressed appropriately.

- In response to the suggestion that he told her to wear pyjamas for longer periods of time than she wanted and to increase the number of times she used a towel before laundering it, he responded that he felt that she was wasteful, doing the laundry too frequently. His practice, that they adopted, was to do the laundry once a week.

- He did not object to her calling in sick to work if she was ill.

- He recalled two instances in 2017 where he was unhappy because of being omitted from her family's events. He did not forbid her from attending but made it clear that he was fed up with their treatment of him.

- In relation to the allegation that he had restricted her ability to speak with a male cousin, he acknowledged this individual supported her in her marriage to him but that they were engaging in long discussions nightly which the cousin was initiating. He had asked the cousin not to call so often.

- Suggestions that he was dismissive of his wife during the time of her pregnancy and the birth of the child, N.K., were rebuffed by him with a detailed explanation of what he had done around that time. It is sufficient to say that he

believes that he provided as much support as he possibly could to his wife during this difficult time. This contrasted to the complainant's generalizations about his inattentiveness to her.

- With respect to the allegation that he could track her on her phone but that she could not track his phone, he flatly rejected the suggestion. Again, he gave a detailed explanation of the acquisition of the phone and the use it was put to by them. They shared a common plan for the phones and generally communicated by text or cell phone.

- With respect to the allegations in the evidence of M.K., he rebutted a suggestion she had made that he was requiring S.K. to sit in the back seat of the car as a means of disrespecting her. He explained circumstances of three or four occasions where people sat in the car when his wife and her mother would both be in the car. He noted that M.K. sat in the front seat out of respect for her age. There was no ill intent associated with asking his wife to sit in the back seat.

[213] S.F.M. reviewed the history of the couple from the separation until his arrest in March 2018. He confirmed that there were growing disputes over the parenting arrangements for N.K. and that S.K. was increasingly limiting his time with N.K. or making arrangements that were difficult for him to exercise his access to his

daughter. He felt that S.K.'s intention was to gradually take full control of N.K. This ultimately resulted in the dispute described by S.K. in which the police were called to assist her in taking N.K. with her. Because there was no custody order in place, there was a negotiated agreement that he would keep N.K. that night and return her the next day, which is what occurred. A Family Court proceeding followed.

[214] Counsel for the accused took S.F.M. through each of the emails, highlighting certain passages which may have been interpreted as statements against his interest. He rejected the notion that he was admitting to any physical abuse of his wife, including sexual abuse. S.F.M. saw his attempt to bring a second woman into the home as his biggest mistake and a significant contributor to the marital problems that he and S.K. experienced. He testified that his expressions of an apology contained in the emails were related solely to the emotional trauma he brought to the complainant as a result of his attempt to introduce a second wife to the home.

[215] That concludes a summary of his direct evidence. I will turn now to his cross-examination.

S.F.M. – Cross-Examination

[216] The Crown Attorney examined S.F.M. on the contents of his statement to the police.

[217] S.F.M. agreed that he provided some false information and that when alone on camera he made some exculpatory remarks in relation to the penicillin "threat" and whether he kicked the complainant out of bed. This was suggested to him to be a deliberate attempt to manipulate and mislead the police as to his culpability. His explanation was that he was motivated to do so in order to be released from custody.

[218] He was extensively cross-examined on the contents of his emails, contained in Exhibits VD 2-2 through to VD 2-5. He acknowledged receiving S.K.'s emails set out in these exhibits and that the replies are his. Her emails contained extensive allegations of his misconduct toward her that are consistent with those made in this trial.

[219] In reviewing the emails, the accused testified that they were not written as a response to criminal charges which he was not contemplating as being a possibility at that time. Neither should his emails be interpreted as complete responses to the allegations being made by S.K. in her side of the exchange of those emails. His interpretation of his replies is that they did not nor was it his intention to admit to her allegations of wrongdoing by him.

[220] Counsel for the prosecution questioned S.F.M. about the circumstances surrounding the allegation that in September 2016 he required S.K. to perform oral sex on him as a condition for her to recover N.K. This was immediately after N.K.'s

birth. Through the course of the questions, it was made clear that S.K. had had a difficult labour with N.K. and that both of he and S.K. were feeling stressed and tired. S.K. was under directions to avoid activities which could open the surgical wound that resulted from a caesarean section. Against this backdrop the accused was asked about the communication between he and S.K. in relation to performing oral sex on him.

[221] He testified that he had suggested that she could relieve his stress by providing a "gummy special" to help release tension. S.K. protested in the beginning but eventually agreed. He was asked whether it was required for him to persist in order to get her agreement and he acknowledged that it was but that that was the case more often than not. The words that he used were it was "more often than not the dance that happened" in their relationship. A short time later he was asked whether he believed it was her obligation to perform sex. He agreed that it was part of her obligation to provide sex. He also testified that her response in this situation was typical; that is, "Let’s get it over with".

