

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Khan*, 2022 NSSC 223

Date: 20220804

Docket: CRH No. 502325

Registry: Halifax

Between:

Her Majesty the Queen

v.

Dederick Eric Khan

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D E C I S I O N

Judge: The Honourable Justice James L. Chipman

Heard: October 28, 2021, May 4, 25 and June 15, 2022 in Halifax,
Nova Scotia

Oral Decision: August 4, 2022

Counsel: Stephen Anstey, for the Provincial Crown
Joel Pink, Q.C. and Grace Levy (Articled Clerk), for Dederick
Eric Khan

By the Court:

INTRODUCTION

[1] Rick Khan and AL met for the first time on the afternoon of March 26, 2019 through a mutual friend, CD. The three enjoyed an afternoon and evening together at Mr. Khan's Dartmouth apartment. They drank beer and Mr. Khan and Ms. L also smoked marijuana. Ms. L and Mr. D took Mr. Khan up on his offer to sleep in his spare bedroom. During the early morning hours of the next day, Ms. L woke up to find Mr. Khan in the bedroom and alleges that he fondled her and inserted his fingers in her vagina. This allegation forms the basis of the charge before the Court that on or about March 27, 2019, Mr. Khan unlawfully committed a sexual assault on Ms. L, contrary to s. 271 of the *Criminal Code*.

[2] Recently in *R. v. D.M.G.*, 2022 NSCA 42, Justice Bourgeois restated the necessary elements for conviction under s. 271 at para. 18:

- It is helpful to set out the necessary elements for conviction under s. 271. These were recently summarized in *R. v. Al-Rawi*, 2021 NSCA 86 at para. 89 as follows:

...

- The *actus reus* of sexual assault requires the Crown to prove three things: i) touching; ii) of an objectively sexual nature; iii) to which the complainant did not consent. The first two elements are assessed objectively; however, the third is assessed by virtue of the complainant's subjective state of mind regarding the touching (*Ewanchuk* at para. 25; *G.F.* at para. 25).
- At the *mens rea* stage, the Crown must establish (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting or was reckless or wilfully blind as to the absence of consent (*Ewanchuk* at para. 42; *R. v. Barton*, 2019 SCC 33 at para. 87 and *G.F.* at para. 25);

[3] Mr. Khan denies that he touched Ms. L in a sexual manner. As with all criminally accused, Mr. Khan is entitled to the presumption of innocence. The Crown has the burden of proof in proving beyond a reasonable doubt that the sexual assault occurred.

[4] This case involves the assessment of contradictory versions of what took place during the time in question. Accordingly, the credibility and reliability of the

witnesses is critical and I am guided by Justice Derrick's comments in *R. v. Stanton*, 2021 NSCA 57 at para. 67:

[67] Before embarking on an assessment of the trial judge's reasons to determine whether he committed legal error, I set out below the legal principles relevant to appeals where credibility is pivotal:

- The focus in appellate review "must always be on whether there is reversible error in the trial judge's credibility findings". Error can be framed as "insufficiency of reasons, misapprehension of evidence, reversing the burden of proof, palpable and overriding error, or unreasonable verdict" (*R. v. G.F.*, 2021 SCC 20, para. 100).
- Where the Crown's case is wholly dependent on the testimony of the complainant it is essential the credibility and reliability of the complainant's evidence be tested in the context of all the rest of the evidence (*R. v. R.W.B.*, [1993] B.C.J. No. 758, para. 28 (C.A.)).
- Assessments of credibility are questions of fact requiring an appellate court to re-examine and to some extent reweigh and consider the effects of the evidence. An appellate court cannot interfere with an assessment of credibility unless it is established that it cannot be supported on any reasonable review of the evidence (*R. v. Delmas*, 2020 ABCA 152, para. 5; upheld 2020 SCC 39).
- "Credibility findings are the province of the trial judge and attract significant deference on appeal" (*G.F.*, para. 99). Appellate intervention will be rare (*R. v. Dinardo*, 2008 SCC 24, para. 26).
- Credibility is a factual determination. A trial judge's findings on credibility are entitled to deference unless palpable and overriding error can be shown (*R. v. Gagnon*, 2006 SCC 17, paras. 10-11).
- Once the complainant asserts that she did not consent to the sexual activity, the question becomes one of credibility. In assessing whether the complainant consented, a trial judge "must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant ..." (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 61).
- "Assessing credibility is not a science. It is very difficult for a trial judge 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 ..." (*Gagnon*, para. 20).
- The exercise of articulating the reasons "for believing a witness and disbelieving another in general or on a particular point ... may not be purely intellectual and may involve factors that are difficult to verbalize ... In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization" (*R. v. R.E.M.*, 2008 SCC 51, para. 49).

