SUPREME COURT OF NOVA SCOTIA
Citation: *R.* v. *Spencer*, 2022 NSSC 288

Date: 20221012
Docket: Ken No. 501613
Registry: Kentville

Between:

Her Majesty the Queen

v.

Brandon John Spencer

Restriction on Publication: s.486.4 and s.539(1) of the *Criminal Code*

TRIAL DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	October 17 and 18, 2021, in Kentville, Nova Scotia; and May 30, 31, June 1, and July 15, 2022, in Halifax, Nova Scotia
Counsel:	Robert F. Morrison, for the Crown Ian Hutchison, for the Defendant

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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

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make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,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):

BACKGROUND AND ISSUE

[1] By indictment dated November 3, 2020, the defendant Brandon John Spencer (the "**Accused**") stands charged with sexual assault on AJ (the "**Complainant**") contrary to section 271 of the *Criminal Code*. At the time of the alleged offence, both the Complainant and the Accused were military members of the same Personnel Awaiting Training (or "**PAT**") platoon stationed at 5 Canadian Division Support Base, Aldershot, Nova Scotia or "Camp Aldershot". They were also assigned to the same dormitory (Building 216) at Camp Aldershot but living in different rooms. The offence is alleged to have occurred just prior to 1:15 a.m. on Saturday, April 27, 2019, in the Complainant's dormitory room (Room E-113).

[2] The Accused pled not guilty and elected trial by judge alone.

Procedural History

[3] The trial began on October 17, 2021. The Crown opened its case by calling three other recruits who were assigned to the same dormitory room as the Accused on the night of the alleged sexual assault (Private Rhian King, Private Kenneth Hunter and Private Joseph Riveros).

[4] The Crown then called the Duty Officer at Camp Aldershot on the night in question (Master Corporal Aime Hirwa).

[5] On October 18, 2021, the Crown called Warrant Officer Joey Wilson to testify as an expert. Warrant Officer Wilson is a senior forensic investigator with the military. He was engaged to examine the Complainant's cellphone and extract all relevant Facebook Messenger messages exchanged between the Complainant and the Accused leading up to and immediately following the alleged assault.

[6] During the course of Warrant Officer Wilson's testimony, it quickly became apparent that he did not deliver to the Crown all of the Facebook Messenger messages which he extracted from the Complainant's cellphone. The reasons for this omission include:

1. Unfortunately, Warrant Officer Wilson unilaterally took the incorrect view that the only relevant messages were those exchanged a few hours before the alleged assault and those which immediately followed the alleged assault. Even though Warrant Officer Wilson

actually extracted numerous messages outside that narrow time frame, he did not deliver them to the Crown;

2. It was not until Warrant Officer Wilson testified at trial that counsel for both the Crown and counsel for the Accused realized that additional relevant messages were available. The complete tranche of Facebook Messenger messages extracted by Warrant Officer Wilson were disclosed in the middle of Warrant Officer Wilson testimony, on October 18, 2021. The additional disclosure was contained in a 96 page .pdf document;

3. The Court closed early on October 18, 2021 to give the parties time to review the new disclosure. The trial resumed on October 19, 2021;

4. The new disclosure was not only voluminous but also contained evidence of prior sexual activity of the Complainant. As such, a further, mid-trial proceeding under section 276 of the *Criminal Code* became necessary; and

5. In all the circumstances, the parties requested (and the Court agreed) that the trial be adjourned from October 19, 2021 to May 30, 2022.

[7] Pausing here, I note that the new, mid-trial disclosure would have been equally available on the Accused's cellphone. However, the Accused deleted the messages on his cellphone shortly after the alleged assault and before his cellphone was seized and reviewed by the Military Police. In the end, the only remaining source for these messages was the Complainant's cellphone and her Facebook Messenger account. The Crown properly did not seek to characterize the Accused's decision to delete the Facebook Messenger messages from his cellphone as after-the-fact conduct consistent with a guilty mind.