[222] S.F.M. agreed that S.K. typically protested when he sought to have sexual relations with her but that her body language communicated consent. The only time that her body language and her words communicated a lack of consent was on August 24, 2017. He also testified that she had many different ways of trying to

delay the onset of sex and many different excuses to avoid engaging in sex with him. When asked whether he understood the word "No", he said that he did but that the language that exists between a husband and a wife is very different. When further pressed he did agree that "No" has a clear meaning.

[223] Upon further examination he stated that having sex with S.K. always involved pestering and negotiation and sometimes pleading or begging.

[224] As in his direct examination, he denied issuing a threat to kill S.K. if she took N.K. away with her on that night.

[225] After reviewing the August 24 incident, he was asked whether there were other occasions where she had resisted when he attempted to remove her clothes. He said that was a difficult question to answer but that it was possible.

[226] That concludes my review of S.F.M.'s evidence.

ANALYSIS

[227] Obviously, the credibility and reliability of the protagonists, S.K. and S.F.M., is in issue. I have spoken to the legal underpinnings for the court's assessment of those factors. I will turn now to a consideration of how I have assessed the credibility and reliability of these two individuals. I will begin with S.F.M..

[228] S.F.M. presents as an intelligent and well-spoken individual. He has a tendency to speak in jargon and often overstates or over describes his position. The level of detail that he provides suggests that he was trying too hard, which by itself does not undermine credibility. However, when, as he did, provide minute detail on an event but then claim not to recall a material fact about the same event, it came across as or it appeared evasive. This type of testimony did undermine his credibility.

[229] S.F.M. is a person who prides himself on self control, claiming to be able to keep his anger inside. He is also a person who, by his own testimony, demonstrated that he values order, standards and rules. That is who he is, and it is evident that he does not tolerate very well those who do not follow the same philosophy, notwithstanding his comments about yielding to the counsel of others in matters, for example, of religious practices. He speaks of guiding others and being guided by others, at the same time appearing very fixed in his own views.

[230] I am satisfied that he communicates his emotions and expectations in sometimes frank and transparent ways and at other times, subtle yet unmistakable messaging. He has also acknowledged that on at least one occasion his temper got the best of him and resulted in physical violence toward the complainant.

[231] Overall, my assessment was that S.F.M. was strategic and evasive on key points, using long narrative answers that were not directly responsive to the questions asked and used as a means to deflect difficult questions.

[232] S.K. is also intelligent and well spoken. She is 41 years old and a schoolteacher. She presented her testimony in a generally credible manner, answering questions directly, not minimizing those things that might have undermined her reliability. Having said that, she too demonstrated traits that negatively impacted on her credibility or reliability.

[233] First, I found that there were internal inconsistencies in her evidence. She was, at best, a poor historian for detail.

[234] Some of her allegations lack detail, were vague and amounted to sweeping assertions of the accused's wrongdoing. She was prone to using absolutes such as a particular thing happened "every time" without demonstrating any ability to distinguish the material events or to place them in any type of timeline. She frequently indicated that she could not recall material facts.

[235] She acknowledged that she added prejudicial allegations as time went on from her letter for Family Court in December 2017 up to and including at the preliminary hearing and in the trial.

[236] Her acknowledgement that counselling changed her perspective on the issue of consent to sexual activity with the accused was both an honest answer but also left open the question of how much it did influence her subjective assessment of consent to the conduct at the time of the activity.

[237] She minimized her own part in the arguments – not conceding her own apparent volatility as part of those arguments.

[238] I do accept the evidence of S.K. that she was able to discern when the accused was unhappy with her.

[239] Finally, the defence has adduced evidence to indicate that the timing of her coming forward coincided with an escalating child custody and access dispute between her and S.F.M.. The suggestion has been made that she was growing her list of allegations as time went on implying recent fabrication and deceit.

[240] As to this final point, while S.K. may have seen this complaint as a way to gain leverage in the custody dispute as has been alleged, I do not think that this fact undermines or detracts from the truth of the allegations. Months before the police became involved, she attempted to get the accused to stop pursuing her. She stated, at length, in emails to him what her complaints were about his conduct toward her.

It could not have been a surprise to him that these were for the most part the same complaints that have made it to the court.

[241] She says that she did not tell anyone about what was happening during the course of their cohabitation and offered an explanation for this that was credible, that is, for the preservation of her marriage. On the occasion when S.F.M. was accused of withholding N.K. from her, this being in February 2018, however reasonable those actions might have been in the circumstances, he triggered S.K. into finally disclosing the complaints which led to this investigation, something that really seems to have been signalled was a possibility, although he seemed to be surprised by it.

[242] Keeping these various observations about the testimony in mind, I now turn to the individual charges.