- A trial judge does not need to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence (*R.E.M.*, at para. 56).
- "A trial judge is not required to comment specifically on every inconsistency during his or her analysis". It is enough for the trial judge to consider the inconsistencies and determine if they "affected reliability in any substantial way" (*R. v. Kishayinew*, 2019 SKCA 127, at para. 76, Tholl, J.A. in dissent; upheld 2020 SCC 34, para. 1).
- A trial judge should address and explain how they have resolved major inconsistencies in the evidence of material witnesses (*R. v. A.M.*, 2014 ONCA 769, para. 14)

[5] I must consider the evidence in this case bearing in mind *R. v. W.(D.)*, [1991] 1 SCR 742. *W.D.* was recently canvassed by Chief Justice Wood in *R. v. Coburn*, 2021 NSCA 1 at paras. 40, 41:

[40] The Supreme Court of Canada decision in *R v. W.(D.)*, [1991] 1 S.C.R. 742 is often cited as the leading authority with respect to the burden of proof in criminal cases which requires the Crown to prove an offence beyond a reasonable doubt. When the accused testifies, it is imperative the trial judge not allow the trial to become a credibility contest, inadvertently shifting the burden to the defense. The proper *W.(D.)* analysis was described by the Ontario Court of Appeal in *R. v. V.Y.*, 2010 ONCA 544:

[8] The Supreme Court Canada decision in *W.(D.)* is the seminal authority on defining the burden of proof in criminal trials. It sets out a three stage analysis to be included in jury instructions, and while the steps are familiar and often recited in decisions, they are worth restating as it would, in my view, have been helpful to apply them in the circumstances of this case:

First, if the trial judge believed the evidence of the appellant, he must be acquitted.

Second, if the trial judge did not believe the evidence of the appellant, but was left in reasonable doubt by it, then again, he must be acquitted.

Third, even if the trial judge was not left in doubt by the evidence of the appellant, he was then required to decide whether, on the basis of the evidence he did accept, he was convinced beyond a reasonable doubt by that evidence of the guilt of the appellant.

[41] A trial judge must remain focused on the purpose of a *W.(D.)* analysis which is to avoid an improper shifting of the burden from the Crown to the accused. For this reason, it is not enough for a trial judge to recite the three well-known steps. Their analysis must reflect a proper application of the burden of proof. As noted by this Court in *R. v. J.P.*, 2014 NSCA 29:

[61] But correct articulation of the *W.D.* jury instruction is no guarantee the burden was properly applied (see: *R. v. D.D.S.*, 2006 NSCA 34 at para. 45; *R. v. A.P.*, 2013 ONCA 344 at para. 39). This legal reality was eloquently explained by Watt J.A. in *R. v. Wadforth*, 2009 ONCA 716:

[50] In cases like this, involving near-equivalent opportunity to commit the offence charged and conflicting assertions and denials of responsibility, it is crucially important that the trial judge's reasons reveal an understanding of the relationship between reasonable doubt and credibility. The failure expressly to articulate the word formula of *W. (D.)* is not fatal. What must appear, however, from the reasons as a whole, is the trial judge's clear understanding of the relationship between reasonable doubt and the assessment of credibility and its application to the case at hand: *W. (D.)* at p. 758; *R. v. Y. (C.L.)*, [2008] 1 S.C.R. 5, at paras. 7 and 9; *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3, at para. 46; *R. v. S. (J.H.)*, [2008] 2 S.C.R. 152, at para. 13.

[51] The formula in *W. (D.)* is not a magic incantation, its chant essential to appellate approval and its absence a ticket to a new trial. Its underlying message is that the burden of proof resides with the prosecution, must rise to the level of proof beyond a reasonable doubt in connection with each essential element of the offence, and, absent statutory reversal, does not travel to the person charged, even if his or her explanation is not believed: *S. (J.H.)* at para. 13.

[62] In this case, not only did the trial judge accurately instruct himself on the proper application of *W.D.*, he also recognized the *raison d'etre* for such an instruction: to prevent a trier of fact from viewing the outcome of a criminal charge as a credibility contest. It is useful to repeat some of what the trial judge said:

[19] And so I may, according to *W.D.*, accept all, part, or none of what a witness or a set of witnesses may say. Credibility here, as I've said, is extremely important, and the test in *W.D.* must be scrupulously applied. The test is designed not to simply allow the Court to apply the burden of proof as a credibility contest between the complainant and the accused. This is so notwithstanding that the only two parties, truly in a position to know are H.M. on behalf of the Crown, (as well as other Crown witnesses); but in particular H.M., and Mr. P. on his own behalf.

[6] With this recitation of the guiding principles and background I now move to my review of the evidence.

THE AFTERNOON AND EVENING OF MARCH 26, 2019

[7] PAL is [redacted] years of age. At the time of the matters in issue she was [redacted] tall and weighed [redacted] pounds.

[8] In March of 2019 Ms. L smoked a package of cigarettes a day. A (then) self-described alcoholic, she was employed as a server at the [redacted] and routinely drank 6 – 7 beer after her shifts. She was a gram a day marijuana smoker and occasionally drank hard liquor. Ms. L took the prescription drug [redacted](40 mg) bi-weekly for [redacted] disease.

[9] On cross-examination Ms. L agreed that she experienced blackouts from drinking alcohol, perhaps once every six months. When her preliminary inquiry testimony was brought to her attention, she agreed that she experienced blackouts every month. She said that when she experienced a blackout, she could not remember anything, “not even fragments”.

[10] On March 26, Ms. L went to Pilots Pub with her friend, CD. Between approximately 1:30 and 2:30 or 3:00 at Pilots she consumed three 12 oz Nine Locks Dirty Blonde tap beer which she said had between 5.5 and 6 percent alcohol.

[11] Upon leaving Pilots, Mr. D drove Ms. L in his car to the 650 Portland Street Nova Scotia Liquor Commission (NSLC) in Dartmouth. She thought they purchased a 12 or 18 bottle or can case of Budweiser. The two then drove to Mr. Khan’s apartment. Mr. D and Mr. Khan had been messaging back and forth via Facebook Messenger.