[8] Returning to the procedural history and as indicated, the new disclosure gave rise to a further, mid-trial proceeding under section 276 of the *Criminal Code*. The Accused also applied for a mistrial based on a mistake which arose during the first stage of that section 276 application. By reasons rendered on May 9, 2022, I dismissed the mistrial request.

[9] The trial resumed on May 30, 2022. At that time, Warrant Officer Wilson completed his testimony. The Crown's final witness was the Complainant. On May 31, 2022, the Crown closed its case.

[10] The Accused elected to present evidence on June 1, 2022, and then closed his case.

[11] After the evidence was presented and tendered, the Accused brought a second application for mistrial. The basis for this second mistrial application was the loss of a one (1) page handwritten statement prepared by the Complainant shortly after the alleged assault. The handwritten statement was requested by the Duty Officer in charge at Camp Aldershot on the night of the alleged assault (Master Corporal Aime Hirwa). Master Corporal Hirwa did not pass this message along to the Military Police and it was subsequently lost. At the same time, the Military Police had immediately begun its own investigation (including a lengthy recorded statement from the Complainant) within 12 hours of the alleged incident. In any event, the Accused argued that the loss of this statement violated his rights under section 7 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***").

[12] The mistrial application was heard on July 15, 2022. At that time, the parties also presented their final arguments on the charges against the Accused, but reserved the right to make further submissions upon receipt of my mistrial decision.

[13] By written reasons rendered August 9, 2022, I denied the second mistrial request (*R.* v. *Spencer*, 2022 NSSC 220). The parties subsequently confirmed that they did not require the opportunity to make further arguments on the main charges.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

[14] I begin with certain key bedrock concepts upon which all criminal proceedings in Canada are built.

[15] It is a fundamental principle of the law in Canada that a person accused of a criminal offence is presumed innocent until proven guilty. The Supreme Court of Canada described this principle as "the golden thread of criminal justice" (*R.* v. *Lifchus*, [1997] 3 S.C.R. 320 ("***Lifchus***", at paragraph 27). This principle exerts such a powerful influence on criminal law in Canada that it was enshrined as a constitutional promise under the *Charter*. Section 11(d) of the *Charter* guarantees that: "Any person charged with an offence has the right … to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

[16] Two further rules flow from the presumption of innocence:

1. The Crown bears the burden of proving the essential elements of sexual assault. The Accused does not have to prove anything – least of all his innocence. Indeed, the Court remains vigilant against somehow reversing this burden of proof or engaging in a process of reasoning that impliedly or explicitly imposes upon the Accused an evidentiary burden to prove his innocence. To do so would violate the foundational presumption of innocence. So, for example, where an accused testifies in his own defence against allegations of sexual assault, the Court must not determine guilt by asking whether it prefers the complainant's testimony. Setting up that sort of a "credibility contest" reverses the evidentiary burden because, instead of being presumed innocent, the accused is required to perform in a manner which is sufficiently credible as to justify an acquittal. To avoid falling into error, the Supreme Court of Canada developed a principled framework through which these types of credibility issues might be properly analysed (*R* v *W.(D.)*, [1991] 1 S.C.R. 742 ("***W.(D.)***"). I return to this framework below;

2. The standard of proof which the Crown must meet is proof beyond a reasonable doubt. At paragraph 36 of *Lifchus*, the Supreme Court of Canada provided the following helpful definition:

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

[17] Having said that, the Crown "is not required to prove its case to an absolute certainty since such an unrealistically high standard could seldom be achieved" (*Lifchus*, at paragraph 31). By the same token, proof beyond a reasonable doubt "falls much closer to absolute certainty than to proof on a balance of probabilities" (*R* v *Starr*, 2000 SCC 40 at paragraph 242).

[18] Finally, an acquittal is neither a formal declaration that the accused is innocent nor is it a formal pronouncement that the complainant's allegations were unworthy of judicial attention. Rather, an acquittal confirms that the evidence raises a reasonable doubt such that it would be wrong to convict an accused person of a criminal offence and subordinate that person's liberty to the state's correctional controls.