[243] In relation to all five counts in the Indictment, it has been proven beyond a reasonable doubt that the accused, S.F.M., is properly identified as the person who the complainant says committed the alleged criminal offences upon her. Further, that whatever acts did take place, the evidence supports the conclusion that they would have occurred in Halifax, Nova Scotia and in the various time frames as set out in the Indictment.

[244] The first three counts in the Indictment contain allegations of sexual assault upon S.K.

[245] The defences raised by the accused include actual consent, an honest but mistaken belief in consent, or an outright denial of the alleged conduct. Before turning to the specifics of these three counts I will set out some of the applicable legal principles[2].

[246] Section 265 of the Criminal Code describes the offence of assault. It states:

> 265. (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly…
>
> Application
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
>
> **Consent**
>
> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority.
>
> **Accused's belief as to consent**

[2] Citations that follow include portions omitted in the oral decision.

> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[247] The offence of sexual assault is created by s. 271 of the *Criminal Code*. Sections 273.1 and 273.2 of the *Criminal Code* deal with the issue of consent. They state:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of the sexual assault offence, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> **Consent**
>
> (1.1) Consent must be present at the time the sexual activity in question takes place.
>
> **Question of law**
>
> (1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.
>
> **No consent obtained**
>
> (2) For the purpose of subsection (1), no consent is obtained if
>
> …
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> **Subsection (2) not limiting**
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from
>
> …
>
> (ii) the accused's recklessness or wilful blindness, or
>
> (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
>
> (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[248] I note that sections 273.1 and 273.2 have been amended since the events with which this decision is concerned: see S.C. 2018, c. 29. I am satisfied that these amendments did not change the substantive law applicable under these sections, but only brought them into line with the interpretation of these provisions as developed by the courts: see, e.g., *R. v. Gray*, 2019 BCSC 1327, at paras. 65-68.

[249] In *R. v. Al-Rawi*, 2018 NSCA 10, Beveridge J.A. reviewed the essential elements of sexual assault, as set out in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. He discussed the elements as follows:

> [19] *R. v. Ewanchuk* ... is the seminal decision on the elements the Crown is required to prove in a sexual assault prosecution. The decision cemented the demise of implied consent and reinforced the necessity of focussing on the subjective state of mind of the complainant to determine if he or she did not consent to the sexual touching.
>
> [20] The *actus reus* of the offence is simply the intentional sexual touching of the complainant and the absence of consent. Justice Major, for the majority, wrote:

> [23] … The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.
>
> ...
>
> [25] The *actus reus* of sexual assault is established by the [Crown's] 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. ...
>
> [26] The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred. ...

[250] Section 273.1 as I have indicated, defines "consent" as "the voluntary agreement of the complainant to engage in the sexual activity in question". The majority of the Supreme Court in *R. v. Hutchinson*, 2014 SCC 19, described a two-step process for analysing consent to sexual activity. Chief Justice McLachlin and Cromwell J. said as para. 4:

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

[251] In *Al-Rawi*, *supra*, Justice Beveridge explained the significance of the complainant's subjective state of mind in the context of the *actus reus*:

> [42] With respect, there is nothing in the words of s. 273.1(1) that suggest the Crown need establish communication of a voluntary agreement to prove the *actus reus* of the offence of sexual assault. The issue of communication, or lack thereof, of a voluntary agreement is highly relevant to the issue of the *mens rea* of the offence - that the accused knew that the complainant did not consent to the activity in question - particularly in light of the statutory requirement in s. 273.2 of the *Code* that an accused took reasonable steps to ascertain the existence of consent.
>
> …
>
> [48] … Consent is entirely an inquiry into the subjective state of mind of the complainant, not about what she did or did not communicate. Major J. succinctly summarized this principle. I quoted from his judgment above, but it is convenient to repeat it:
>
> > [26] The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred. . . .
>
> [49] This is also reinforced by the majority reasons for judgment later written by McLachlin C.J. in 2011 in *R. v. J.A.*, *supra* where she stressed the difference between the *actus reus* and *mens rea* of the offence of sexual assault. The issue of communication of consent is only relevant to the issue of *mens rea*. She explained:
>
> > [37] The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering these provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea* . . . Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent*. Conversely, the only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to express her lack of consent or her revocation of consent for the *actus reus* to be established.
> >
> > [Emphasis in original]

[252] In *R. v. Barton*, 2019 SCC 33, Moldaver J., for the majority, again reviewed the role of consent in a sexual assault analysis at para. 89:

> 89 Consent is treated differently at each stage of the analysis. For purposes of the *actus reus*, "consent" means" that the complainant in her mind wanted the sexual touching to take place" . . . Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent -- plain and simple . . . At this point, the *actus reus* is complete. The complainant need not *express* her lack of consent, or revocation of consent, for the *actus reus* to be established. . . .
>
> 90 For purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused" . . . Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" . . . [Citations omitted.]