[12] When they arrived at Mr. Khan’s building, Mr. D had no data on his phone so Ms. L messaged Mr. Khan as follows:

Hey sweetie, let [C] and I up



We have beer

WWWAAAKE UPPP

DUUUUDE

Wake the **** up

We got beer

Mr. D also tried to reach Mr. Khan by phone without answer.

[13] Ms. L and Mr. D ultimately met up with the building superintendent. Mr. D told the superintendent that he was Mr. Khan's cousin, so he let them in. Upon entering Mr. Khan's apartment, the three started drinking the case of beer. They drank "one for one", such that if there were 18 in the case, each had 6 and if 12, each had 4. Ms. L and Mr. Khan also smoked marijuana, "probably a joint or two", consuming Ms. L's gram. She had purchased 3.5 grams a few days earlier from the NSLC and agreed on cross-examination that the marijuana had 17 – 18 percent active Tetrahydrocannabinol (THC).

[14] At one point Ms. L recalled leaving the residence to walk to [redacted] Variety to pick up cigarettes. She went by herself and thought she was gone for about twenty minutes. Upon returning to the apartment, the beer was gone by perhaps 8 or 9 p.m. so the three went back to the Portland Street NSLC. Ms. L thought that they "cabbed" and then clarified that she was "not sure how we got down there". She said Mr. D purchased 12 or 18 more Budweiser and then they returned to the apartment.

[15] Upon returning Ms. L estimated that she had at least 3 or 4 more cans or bottles of beer. In all, she agreed on cross-examination that she had a minimum of 10 beer and 3 joints. Since she was "really, really" feeling the affects of the alcohol and marijuana, Ms. L thought that she went into Mr. Khan's spare bedroom at around 11:00 – 11:30 p.m.. On cross-examination she could not recall talking to Mr. Khan before going into the bedroom.

[16] At some point prior to going to bed, Ms. L said that she was on the living room couch with the two men. She was laying with her legs across Mr. D when Mr. Khan rubbed her feet and Mr. D told him to stop. On cross-examination, Ms. L acknowledged that the first time she mentioned this incident was when she brought it to the attention of the police a few days before the first day of trial.

[17] Mr. D is [redacted] years old and works as a [redacted]. He met Ms. L at the [redacted] and describes her as a "good friend". Mr. D met Mr. Khan through a family friend. On cross-examination, he agreed the two were acquaintances.

[18] On March 26, 2019 he recalled walking with Ms. L on Pleasant Street and meeting up with Mr. Khan. The three went to the Portland Street NSLC and he purchased a 24 pack of Coors Light. From there the three went to Mr. Khan's place at about 3:00 or 3:30 p.m. They drank beer and listened to music. Mr. D thought he had ten or 11 beer but could not say how many the others had. He observed Mr. Khan and Ms. L smoking joints. He thought that the marijuana was Mr. Khan's.

[19] On cross-examination, Mr. D agreed that when he spoke with Mr. Khan on Pleasant Street, it was through his car window. Ms. L was with him but he had no recollection of earlier being at Pilots Pub. When asked about the beer he bought, Mr. D agreed that it could have been a 24 case of cans.

[20] Mr. D agreed that the building superintendent let him and Ms. L in because he told him that he was Mr. Khan's cousin. On cross-examination he agreed that this is untrue; he also agreed phone records show that he placed seven calls to Mr. Khan without getting an answer.

[21] On cross-examination Mr. D agreed that the three drank "beer for beer" and this would mean they each had eight from the case. The full case of beer was consumed – this would have been 24 or 18.

[22] Mr. D had no recollection of anyone leaving the apartment for cigarettes. Nor did Mr. D remember a later trip to the NSLC.

[23] Mr. D recalled the three sitting on Mr. Khan's sofa. Ms. L had her legs up on his legs and Mr. Kahn was rubbing her feet.

[24] Mr. D could not be sure of his friend's consumption of beer and marijuana. He thought, "she was not as bad as Rick was, loaded-wise". On cross-examination he did not agree that Ms. L went to bed "highly intoxicated", stating "I believe she was fine".

[25] Mr. D had seen Mr. Khan intoxicated before; as to the number of times, he agreed that it was in "double digits" As to his own level of intoxication, "I was pretty decent, I had five to ten [beer] in five hours". He added that he knew what he was doing and, "I remember every single thing from waking up". He said that there was no dancing, just drinking, conversation (which he could not recall) and listening to music.

[26] Mr. Khan is [redacted] years of age. He is single and works as a [redacted] at [redacted]. On March 26, 2019 he was working in a warehouse and got off work at around noontime. He took the bus home and stopped at a convenience store across from his apartment complex on [redacted] in Dartmouth. While walking to his apartment he heard a passerby in his vehicle call his name. The person, CD, as an acquaintance; he pulled over and they chatted for about five minutes. Mr. D asked Mr. Khan if he was doing anything later and Mr. Khan said to Facebook message him.

[27] Mr. Khan is [redacted] tall and at the time weighted [redacted] pounds. In March, 2019, he drank alcohol – “beer, normally, less than a 12 pack, it varied” – about twice a week. He consumed cannabis about two to three times a week at that time in his life.