EVIDENCE AT TRIAL

[19] Many of the facts leading up to the alleged assault are not contentious:

1. The complainant originally arrived at Camp Aldershot in 2018 as a member of a different PAT platoon. In January 2019, she injured her left shoulder and was unable to continue the military training. She left Camp Aldershot to recover, but then returned in March 2019 with plans to complete her training by April, 2019. When she returned, her original PAT platoon had moved on. As a result, the Complainant joined a new PAT platoon which just arrived. The Accused was also a member of this new PAT platoon;
2. As indicated, all members of the new PAT (including the Complainant and the Accused) were housed in the same barracks or dormitory at Camp Aldershot (Building 216). The male and female sleeping quarters were on the same floor but in different rooms.
3. The Complainant's sleeping quarters was Room E-113, a barracks-style room with a number of single bunk beds. Between Friday, April 26, 2019, until the morning of April 27, 2019, the Complainant had this room to herself. Her roommates had left for the weekend.
4. The Accused's sleeping quarters was also a barracks-style room, with 16 single, bunk beds. At all material times, 8 of those 16 bunkbeds were occupied by the Accused and 7 other recruits. Three of the Accused's roommates (Rhian King, Joseph Diaz Riveros and Kenneth Hunter) testified at trial, as indicated.

5. The Accused and the Complainant did not know one another prior to April 2019. In the weeks leading up to the alleged assault, the Accused and the Complainant became increasingly familiar. The medium through which their relationship evolved is germane. Even though the Complainant and the Accused were frequently in close physical proximity to one another, their conversations occurred primarily online via private Facebook Messenger. For example:

    a. In a span of 48 hours between April 25 and April 27, 2019, they exchanged more than 700 private Facebook messages – often when they were in the same building and, at times, in the same room; and

    b. Between about 9:20 p.m. and 11 p.m. (just prior to the alleged assault), the Accused and the Complainant were sitting close to one another, socializing with other recruits. During that same period of time, they would exchange more than 150 messages to the point their fellow recruits began to tease them.

6. As indicated, in the days preceding the alleged assault, their Facebook Messenger messages track an evolving relationship that was becoming increasingly personal and flirtatious. Several examples follow. I note that many of these text messages contain text-slang or shortcuts and some grammatical errors. Where necessary, I identify obvious errors. Otherwise, they are reproduced *verbatim*.

    a. At about 9 p.m. on April 25, 2019, the Accused sent a message asking if the Complainant would like to see photos of him from the prior summer. The Complainant responded "Sure!" She then received several photos of the Accused bare-chested. The Complainant then volunteered two photos in which she compared her physique in about June, 2018 against a more recent photo taken in April, 2019. In the more recent photo, the Complainant was in a gym, wearing tight, form-fitting clothes. What followed was a series of messages discussing how much slimmer the Complainant had become;

    b. At around 11:35 a.m. the next day (April 26, 2019), the Accused and the Complainant begin to message one another again. The content of their messages quickly turned sexual in nature. The Accused writes such things as "Mind u I'm adventurous so I find most sex kinda boring lol". The

Complainant responds that "more recently, I've been more adventurous so it's harder to find partners that excite me" and, about 12 minutes later, "like if it's not getting pretty aggressive it's almost not enough, like it'll be good, but not great";

c. At about 4:56 that same afternoon, the Complainant graphically described a sexual experience in which she had been drinking. She portrayed herself as the initiator; writing such things as "And after a bit I push him off and apparently shout 'get up here and fuck me!' And was dirty talking the whole time." She later wrote "I think normally, im [*sic*] a little less aggressive, but sometimes it depends on the guy". This online exchange also occurred when the two were a few feet apart from one another. Near the end of the conversation, the Complainant added "You know too much, you're stuck being my friend now. No getting word". She immediately corrected "word" to mean "weird";