[253] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Major J., for the majority, commented on the process of analyzing credibility with respect to consent:

> 61 In sexual assault cases which centre on differing interpretations of essentially similar events, trial judges should first consider whether the complainant, in her mind, wanted the sexual touching in question to occur. Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant. If the trier of fact is satisfied beyond a reasonable doubt that the complainant did not in fact consent, the *actus reus* of sexual assault is established and the inquiry must shift to the accused's state of mind.
>
> 62 If there is reasonable doubt as to consent, or if it is established that the complainant actively participated in the sexual activity, the trier of fact must still consider whether the complainant consented because of fear, fraud or the exercise of authority as enumerated in s. 265(3). The complainant's state of mind in respect of these factors need not be reasonable. If her decision to consent was motivated by any of these factors so as to vitiate her freedom of choice the law deems an absence of consent and the *actus reus* of sexual assault is again established.

[254] The relevant time period for the consent analysis is when the sexual acts occurred, not before or after: *R. v. Rand*, 2012 ONCA 731, at para. 17. The majority of the Supreme Court of Canada said, in *R. v. J.A.*, 2011 SCC 28:

> [46] The only relevant period of time for the complainant's consent is while the touching is occurring: *Ewanchuk*, at para. 26. The complainant's views towards the touching before or after are not directly relevant. An offence has not occurred if the complainant consents at the time but later changes her mind (absent grounds for vitiating consent). Conversely, the *actus reus* has been committed if the complainant was not consenting in her mind while the touching took place, even if she expressed her consent before or after the fact.

[255] In *R. v. J.A.*, [2011] 2 S.C.R. 440, McLachlin C.J. explained for the majority that there is no such thing as advance consent in sexual assault cases:

> [65] In the end, we are left with this. Parliament has defined sexual assault as sexual touching without consent. It has dealt with consent in a way that makes it clear that ongoing, conscious and present consent to "the sexual activity in question" is required. …

[256] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Major J. considered the parameters of honest but mistaken belief in consent:

> 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. In *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 79, the Court stated:
>
> > An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(a)(ii).

[257] Justice Major continued at para. 63:

> 63 Turning to the question of *mens rea*, it is artificial to require as a further step that the accused separately assert an honest but mistaken belief in consent once he acknowledges that the encounter between him and the complainant unfolded more or less as she describes it, but disputes that any crime took place. . . . In those cases, the accused can only make one claim: that on the basis of the complainant's words and conduct he believed her to be consenting. This claim both contests the complainant's assertions that in her mind she did not consent, and posits that, even if he were mistaken in his assessment of her wishes, he was nonetheless operating under a morally innocent state of mind. It is for the trier of fact to determine whether the evidence raises a reasonable doubt over either her state of mind or his.
>
> 64 In cases such as this, the accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. 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 <u>that the complainant had communicated consent</u>. Any other belief, however honestly held, is not a defence.
>
> 65 Moreover, to be honest the accused's belief 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 <u>before</u> he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.
>
> 66 Cases involving a true misunderstanding between parties to a sexual encounter infrequently arise but are of profound importance to the community's sense of safety and justice. The law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.
>
> [Emphasis in original]

[258] In *Barton*, *supra*, Moldaver J. expanded on *Ewanchuk*, *supra*, holding that the defence should be referred to as honest but mistaken belief in communicated consent:

> 91 This Court has consistently referred to the relevant defence as being premised on an "honest but mistaken belief in consent" . . . and the *Code* itself refers to the accused's "belief in consent" (s. 273.2(b) (heading)). However, this Court's jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually *communicated* consent, whether by words or conduct . . . [Emphasis added.] As L'Heureux-Dubé J. stated in *Park*, "[a]s a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary" (para. 44 [Emphasis in *Park*.]).
>
> 92 Therefore, in my view, it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in *communicated* consent". This refinement is intended to focus all justice system participants on the crucial question of *communication* of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.
>
> 93 Focusing on the accused's honest but mistaken belief in the *communication* of consent has practical consequences. Most significantly, in seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in *communicated* consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she *communicated* consent to the sexual activity in question at the time it occurred . . . As I will explain, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact. [Emphasis added]
>
> 94 However, great care must be taken not to slip into impermissible propensity reasoning. . . . The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the "twin myths", which is prohibited under s. 276(1)(a) of the Code. [Some citations omitted.]

[259] In discussing the parameters of the defence, Moldaver J. outlined the need for reasonable steps to ascertain consent:

> 104 Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent -- no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time . . . Notably, however,

> s. 273.2(b) does not require the accused to take "all" reasonable steps, unlike the analogous restriction on the defence of mistaken belief in legal age imposed under s. 150.1(4) of the *Code*. . . . [Citations omitted.]