[28] Mr. Khan went up to his apartment, had a beer and checked emails on his computer. At 1:24 p.m. he received a message from Mr. D; this text and a number of subsequent texts between the two men from March 26th were entered as exhibit 2.

[29] About an hour after their initial text exchange Mr. Khan took a nap. He was awoken at about 3:30 p.m. to loud knocking at his door. When he went to the door he was met by his landlord, Mr. D and a woman whom he did not know. Mr. Khan told his landlord that everything was fine and invited Mr. D and the woman inside. He was introduced to the woman, AL and all three drank beer from an 18 can case of Budweiser that Mr. D had purchased.

[30] Mr. Khan estimated that they started drinking around 4 p.m. and that by 9:30 p.m. they all agreed to leave the apartment to pick up cigarettes and beer. By this time Mr. Khan had consumed five to six beer and smoked a joint with Ms. L. Mr. D did not have any cannabis. Mr. Khan said that both Mr. D and Ms. L drank beer but could not say how many. When they left the apartment Mr. Khan felt he was intoxicated or impaired along with the others.

[31] Mr. D drove to the Portland Street NSLC with Mr. Khan and Ms. L as passengers in his car. Mr. D purchased an 18 can case of Budweiser beer and then they drove back to Mr. Khan’s apartment. The three socialized, drank beer and Mr. Khan and Ms. L shared a joint. By 12:30 a.m. Mr. Khan decided to go to bed. Since he thought Mr. D was impaired, Mr. Khan felt that he should rest and drink coffee before he drove. Mr. D took Mr. Khan up on his offers. As for Ms. L, she went into Mr. Khan’s spare bedroom and rolled a joint which she then gave to Mr. Khan. She said that she wanted to smoke the joint with Mr. Khan just before she and Mr. would be leaving. According to Mr. Khan, Ms. L said “to come get her after and we’d smoke before she left”.

[32] She then went into the bedroom with Mr. D, leaving the door slightly open. On cross-examination he said that there were curtains on the window but that some moonlight shone through. Mr. Khan left the two and stayed in his living room where he went on his computer and watched videos.

[33] While they were together Mr. Khan said that the three socialized and listened to music. There was dancing but he denied dancing or any “interplay” with Ms. L.

[34] On cross-examination he denied that the alcohol reduced his inhibitions when he was dancing. Although impaired by the alcohol and cannabis he said that he felt “normal” and was happy but denied an increased libido. On re-direct examination Mr. Khan said that his alcohol ingestion did not affect his memory.

THE SPARE BEDROOM AND THE ALLEGED SEXUAL ASSAULT ON MARCH 27, 2019

[35] Ms. L stated that she and Mr. D went to the spare room together and she shut the door. Mr. D got into the left side of the bed (closest to the door) and she took the right side. Mr. D took his jeans off and wore his boxers and shirt to bed. Ms. L took her jeans off and kept her panties, bra and shirt on. After falling asleep for a time, Ms. L awoke as she felt a hand on her leg. First she thought this was Mr. D’s hand but then realized it was coming from the other side of the bed. She realized it was Mr. Khan and that his “hands went in my vagina and touched my labia and clitoris”. Ms. L described feeling “intoxicated, not quite conscious... I freaked out, I think I hit him. I started throwing things and then C called the police”.

[36] Ms. L added when she saw Mr. Khan that he was down on his knees. She felt his hand making a “kinda upward motion at first ... I was not quite awake”. She stated that his hand was “very close to my groin, inside my left thigh”. She added that Mr. Khan’s hand went up and, “he fondled my labia and then clitoris and then inserted his fingers in my vagina”. She woke up and felt “violated”, estimating that the sexual assault lasted “maybe a minute and a half”. On cross-examination she agreed that her panties were not pulled down; “he went in through the side of my panties”.

[37] Ms. L punched Mr. Khan and said “what the fuck”. He responded by repeating several times that he was very sorry. She recalled that Mr. Khan was wearing a “Cookie Monster” t-shirt with an unbuttoned blue plaid shirt over it. She described the lighting in the bedroom at the relevant time as “really dark” with a small amount of light entering in through the curtains.

[38] Ms. L said she could not recall saying anything to Mr. Khan to permit him to touch her. She said he touched her while she was on the bed, under the covers. She said the incident left her “frazzled and in disbelief, mad”. Apart from a bruised hand from hitting Mr. Khan, Ms. L did not sustain injury from the incident.

[39] Ms. L agreed that Mr. D was “fairly intoxicated” when he went to bed. After the sexual assault Ms. L said that Mr. D called the police while they were inside the apartment and he then took her outside. She recalled speaking with the ambulance attendants. On cross-examination she denied saying to the attendants that there had been “no penetration”.

[40] Mr. D said that he was tired so he turned in at 11 or 12. Mr. L went to bed at the same time that he did. It was dark when they went to bed. They went into the spare room where there was an overhead light, bed and bureau. Mr. D said he did not undress and that he laid on top of the bed. After 20 or 30 minutes, he fell asleep. Ms. L was also on the bed but “nothing was going on”. Ms. L did not take off her clothes and did not get under the covers.

[41] After being asleep for two hours, Mr. D heard screaming. He awoke and saw that Ms. L was still on top of the bed to the left of him with her clothes on. When he woke up he is “one hundred percent” positive that the bedroom light was on. Mr. D saw Mr. Khan “outside the bed going toward her, touching her”.