d. About four hours later, the Complainant and the Accused would be in the Complainant's barracks room drinking with several other recruits. I return to the amounts of alcohol being consumed and their respective levels of intoxication below. As indicated, they would exchange about 150 more messages between 9:20 p.m. and 11:00 p.m. By this time, it was the Accused taking the initiative in terms of repeatedly complimenting the Complainant's appearance and personality. The Complainant did not directly reciprocate or compliment the Accused. Instead, as the evening progressed, the Complainant became increasingly focussed on the anger she felt towards her last boyfriend who left for another woman. During her testimony, the Complainant explained that she found this part of the exchange somewhat comforting, given the hurt caused by her old boyfriend.

e. By the end of the evening, the Complainant and the Accused agreed that the Accused would sleep in the Complainant's room. At about 11:00 p.m., the Accused wrote that he might "crash" in the Complainant's room because "I hate being woken up ewrly [*sic.*]". The Complainant replied

"I'm cool with it". This was the last Facebook message exchanged before the alleged assault.

7. Just after 11:00 p.m. on April 25, 2019, the Accused and the Complainant found themselves alone in the Complainant's room. At this stage, their conversations moved from electronic to entirely verbal. They confessed to difficulties in their personal relationships. As indicated, the Complainant was recovering from a difficult break-up with her former boyfriend. The Accused expressed uncertainties with his own partner with whom he had a child;

8. At this point, the evidence of the Accused and the Complainant begins to diverge in often critical ways. However, they do agree that:

    a. The two began to kiss;

    b. At some point, the Accused asked the Complainant if she wanted "[his] cock in [her] pussy". There is some discrepancy as to when the Accused made this comment and what happened next. The parties agree, however, that the Complainant declined the offer; and

    c. The Accused and the Complainant eventually moved to the Complainant's bunk where they continued kissing. They also began to grind their bodies against one another, with the Complainant lying on her mattress and the Accused on top. While there is no disagreement that this occurred although, again, there is a discrepancy as to when this occurred in the sequence of events. There is also some discrepancy as to whether the Complainant ever consented to the Accused being fully in bed with her – as opposed to lying on top of her while she reclined at an angle on the side of the bed. I return to these issues below.

9. The evidence of the Accused and Complainant then re-aligns. In particular, at around 1:15 a.m., the Complainant began to scream and curse at the Accused. She demanded that the Accused immediately stop what he was doing and leave her room. The parties agree that the Accused immediately stopped and attempted to speak with the Complainant. However, the Complainant was upset and enraged. The Accused quickly left the room, as requested, and returned to his own room.

[20] There is a very significant disagreement as to what happened just prior to 1:15 a.m. and triggered the Complainant's upset. It is that disagreement which lies at the heart of this proceeding.

[21] The Accused states that the Complainant instructed him to take off his shoes, turn off the lights and return to bed where they continued to kiss. He says that the Complainant took his hand and guided it to her vagina. He says that there was indirect contact between his hand and the Complainant's vagina in that her underwear was always covering her vagina. Based on her actions, the Accused believed that the Complainant was a conscious and consenting partner throughout. He was very surprised when the Complainant suddenly became upset. He tried to talk to her, but she was furious. So, he complied with her demands to immediately leave the room.

[22] The Complainant says that she became disinterested in any further intimacy. She agreed that the Accused could sleep in her room. However, she said that she asked him to turn out the light and move to another bunk bed. The Complainant says that she turned over on her side and immediately went to sleep. Her next recollection was the shocking sensation of being digitally penetrated from behind. She recalls that her yoga pants were pulled down and the force of the digital penetration was pushing her head into her pillow. She also said that her shirt had been pulled up into an awkward position which restricted her arm movements. She began screaming and swearing at the Accused. She yelled that he leave her bed and her room. She agrees that the Accused complied and immediately left although she remained upset and angry.

[23] At this stage in the narrative, the evidence of the Accused and the Complainant re-aligns or at least is not contentious.