[260] As to what constitutes "reasonable steps", Moldaver J. stated that the "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" (para. 106). He did, however, consider the parameters:

> 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 . . . Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step . . . 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. . . .
>
> 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…. 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. [Citations omitted.]
>
> [Emphasis added]

[261] I am now going to go to the individual counts and provide you with my analysis and conclusions. To some extent I have taken some of what I have already said of the evidence previously and you will hear some repetitiveness of some of that evidence at this stage, but it is to give context to the conclusion.

[262] Count #1, which is the allegation of sexual assault basically through the entire course of the marriage from marriage to the last separation.

[263] As I have said in reviewing S.F.M.'s testimony, this has three different components.

[264] The testimony of the complainant alleges that throughout the course of the marriage the accused consistently required her to engage in vaginal intercourse against her expressed will. She had characterized it as typically occurring when she was in bed, that he would approach her physically and pull her pants down to which she would say no. He would pursue intercourse over her objection. Her testimony was that this occurred approximately twice per month during the course of the marriage.

[265] In response to this allegation, S.F.M. testified that there had always been difficulties with vaginal penetration, which had been recognized from the beginning of their marriage.

[266] He testified that in the beginning they were very physically active, trying different ways to reduce her discomfort. He was aware that it could cause her pain and so continually asked her what she wanted: to let him finish or to stop. If she said stop, he says that he did, and she would then pleasure him - typically with oral sex or masturbation. He denied forcing her to complete intercourse over objections due to pain or burning. S.F.M. described it as a negotiation as to whether or how they would engage in sexually intimate acts. In his mind, as I said previously, he feels that he did not act without her consent.

[267] He testified that after the 2014 miscarriage they had intercourse very rarely and that when they did, she often complained of pain and burning during penetration.

[268] He said that over the course of the four years they were together it was rare that they engaged in full penetration. He estimated between 12 and 24 times over the period of four years. He testified that on any of these occasions he always sought permission to finish.

[269] The second aspect of this count is the specific example of him having penetrated her, that is having sexually assaulted her while she was pregnant with N.K.

[270] This allegation was first disclosed, as I indicated, at the preliminary inquiry. S.F.M. denies the allegation flatly. He says that after returning to their home in May 2016, there were an agreement to try more "adventurous" activities such as role playing, S&M relations and oral sex. He acknowledged that he had an interest during that time in having intercourse with her and that he may have been "between her legs" at one point, but that she was not crying.

[271] The third aspect of this charge is the suggestion that sex was used as punishment.

[272] S.F.M. testified that while obtaining intercourse was always a negotiation, S.K. did not resist or complain about performing oral sex. In his testimony any such act was always consensual and never used as a form of punishment.

[273] He added that he did not exercise control over her and so there would be no reason for her to believe that sex was being used as punishment for a failure to obey him. He also denied forcing her to perform oral sex by holding her head on his penis.

[274] As I indicated previously in my review of his evidence, he said that while he may have "persisted" he never forced himself on S.K., that is to have intercourse. He says oral sex was always consensual and without complaint.

[275] The second count is also one of sexual assault and relates to the period in September 2016. As you will recall, S.F.M. said that the baby had gone to sleep; he asked S.K. if she would give him oral sex or masturbate him; that initially she did not want to do that but then after discussion she did take down his pants and then first performed oral sex on him, then masturbated him. The accused afterwards went to the bathroom and when he came out the complainant was in another room feeding N.K. He went to the bedroom and fell asleep.

[276] S.F.M. testified that S.K. has conflated two different incidents into one and further that she misrepresented what actually occurred.

[277] He testified that on September 29, 2016, at about 12:30 a.m. N.K. was sleeping between her parents. S.K. woke him and said that N.K. needed to be changed. He said that he would change the baby while she got the baby's clean clothes. He said that he changed the baby, S.K. got the clothing, and he went back to sleep. At approximately 9:30 p.m. on September 29, the baby began to stir and both he and his wife got up. He picked up N.K. and began to rock her back and forth while he was in the living room. S.K. asked for the baby and he said to go back to sleep because she was dressed and needed to relax. A conversation ensued. She complained that he was not helping with the baby enough to which he replied that he would try to do better.

[278] S.F.M. said that the baby went to sleep, and he asked S.K. if she would give him oral sex or masturbate him. Initially, she did not want to do that but then, after discussion, she did take down his pants and first performed oral sex on him and then masturbated him. The accused went to the bathroom and when he came out the complainant was in another room feeding N.K. He went to their bedroom and fell asleep. When he woke the next morning, S.K. was still in the other room.

[279] My conclusion with respect to these two counts - there is common ground and why I have dealt with them together. There is common ground between the accused and the complainant that sexual intercourse was difficult and painful for S.K. It is also common ground that S.F.M. enjoyed and wanted to have an active sex life. This created a tension in their marriage. This was aggravated by S.F.M.'s belief that it was a duty for his wife to participate in sexual activities with him.

[280] In lieu of intercourse, S.K. sometimes provided consensual oral sex or masturbation to S.F.M..