[42] Mr. D said that he woke up “in panic and shock – she was freaking out and Rick was beside her coming up on to the bed”. He added that Mr. Khan’s hands were going towards “her private parts ... her vagina”. He recalled that Ms. L had her pants on and that Mr. Khan touched her. On cross-examination he said he saw Mr. Khan’s hand touch her vagina. Mr. D said that at the time he was “half asleep”.

[43] Mr. Khan noted that his spare bedroom had a window and a linen closet; there was a bed and a light fixture but at the time it did not have a light bulb.

[44] Around 3:30 or 3:40 a.m. Mr. Khan went into the spare bedroom to get Ms. L to smoke the joint. As he entered the bedroom he noticed that Mr. D was on the left side of the bed under the sheets and that Ms. L was under the comforter. He said that Ms. L was looking in his direction and that he saw the front of her face. Mr. Khan touched Ms. L “on her shoulder to wake her up”. Ms. L then “flew up and backhanded me, I’m on the floor, she’s hysterical ... get your hands off me, creep”. Mr. Khan said that Ms. L went into a rage breaking a mirror; he recalled, “she threw pots around, threw things around my bathroom”. He added that Mr. D tried to calm her down and that Ms. L left his apartment with Mr. D following behind.

[45] Mr. Khan testified that Mr. D came back up to his apartment and told him that she was calling the police. Mr. Khan asked why noting that he felt “stunned, shocked, confused”. He went downstairs to wait for the police and shortly thereafter

three officers appeared. Mr. Khan was arrested and placed in the back of the police car.

[46] Mr. Khan denied touching Ms. L's "private parts". Specifically asked if he placed his fingers in her vagina, he said, "no I did not". Mr. Khan said he woke Ms. L up to smoke the joint and "to get them out of my house". On cross-examination he denied that he had planned not to wake Ms. L and moved surreptitiously toward her.

[47] On cross-examination he said that he faced the foot of the bed when he entered the room and that Mr. D was on the left and Ms. L on the right. He said that he walked to the right side of the bed and "pushed her on the shoulder ...I was down on the ground after she hit me, I stumbled back and kneeled on the floor ...I said 'I'm sorry' as she jumps off the bed". He said that he touched the top of Ms. L's shoulder with his right hand. Asked if he was hit with the front or back of her hand; "I just know I got hit". Mr. Khan added. "I stumbled back ...I stumbled a bit over my foot onto my knee and said I'm sorry".

INTERACTIONS INVOLVING THE POLICE ON MARCH 27, 2019

[48] Mr. D tried to calm down Ms. L and Mr. Khan. Ms. L was "hollering and crying ... she was upset the situation happened". While in the living room Mr. D called the police. He observed the police arresting Mr. Khan. Mr. D was driven home by the police as they gave him a "breathalyzer test... it obviously came back, no".

[49] As Mr. Khan sat in the back seat of the police car, he was separated by a "silent partner" from the two officers in the front seat. He said that "they asked me what I thought was going on, did you think a 'ménage à trois'?" He denied this and said there had to be "a misunderstanding, we were all drinking". On cross-examination Mr. Khan repeated that one of the police officers brought up the ménage à trois.

[50] On cross-examination it was put to Mr. Khan that he told Cst. Rideout in his statement that his memory was "very good up until I went to shake her ...". Mr. Khan said that he was referring to waking up in the holding cell and not referencing the evening in question.

[51] Cst. Rideout is an 18 year veteran of the RCMP. In March, 2019 he worked in the sexual assault unit. He was the lead investigator in this matter and took an

audio/video statement from Ms. L on March 27, 2019 at 1:00 p.m. He described her demeanor as being upset but acknowledged on cross-examination that he had never met Ms. L before. He did not notice any signs of intoxication with Ms. L.

[52] Cst. Carter is an eight year member of HRP. He was on patrol / general duties on March 27, 2019. Shortly before 4:30 a.m. he was dispatched to [redacted] in Dartmouth. Mr. D reported that his friend, AL, had been sexually assaulted. Mr. D and Ms. L were in the apartment building parking lot when he arrived. Cst. Carter spoke with them briefly at the foot of the large set of outside stairs. He discerned that they were both under the influence of alcohol, but did not document intoxication. On cross-examination he could not recall any specifics concerning the smell of alcohol, slurred speech or unsteady balance. He did not recall conducting a roadside screening (or whether it came back a fail) of Mr. D. He felt that Ms. L was very upset.

[53] Cst. Carter observed Mr. Khan in the apartment lobby. Cst. Carter spoke with him and observed that he was intoxicated. He smelled alcohol from his breath and observed “froth” at the corners of his mouth and unsteady balance. Cst. Carter placed Mr. Khan under arrest.

[54] Cst. Carter drove Mr. Khan to the Halifax Police Station, about a 10 minute drive. During the drive Mr. Khan said that there had been a “misunderstanding”. Cst. Carter said he elaborated as Mr. Khan stated that he thought there was a “manage et trois” and that he had drank too much alcohol that evening. Since he was driving when he heard these utterances, Cst. Carter made notes upon his return to the station.

[55] On cross-examination he said his standard police car had a “silent partner” in between the front and back seats and could not recall if it was open or closed. He could not say who initiated the conversation between Mr. Khan and him.