[24] The Complainant's screams did not go unnoticed by their fellow recruits in the barracks. Another recruit (Private Kenneth Hunter) sent a Facebook message to the Complainant and asked if she was okay. As indicated, Kenneth Hunter was also one of the Accused's roommates. The Complainant sent a message back to Private Hunter that said "Not. Fucking. Happy." And "[The Accused] just tried to rape me." I pause here to note that the Accused does not challenge these messages were sent but obviously disputes how the characterization of his actions.

[25] In any event, the Complainant's message to Private Hunter also contained the following additional details:

> "I woke up with my shirt and pants half off and him aggressively fingering me and im [*sic*.] about ready to kill him"
>
> "We were drinking, he said he wanted to have sex with me, I said no, he asked if I mind I'd [*sic*.] he stay in the room, I said I was fine with it, I passed out, then woke up to my shirt off one arm, bra pulled up, pants have down and his fingers inside of me. Then I started screaming at him to get out."

[26] At around the same time, the Accused began sending a number of apologetic messages to the Complainant. The Accused said that he did not know what came over him and that he was sorry. He asked what he could do, including leaving the military.

[27] The Complainant did not respond to the Accused. She continued her conversation with Private Hunter. Eventually, Private Hunter and the Complainant arranged to quietly leave the dormitory and report the incident to the Duty Officer, Master Corporal Hirwa.

[28] Master Corporal Hirwa asked that the Complainant provide a handwritten statement. This statement was lost, as indicated. At the same time, Master Corporal Hirwa arranged to immediately transport Private Hunter and the Complainant to CFB Greenwood, a 30-minute drive away. Immediately upon arriving at CFB Greenwood, the Military Police arranged for the Complainant to be examined by a S.A.N.E. nurse. No physical evidence of a sexual assault was found and the results of this examination were not placed in evidence. The Military Police also began their investigation which included taking a lengthy recorded statement from the Complainant within 12 hours of the alleged assault.

ANALYSIS

[29] Several preliminary, important observations regarding the evidence summarized above and the use that can be made of this evidence must be emphasized because they are important.

[30] Portions of the evidence involved the increasingly personal and, at times, highly sexualized content of the online exchanges between the Complainant. It also involved certain sexual activity between the Complainant and the Accused in the hour or so prior to the alleged sexual assault. The parties agree that this prior sexual activity was consensual. However, for clarity, I emphatically and decidedly confirm that:

1. I do not find that this evidence either implies or suggests or constitutes "advance consent" by the Complainant to the allegations of subsequent sexual activity that comprises the charges against the Accused. The jurisprudence confirms that there is no such thing as "advance consent" to sexual activity. In *R.* v. *J.A.*, 2011 SCC 28, the Supreme Court of Canada recognized that Parliament has made "…it clear that ongoing, conscious **and present** consent to "the sexual activity in question" is required" (at paragraph 65, emphasis added). In this case, the Crown concedes that certain mild sexual activity was consensual but maintains that it culminated with the Accused committing a non-consensual sexual assault;
2. This evidence cannot support the kind of archaic twin myth reasoning that has been resoundingly and repeatedly rejected by both Parliament (section 276(1) of the *Criminal Code*) and the Supreme Court of Canada (see, for example, *R.* v. *Goldfinch*, 2019 SCC 38 at paragraphs 34 - 37). I specifically do not find that the personal, sexual communications between the Complainant and the Accused and their consensual sexual activity somehow makes the Complainant more likely to have consented to the sexual activity which formed the basis of the charges against the Accused. Nor do I find that their personal communications and consensual sexual acts make the Complainant less worthy of belief.

[31] Mindful of these cautions and cognizant that these evidentiary limitations must remain firmly in place, I turn to the essential elements of the crime of sexual offence and the evidence which bears upon the question of whether the Crown has proven each element beyond a reasonable doubt.