[281] The parties differ as to the number of times they had or attempted intercourse over the span of the four years they were together, but I have concluded that it was not frequent by either of their estimates. It may have been that it was twice a month in some months but it also, given the pattern I have heard of their living together and being separated and other things that were going on in life, there were months it was

likely that there was no attempt at intercourse. To some extent S.F.M., I think, is closer to the truth of this matter than perhaps S.K.

[282] S.K. says that she consistently said "No" to S.F.M.'s approaches to her for intercourse. They both agreed that there was a pattern of him trying to talk her into it, whether it was, as he said, a negotiation, or by pleading or begging or incentivizing I think was a word that was used. Essentially, he overcame her resistance by being persistent and sometimes invoking what he saw as her religious obligations to provide him with sex.

[283] I have previously spoken to the evidence to suggest that he was controlling her. The prosecution would say that it was to the point that it made any expressed consent she gave invalid as not being true consent. I accept that S.F.M. is a person who seeks more to guide than to be guided by others. I am not convinced that S.K., however, was as overwhelmed by his efforts to be directed or guided or controlled in her everyday aspects of life as she would portray. My perception is that she was frustrated and annoyed by his interference with her life and lifestyle and did not want to tolerate it and did not do so well. In listening to her mother's evidence, it seemed that S.K. was quite independent prior to marrying S.F.M.. It seems unlikely from my observations and the evidence that she was naturally disposed to be subservient to him.

[284] So, it is difficult to say then exactly how many times sexual activities were engaged in by the parties and what percentage of those involved the described pattern of the complainant refusing and then yielding to his wants over her objections.

[285] The problem for S.F.M. is that Canadian law as it relates to the requirement to have a valid consent is very strict in its interpretation, as I laid out earlier in my recitation from other cases. S.F.M.'s own testimony, and in particular some of his answers in reply to the prosecutor's questions, make it clear that he knew that S.K. was, on many occasions, communicating clearly that she did not want to have intercourse with him and that her ultimate consent was obtained not as a willing partner but as a person who had given in. Language such as "let’s get it over" or negotiating to perform a different sex act are consistent with a lack of a valid consent to intercourse.

[286] Section 273.1(2) stipulates that:

> No consent is obtained . . . 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.

[287] There is evidence that S.K. would tell him how much penetration was hurting and to stop. S.F.M.'s response to being told to stop was, frequently, to ask whether he could continue until he was finished and that in some instances, in fact, he would do so. This in my mind is the scenario that is contemplated in 273.1(2)(e) which I have just quoted.

[288] As indicated, the Crown must prove beyond a reasonable doubt that the complainant did not consent to this sexual activity in question. Consent means the voluntary agreement of the complainant to engage in the sexual activity. The consent must be to each and every act that occurred. The complainant is not obliged to express a lack of consent either by words or conduct. There is no consent unless the complainant agreed in her mind to this sexual activity at the time it was occurring. Submission or lack of resistance does not constitute consent in Canadian law.

[289] I am satisfied that the Crown has proven beyond a reasonable doubt that during the time alleged in Count #1 there were a number of instances in which S.F.M. ignored the clear communication of a lack of consent or was reckless or wilfully blind to the lack of consent by S.K. I accept her evidence that sexual intercourse was so painful for her that in her mind as the sexual activity was occurring, she was not voluntarily agreeing to engage in the activity. I am satisfied therefore that the evidence proves beyond a reasonable doubt that at least some of

the complained of incidents that were testified to were cases where the complainant was not consenting to the sexual intercourse and that she had communicated this to S.F.M. both before and during intercourse. Notwithstanding the accused's testimony, I do not accept that he took reasonable steps to ensure that consent was present and valid during the course of the act of penetration. There is ample evidence of his desire to override her objections through, as he says, negotiation. The bottom line is that in general it was his view that he had the right and she had the obligation to engage in this. I do not accept that he took the reasonable steps necessary to find an honest but mistaken belief in consent. In making this conclusion I also refer to his email statements and his own testimony that he knew she did not want to engage in the intercourse. In my assessment he chose to rationalize at the time that the conversations they were having justified and provided him the right to proceed.

[290] In relation to Count #1 on this issue with respect to the issues of vaginal penetration, I find the accused guilty.

[291] In relation to Count #2. Again all of the essential elements of the offence of sexual assault have been proven beyond a reasonable doubt with the only real question being whether or not the Crown has proven a lack of consent on the part of the complainant. There has been evidence that the complainant engaged in oral sex consensually on a number of occasions and so obviously saw this in a different light

than the act of intercourse which was physically painful. However, the complainant says that this particular incident took place shortly after having delivered a baby. Having regard to her physical state and the circumstances described, she did not want to perform oral sex on S.F.M.. She said that she had expressly stated this to him and only agreed in order to get N.K. back from him. She left the home the next day to live with her mother which lasted for three months. Again, I am satisfied it has been proven beyond a reasonable doubt that she did not subjectively consent to this act. Further, I conclude that, notwithstanding other examples of consensual oral sex, in all of the circumstances that have been presented around this one particular incident, S.F.M. again, I believe, ignored the clear signs that there was a lack of consent. He rationalized his conduct and whatever steps he might have taken to satisfy himself that there was consent were not reasonable steps. Therefore, I find there is no support for a defence of an honest but mistaken belief in consent and so I find S.F.M. guilty in relation to Count #2 of the Indictment.