[56] On further cross-examination Cst. Carter agreed that the silent partner could affect one’s ability to hear what was being said. He acknowledged that his notes were made at 6:21 a.m. on March 27, 2019. Cst. Carter said that his notes were based on what Mr. Khan told him. When his comments about a “manage et trois” were revisited, Cst. Carter had no recollection of this comment having been made by anyone.

[57] HRP Cst. Steven Logan has no recall of his involvement in this matter. He made some notes and they read that Ms. L stated that there was “no penetration, only touching of some sort”.

EXPERT EVIDENCE

[58] Gregory J. Johnstone is a toxicologist called as an expert by the Defence. His twenty-five page curriculum vitae was introduced (exhibit 1, tab 2) and he was qualified to testify:

1. as an expert in the field of Pharmacology and Toxicology;
2. on the absorption, distribution, elimination, analysis and effect of alcohol, drugs, and chemicals on the body;
3. on all common drugs of abuse including alcohol and cannabis;
4. on specific issues relating to the absorption, distribution, elimination, acute chronic and residual effects and extent of effects of cannabis alone or in combination with other drugs i.e. alcohol;
5. as to the nature of drug abuse and addiction, their impact and manifestation in the body system;
6. on the calculation of blood alcohol concentration or quantities of alcohol ingested to count for various scenarios; and
7. on issues of impairment associated with one or more drugs over the course of time.

[59] On cross-examination Mr. Johnstone confirmed that he is not a medical doctor or expert in memory. It was agreed that his opinion would be accepted consistent with the way in which the opinion of a clinical pharmacist (Dr. David Rosenbloom) was accepted by Justice Boswell in *R. v. Osbourne*, 2019 ONSC 907 at paras. 50 – 58. Of these passages, paras. 55 and 56 nicely encapsulate how I will accept Mr. Johnstone’s opinion:

[55] For clarification purposes, I am satisfied that ~~Dr. Rosenbloom~~ [Mr. Johnstone] has expertise in, and may offer opinions, in the following areas:

- The generally observed effects associated with the ingestion of ~~cocaine~~, marijuana and/or alcohol, including, but not limited to, the sensations of euphoria, disinhibition, impulsiveness, increased vigilance, paranoia, increased heart rate, dilated pupils, muscle spasms, anger, hostility, an increase in the fight or flight response, and increased stress or tension;

- The impairment of information processing and judgment and decreased thoughtfulness and reflectiveness associated with advanced intoxication;
- The combined effects of alcohol and ~~cocaine~~, including a longer half-life of the cocaine high, increased disinhibition and risk-taking, unbridled anger and aggressiveness, decreased capacity for executive decision-making and an increase in the fight or flight response; and,
- The general inhibition of working memory, resulting in the potential (but not the inevitability) of memory loss;

[56] He may offer an opinion about whether ~~Mr. Osborne's~~ [Ms. L's] described symptoms are consistent with advanced alcohol/~~cocaine~~ intoxication.

[with my changes]

[60] As Mr. Johnstone did not attend for Ms. L's in-court testimony, he was provided with a hypothetical (exhibit 1, tab 3) that closely mirrors the situation in this case:

1. Assume that Ms. X. is [redacted] foot [redacted] inches;
2. Assume that Ms. X. weighs [redacted] pounds;
3. Assume that Ms. X. is [redacted] years of age;
4. Assume that Ms. X. was an experienced and regular user of cannabis marijuana and drinks beer on a regular occasion;
5. Assume that prior to 1:30 pm. on March 26th, 2019 Ms. X. had no alcohol in her system;
6. Assume that Ms. X. does not remember when she had her last drink prior to March 26th, 2019;
7. Assume that Ms. X. would drink alcohol 3 or 4 times per week;
8. Assume that Ms. X. when she did drink she would consume 6 or 7 beers in a night;
9. Assume that on March 26th, 2019 Ms. X. was drinking alcohol and smoking marijuana;
10. Assume that Ms. X. in March, 2019 was an alcoholic;
11. Assume that Ms. X. was on a drug called [redacted] (40 mgs bi-weekly) for [redacted] disease;
12. Assume that Ms. X. started drinking at approximately 2:00 p.m. on March 26th;
13. Assume that Ms. X. between 2:00 p.m. and 3:30 p.m. was drinking tap beer and she consumed 3 12 ounce glasses of Nine Locks Dirty Blonde tap beer which had an alcoholic content of 5 percent;

14. On March 26th, 2019 Ms. X. in her possession had 1 gram of cannabis marijuana;
15. Ms. X. estimates that the THC was between 17 and 18 percent;
16. Assume that Ms. X. and Mr. D. went to the liquor store and purchased 1 case of Budweiser beer 5% alcohol – 18 cans;
17. Assume that Ms. X. and her friend Mr. D. and Mr. K. drank the same amount of beer between 3:40 p.m. and 9:30 p.m. and they consumed all 18 beer;
18. Mr. D. and Mr. K. and Ms. X. each consumed 6 beer out of the first case of Budweiser beer;
19. Assume Mr. D., Mr. K. and Ms. X. went to the Liquor store at approximately 9:30 to purchase another case of Budweiser beer.
20. Mr. D. and Mr. K. and Ms. X. started to consume the second case of beer at approximately 9-9:30 p.m.;
21. Assume at Mr. K.'s apartment Ms. X. started smoking cannabis marijuana with Mr. K.'
22. On March 26th between 1:30 p.m. to midnight Ms. X. smoked 3 joints of marijuana and she consumed 8-12 cans of beer plus 3 12 ounce draft beer;
23. Assume further that at 12:00 a.m. Ms. X. described herself as highly intoxicated from the alcohol and marijuana;
24. Assume that Ms. X. has little recollection of what took place during the course of the evening;
25. Assume further that Ms. X. after going to bed around 12:00 a.m. that she falls asleep;
26. Assume that Ms. X. is a cigarette smoker;
27. Assume that Ms. X. had previously had alcoholic blackouts;
28. Assume that Ms. X. during an alcoholic blackout has no memory or recollection of what occurred;
29. Assume that Ms. X. smokes approximately 1 gram of cannabis marijuana per day;