[32] The first essential element of the offence is that force must have been applied or threatened (section 265 of the *Criminal Code*). The law often refers to this element as part of the *actus reus*[1] of sexual assault. The second essential element is that the force must have been applied intentionally and that the accused knew he was touching the complainant's body in a way that reasonable person would deem sexual. In historic legal terminology, this is sometimes described as part of the *mens rea*[2] of sexual assault.

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[1] *Actus reus* is a Latin term which, translated literally, means a "guilty act". In this context, *actus reus* refers to the physical act or omission that forms part of the offense of sexual assault.

[2] *Mens rea* is also a Latin term. Translated literally, it means a "guilty mind". In this context, *mens rea* refers to mental element of the offence or the Accused's state of mind.

[33] These first two elements of the offence have been proven beyond a reasonable doubt. The Accused applied force to the Complainant. The Accused knew he was touching body in a way that reasonable person would deem sexual. The testimony of the Accused and the Complainant reveals a very significant difference as to the nature of the sexual activity which occurred. The Accused agreed that he indirectly touched the Complainant's vagina under her pants but over her underwear. The Complainant testified that the Accused pulled down her pants and used his fingers to aggressively penetrate her vagina. I consider this conflicting testimony below. However, for the purposes of examining the first two essential elements of sexual assault and regardless of which version of events is accepted, the evidence clearly confirms intentional touching by the Accused in a way which any reasonable person would consider sexual.

[34] The analysis turns to the third element of the offence: consent. Consent is the pivotal issue in this case. The question becomes whether the Crown has proven beyond a reasonable doubt that the Complainant did not consent to this sexual touching.

[35] Section 273.1 of the Criminal Code defines consent as follows:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> Consent
>
> (1.1) Consent must be present at the time the sexual activity in question takes place.
>
> Question of law
>
> (1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.
>
> No consent obtained
>
> (2) For the purpose of subsection (1), no consent is obtained if
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (a.1) the complainant is unconscious;
>
> (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> Subsection (2) not limiting
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[36] From a legal perspective, the presence or absence of consent is measured by reference to the complainant's subjective state of mind towards the conduct when it occurred. The accused's state of mind is irrelevant. If the complainant did not subjectively agree, there is no consent (*R v Ewanchuk*, [1999] 1 SCR 330 at 347).

[37] That said, even though the Court focusses on the complainant's subjective state of mind, the mere fact that a complainant says they did not consent to the sexual act in question does not end the inquiry. The totality of the evidence (including evidence from an accused) may yet leave a reasonable doubt as to whether consent has been proven.

[38] The following, more specific and related restrictions on the issue of "consent" in the context of sexual assault bear emphasis:

1. I repeat that the law does not recognize either implied consent or "advance consent"; and
2. Consent must be specific to the activity (or force) in question. Equally, a complainant may consent to certain sexual activity, but consent is neither unqualified in nature nor indefinite in time. A complainant may place limitations on the nature of the sexual activity and a complainant may withdraw her consent.

[39] Finally, many allegations of sexual assault occur in circumstances that are private and intimate. And the evidence around consent is often limited to the conflicting testimony of the complainant and the accused. As such, whether the Crown has proven the lack of consent beyond a reasonable doubt often turns on questions of credibility and reliability.

[40] Credibility is sometimes referred to as "honesty" and reliability is sometimes referred to as "accuracy" (*R.* v. *MJL*, 2021 ABCA 41 at paragraph 10). Honest, credible people may still be mistaken in their recollections; and their testimony

might, therefore, be unreliable. In *Cameco Corporation* v *The Queen*, 2018 TCC 195, the Court elaborated:

> [11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In *R. v. Norman*, [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:
>
> > ... The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount...

[41] The process of assessing credibility and reliability is difficult. It is not a precise science (*R* v *H(GE)*, 2012 NSCA 69 and *R. v. M. (R.E.)*, 2008 SCC 51 at paragraph 49). In *R* v *Gagnon*, 2006 SCC 17, the Supreme Court of Canada recognized the difficulty associated with sifting through the evidence and trying 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" (at paragraph 20). Saunders, JA similarly commented in in *R* v *DDS*, 2006 NSCA 34 at paragraph 77 that: “There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity.”