[292] Count #3 has been identified as referring to allegations of the complainant that at an unspecified time between May 1 and August 31, 2017, they engaged in non-consensual intercourse on two or three occasions. In making this allegation the complainant provided, as I have said, no unique detail or specifics as to timing. As stated in her testimony, the complainant did specify one instance of non-consensual

intercourse that resulted in pregnancy with her second child. Again, she provided no particulars of the allegation but assumes that it was in July 2017 so as to conform to the date of conception. She indicated that she did engage in consensual oral sex with S.F.M. during this same time period, however.

[293] In response, the accused indicated, as I have outlined before, that there was one instance of intercourse only during the time set out in Count #3. This was following a trip to central Canada to visit relatives. They returned to Halifax. They were tired. The following day, at around noon, S.F.M. indicated that he and the complainant were in bed, and they began to hug and embrace. He rolled on top of her put his hand under her shirt and she initially protested saying that she had just finished her period. He continued to talk about the trip, which both described as being a positive experience. He testified that he engaged in consensual vaginal intercourse with her.

[294] The Crown has the burden of proving beyond a reasonable doubt the essential elements of the offence. I accept the evidence of S.F.M. who provided an understandable narrative for the circumstances surrounding this act. He testified that there was only one instance of sexual intercourse during this time period and that it was consensual. I accept both of these statements as being accurate.

[295] He testified that their child was conceived in an act of consensual intercourse. I accept that to be accurate. His evidence and to some extent confirmed by the complainant was that they were coming back from a good holiday in Ontario visiting relatives. The parties were in a positive place as a couple for at least a very short time. They had been engaging in some instances of consensual oral sex. The evidence of S.K., as noted, provided a paucity of detail upon which to satisfy the burden upon the Crown that there was a second act of intercourse in that time period. Her evidence also failed to provide proof beyond a reasonable doubt that there was a lack of consent to the one act that S.F.M. testified to.

[296] As such, I find S.F.M. not guilty of Count #3 of the Indictment.

[297] Count #4 is an allegation that during the course of the marriage in 2013 to 2017, S.F.M. unlawfully assaulted S.K. contrary to s.266 of *Criminal Code.*

[298] The Crown has the burden of proving beyond reasonable doubt that the accused intentionally applied force to the complainant without her consent and that the accused knew that the complainant was not consenting to the application of that force. There are multiple allegations of assault that would fall within this definition in the timeframe set out in the Indictment.

[299] First, S.F.M. was asked to respond to the allegation that on August 25, 2017, he kicked S.K. in the left hip causing her to fall off the mattress and onto the floor.

[300] S.F.M. provided a meandering response, as I have indicated previously, with a great deal of irrelevant detail. The most relevant aspect of it was that they were sleeping on a foam mattress that sat on the floor. There was no bed frame. He did say at the end of his answer that he "never touched her body".

[301] In my view, S.K. overstated the severity of the act, but it is clear as well that the accused minimized what took place. In my view his evidence does not create a reasonable doubt. On a consideration of the totality of the circumstances of the evidence I do accept that he kicked at S.K., striking her as she described, without causing injury and without her consent. This in itself would form the basis for a finding of guilty on this charge. However, I have been asked to consider others.

[302] The second allegation is that he struck her causing a black eye in January of 2017 and also that he choked her.

[303] S.F.M. admitted that in the course of an argument with his wife he slapped her causing the black eye. He recalled the circumstances as being an argument about another woman; that S.K. was angry and that at one point she said, "Why don’t you just go fuck Emma?" S.F.M. said he reacted instinctively and slapped her. She

looked at him blankly for a moment and then apologized saying that she realized she had gone too far. He apologized and expressed remorse.

[304] He was asked to respond to the suggestion of the complainant that she had slapped him first. He responded that he could not exactly recall this but that she was acting overly aggressive and that it was possible that she slapped him first. He could not commit to whether she had or had not.

[305] I accept S.F.M.'s testimony that he instinctively struck the complainant after she told him to "Go fuck Emma". S.K.'s evidence that she struck him first has left some confusion about what actually occurred. S.F.M.'s evidence does not say that he struck her in self defence following that action. In fact, while he provides great detail of everything leading up to the slap, he can only say that it was possible that she struck him. Frankly, I believe that if she had struck him first, he would have recalled it. In the circumstances, I can find no legal justification for the slap that caused the black eye, and this too supports a finding of guilt under this section. I am not satisfied however that the evidence supports a conclusion beyond a reasonable doubt that he choked the complainant on that occasion.