[61] On cross-examination Mr. Johnstone said that if the hypothetical was incorrect and Ms. L actually started drinking at 1:00 p.m. that this would be a “relatively insignificant” difference. As for the possibility that an individual may develop some level of alcohol tolerance, Mr. Johnstone acknowledged this but explained that this factor would not significantly alter his opinion.

[62] The expert then confirmed that he prepared his expert report (exhibit 1, tab 4) based on the hypothetical. He then spoke to his seven page report with emphasis on numbered paras. 2 – 12 under the “Interpretations and Comments” in his report.

[63] Mr. Johnstone then provided his opinion as set forth at pp. 5 – 6:

Opinion and conclusions relative to the effects and impacts of the alcohol and Cannabis Ingested by Ms. X.

1. Due to Ms. X’s small body weight and lean body composition, Ms. X would have had a substantial blood alcohol concentration and related effects.
2. Due to the high THC concentration in the ingested Cannabis/marijuana, the amount of Cannabis ingested and the relatively short time period involved, relative to the retention time of THC in the body, Ms. X would have had a significant concentration of THC in her blood (and hence brain), with the related impairments, in the later part of the night and thereafter, including when she awoke in the early morning.
3. Under these conditions, she would have experienced substantial impairing effects in most of her body systems and functional capacities, ...

...

Ms. X’s emotional response, her other physical responses, actions and conversations need to be seen in the context of the drug induced impairments and the nature and extent of realization of what was happening, who and when, what he said and what he was wearing, etc. The individual combined effects of these drugs can impact perception, recollection (memory) and context of what is or may be happening at a given time after such use.

4. Ms. X’s blood concentration of THC would decline rapidly during the elapsed time so that the concentration when she awoke would be substantially lower than when she went to bed. However, the concentration of THC in her brain would proceed with a delay compared to that of the blood THC decline. This delay leads to a longer exposure of the THC in the brain with THC associated effects in “effects compartments” of the brain. The longer the elapsed time, between when Ms. X went to bed and when she awoke, THC impairment could/would be reduced compared to when she went to bed.

[64] Mr. Johnstone testified as to the combined impairing effect of alcohol and cannabis. Asked to review the situation here, he opined, “that’s a lot of alcohol in a smaller body person”. He later stated that given the amount of beer consumed in the relatively short time span that the individual would be “grossly intoxicated”. With the addition of the cannabis intake Mr. Johnstone stated, “she would be more

impaired”. The quantity of beer and cannabis would result in “distortions” of fine motor skills and one’s intellectual and perceptual skills. Mr. Johnstone added that a person in this state when sleeping would be in a “drug induced sleep”. This would compromise the individual’s senses and impair their judgment.

[65] On cross-examination Mr. Johnstone was referred to a 2003 article and specifically the “Modal Model of Memory”. He questioned whether the 1968 model was still valid. Mr. Johnstone was asked about the effect of adrenaline, which he acknowledged would likely be released if one believed that they were assaulted. He stated that an adrenaline release typically lasts one to two minutes and leaves one with a “broken memory”.

POSITIONS OF THE PARTIES

Crown

[66] The Crown asks the Court to find that Ms. L was a credible and largely reliable witness. As for Mr. Khan, the Crown submits that his testimony was manufactured to provide some reason as to why he was in the spare bedroom during the early morning of March 27, 2019. In the Crown’s words the idea that Mr. Khan went to wake Ms. L up to smoke a joint is “preposterous” or “incredulous”.

[67] The Crown points to the evidence of Cst. Carter and his attribution of a “manage et trois” to Mr. Khan. As for the EHS notes referencing a lack of penetration having occurred, the Crown characterizes this as “a paraphrase” and that it may mean a lack of penile penetration.

[68] At the end of the day the Crown argues that Mr. Johnstone’s evidence offers not much more than a common sense view of things. The Crown submits that at best Mr. Johnstone only establishes that Ms. L’s combined level of alcohol and THC was such that her sensation levels were reduced but not eliminated. Further, the Crown submits that there is no basis to say that she was hallucinating or in a dream state.

[69] The Crown submits that the evidence establishes beyond a reasonable doubt that Mr. Khan entered the bedroom with a sexual purpose and that the elements of the s. 271 offence are clearly made out.

Defence

[70] The Defence submits that the acts as described by Ms. L did not occur. Mr. Khan asks the Court to accept Mr. Johnstone's expert evidence which he submits diminishes Ms. L's evidence on account of the combined effect of the alcohol and THC in her system.

[71] The Defence points to conflicting evidence between Ms. L, Mr. D and Mr. Khan regarding various aspects of the events leading up to the alleged sexual assault. Mr. Khan emphasizes Mr. Johnstone's evidence and notes that even Ms. L admits that she was in a state such that she does not remember everything. Critically, the Defence says that Ms. L's brain executive function would have been impaired when she woke up.