[306] The third allegation is that in December 2015 he slapped S.K. across the face multiple times. He has denied this allegation.

[307] Again, while I do not necessarily believe S.F.M.'s denial, on the totality of the evidence I have a reasonable doubt. The testimony of S.K. about this incident amounts to very little more than a bare assertion of the *actus reus* of the offence. There is no context provided from which to make an assessment of what really happened, if anything. The suggestion that he could strike her 10 to 15 times, causing her to have bleeding inside of her mouth but without leaving any marks on her face seems improbable in my view. More explanation would have been required.

[308] I have a reasonable doubt as to whether S.F.M. struck her as alleged and conclude that this allegation has not been proven beyond reasonable doubt.

[309] The fourth allegation of common assault is from the incident in March 2016 where there was an altercation in the bathroom in which S.F.M. tried to recover his cell phone from S.K. and she resisted. During the course of this altercation the accused wrapped his arms around her in a so-called "bear hug".

[310] S.F.M.'s defence is, in essence, that he was using reasonable force, first to recover his property, being a cell phone, and second to restrain S.K. from striking him repeatedly, as was suggested that she did in her anger over discovering naked photographs of a woman that he was considering taking as a second wife. I accept S.F.M.'s evidence as providing a more consistent narrative with the entirety of the

circumstances. In doing so, I have concluded that he used reasonable force to defend himself from the assault initiated by S.K. and also necessary to recover his property.

[311] Therefore, my overall conclusion as to Count #4 is that the allegations of assault stemming from the incidents in January 2017 (the so-called black eye) and August 2017 (the kick to her leg) have been proven beyond a reasonable doubt and I find S.F.M. guilty of this count. The other allegations offered in support of this charge have not been proven beyond a reasonable doubt and they will not form part of the ultimate disposition.

[312] The final charge is that of uttering threats. Again, this is uttering threats basically over the course of the marriage, September 2013 to August 2017.

[313] The Crown has the burden of proving beyond a reasonable doubt each of the following essential elements of this charge:

- that the accused made a threat to cause death or bodily harm to the complainant; and

- that the accused made the threat knowingly.

[314] A threat can be made by words, spoken or written, or gestures, or in some other way. The threat must be communicated to another person. To assess whether

a statement constitutes a threat, the Crown has to establish that a reasonable person in all the circumstances would consider the accused's conduct or words amounted to a threat to cause death or bodily or serious bodily harm. In making this assessment it is necessary to consider the circumstances in which the words or gestures were used, the manner in which the words or gestures were communicated, the person to whom they were addressed, and the nature of any prior existing relationship between the parties.

[315] A person makes a threat knowingly when he or she means it to intimidate or to be taken seriously by someone. The Crown does not have to prove that the complainant felt threatened or frightened. Nor, in this case, would it be necessary for the Crown to prove that the accused meant to carry out the threat. To decide whether the accused made the threat knowingly, it is necessary to take into account all the evidence including the words and gestures used, the context, and the accused's mental state at the time. It is possible to infer, for example, as matter of common sense, that a person usually knows predictable consequences of his or her actions and means to bring them about. However, the court is not required to draw the inference about the accused.

[316] In this situation, there were two factual scenarios presented. The first was the so-called penicillin question.

[317] S.K. accused S.F.M. of saying that he had thoughts of giving her food poisoning by putting mold in her food. He denied that version.

[318] S.F.M. says that he did acknowledge telling her that he had a dream that he had put mold in a sandwich, and he explained that this was something that upset him and that it was a reflection of mental exhaustion and stress on his part. He denies any intent to issue a threat to her.

[319] In my view, the evidence of S.F.M. has raised a reasonable doubt both as to the words that were spoken, which in his version would, in my opinion, not cause a reasonable person in all the circumstances to consider that a threat. Further, I have a reasonable doubt, based on the evidence of S.F.M. that he knowingly issued a threat. Therefore, this charge is not made out on the basis of this allegation.

[320] The second allegation is that on September 30, 2016, the accused said to the complainant "If you leave with her, I will kill you". Again, S.F.M. denied making this threat.

[321] I am satisfied that if these words were spoken, they would constitute a threat. The circumstances suggest that it is possible that he uttered these words; however, while I am not prepared to accept his denial entirely, I am left with a reasonable doubt as to whether he made this alleged threat. I say this having regard to all of the

circumstances as I have outlined today in my decision. Therefore, I find the accused is not guilty of Count #5 of the Indictment.

[322] In summary, for the reasons that I have given this afternoon, S.F.M. has been found guilty of offences under Counts #1, #2 and #4; not guilty of Counts #3 and #5.

Duncan, A.C.J.