[72] The Defence argues that the combined effect of the drugs had to have impacted Ms. L's memory. Mr. Khan emphasizes that he merely touched Ms. L's shoulder and that her testimony that she was sexually touched must be discounted.

[73] Mr. Khan submits that the evidence in no way establishes that the elements of the s. 271 offence have been made out.

ANALYSIS AND DISPOSITION

[74] In assessing this matter I am mindful of the totality of the evidence and the legal framework. I have comprehensively set forth my review of the evidence and touched upon recent guiding authorities from our Court of Appeal.

[75] In assessing this matter it must be borne in mind that the task of the Court is not to assess which witness is most believable. Rather, I must consider the entirety of the evidence. If there is reasonable doubt with respect to any one of the essential elements of the offence, I must acquit.

[76] With the exception of Mr. D, I found all of the witnesses credible. As for reliability, I found that all of the witnesses to be lacking in their recall of the events in question.

[77] Dealing with Mr. D first, he went to great lengths in an attempt to convince the Court that he had a clear memory of the night and early morning. For example, he stated that after he woke up and saw Mr. Khan in the bedroom, he remembered everything. He said that he was positive that the bedroom light was on even though both Ms. L and Mr. Khan testified to the contrary. Mr. D was sure that Ms. L had her clothes on yet he was emphatic that he saw Mr. Khan touch her vagina. Although

he acknowledged being half asleep, Mr. D was determined in his testimony to describe a sexual assault having occurred.

[78] When I test Mr. D's evidence against the totality of the evidence it causes me to seriously question his credibility. Accordingly, I have discounted his testimony as it does not shed any credible light on the events of March 26 and 27, 2017.

[79] With respect to reliability, my concerns about Ms. L's evidence include that:

- she could not be sure if Mr. D initially purchased 12 or 18 beer and whether the beer was in cans or bottles
- Ms. L thought she walked alone to buy cigarettes whereas Mr. D had no recall of anyone going for cigarettes and Mr. Khan thought all three went for cigarettes
- she initially thought all three took a taxi to the Portland Street NSLC but then said she was not sure how they got there
- during her second stop at the Portland Street NSLC Ms. L could not be sure if Mr. D purchased 12 or 18 beer

[80] The above discrepancies are understandable given Ms. L's acknowledged level of alcohol and marijuana consumption on the afternoon and evening in question. Indeed, she acknowledged "really, really" feeling the affects of the alcohol and marijuana. This was to the point that she could not recall speaking with Mr. Khan before going into his spare bedroom.

[81] As for Mr. D, when I evaluate his evidence in context of all of the testimony, just as I determined it to be incredible, I find it sorely lacking in reliability. For instance, he could not even recall being at Pilot's Pub earlier in the afternoon. Further, he thought he might have initially purchased 24 cans of beer. Unlike both the complainant and the accused, Mr. D had no recall of the cigarette or beer trip later in the evening. Also contrary to the evidence of Mr. Khan and Ms. L, Mr. D thought that Ms. L was "fine" *vis-à-vis* her alcohol and marijuana intake when she went to bed.

[82] Once in the bedroom together, Mr. D contradicted Ms. L in terms of both of their states of undress. Importantly, Mr. D said that although she was wearing pants he saw Mr. Khan touch her vagina.

[83] As for the police officers, my reliability concerns stem from these examples:

- Notwithstanding Ms. L's acknowledged high level of alcohol and marijuana consumption, Cst. Rideout did not notice any signs of intoxication in Ms. L
- Cst. Carter could not recall whether he conducted a roadside screening of Mr. D and if he did, the result
- Cst. Carter could not recall if the silent partner was open or closed
- Cst. Carter initially said that Mr. Khan made the "manage et trois" comment but later could not recall if the comment had been made
- Cst. Logan had no recall whatsoever of his involvement in the matter.

[84] With respect to Mr. Khan, I have reliability concerns surrounding his evidence about his interactions with Ms. L and Mr. D. Although he said that his ingestion of alcohol did not affect his memory, I pause here to state that I am of the view that all three lay witnesses' memories were adversely affected by their alcohol consumption and in the case of Mr. Khan and Ms. L, this was compounded by their marijuana smoking.

[85] My concerns surrounding the reliability of all three lay witnesses are buttressed by the expert evidence of Mr. Johnstone, which I accept. Although he confined his opinion specifically to Ms. L, it is easy to appreciate that alcohol and THC impaired Mr. Khan's executive function and that alcohol impaired Mr. D's ability to reliably recall all of what transpired.

[86] In conclusion, notwithstanding my reliability concerns, I found both Ms. L and Mr. Khan believable with their versions of what went on during the night and early morning of March 26 and 27, 2019. Having said this, it would be wrong in law to now embark upon a process to determine which of the two is most believable. Rather, I must consider the totality of the evidence and determine whether I am left with a reasonable doubt. In so doing, I have to assess Mr. Khan's evidence through the *W.D.* lens. With this in mind, I cannot say that I believe all of what he said. Nevertheless, when I consider Mr. Khan's evidence in the context of the evidence as a whole, I am left with a reasonable doubt. In the result I hereby acquit Dederick Eric Khan of the charge before the Court.

Chipman, J.