[42] Despite these problems, the Court must still render a determination as to credibility and reliability based on the evidence presented as a whole. In *Baker v. Aboud*, 2017 NSSC 42, Forgeron, J provides the following helpful list of issues and questions to be taken into account when assessing credibility and reliability:

> • 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 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), 1993 CanLII 3387 (ON CA), 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*, 1951 CanLII 252 (BC CA), [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?
>
> (at paragraph 13)

[43] Finally, the Court does not approach credibility and reliability in an arbitrary fashion without regard to those bedrock principles (including the presumption of innocence) upon which the criminal law in built. The jurisprudence confirms that the following important, distinct principles apply when making findings regarding credibility and reliability within a criminal prosecution:

1. As mentioned, the analytical framework created by the Supreme Court of Canada in *W.(D.)* comes into play. In *W.(D.)*, Justice Cory on behalf of the majority, instructed triers of fact in applying the burden of proof where evidence has been led on behalf of the accused. He wrote that the trier of fact: “need not firmly believe or disbelieve any witness or set of witnesses" (at paragraph. 27). And he approved the following analytical sequence at paragraph 28:

> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

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

2. In *R. v. S. (J.H.)*, 2008 SCC 30, the Supreme Court of Canada emphasized that the specific questions listed in *W.(D.)* were not to be rigidly repeated in a manner that suggested an unintended "level of sanctity or immutable perfection". Rather: "The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt" (at paragraph 13). These comments echoed the following earlier statement by from Cromwell, J.A. (as he then was) in *R* v *C.*, 2004 NSCA 135:

> The *W.(D.)* principle is not a magic incantation which trial judges acting as triers of fact must mouth to avoid appellate intervention. The question for the appellate court in a judge alone case is whether, upon consideration of the whole of the judge's decision and the evidence at trial, it appears that the judge did not apply the proper test and therefore did not apply his or her mind to the possibility that despite having rejected the evidence of the respondent, there might nevertheless be a reasonable doubt: *R. v. Brown* (1994), 132 N.S.R. (2d) 224 (N.S. C.A.); *Sheppard* at para. 65.
>
> (at paragraph 21)

3. In the more recent decision of *R.* v *Gauthier*, 2022 ABCA 121, the Alberta Court of Appeal synthesized the principles which apply to the *W.(D.)* analysis as follows:

> i. The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown (subject to the caveat that this does not apply to defences, such as that found in s 16 of the Criminal Code, where the onus rests with the proponent of the defence);
>
> ii. In that context, if the accused's evidence denying complicity or guilt (or any other exculpatory evidence to that effect) is believed, or even if not believed still leaves the jury with a reasonable doubt that it may be true, then the jury is required to acquit (again subject to defences with additional elements such as an objective component);

> iii. While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit; and
>
> iv. Even if the jury completely rejects the accused's evidence (or where applicable, other exculpatory evidence), they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.
>
> (at paragraph 30)

[44] Bearing these principles in mind, I return to the evidence before me.

[45] I did not find the Accused to be an entirely reliable or credible witness. For example, the Accused testified that he was carefully counting the amount of alcohol being consumed by the Complainant in the hours leading up to the alleged assault and could recall with precision the exact number of drinks she consumed. At the same time, he was drinking and socializing with numerous other recruits in the room. His evidence on this point was incredulous.

[46] In the immediate aftermath of the incident, the Accused's testimony that many of his actions were almost singularly motivated by concern for his partner was similarly incredulous.

[47] Having said, there were aspects of the Accused's evidence that I do accept. In particular, I find that:

1. The Complainant was not exceedingly intoxicated on the evening in question. On this, the Accused's evidence was supported by that of Private Hunter whose evidence was clear and candid. Private Hunter met with the Complainant immediately after the alleged assault, as indicated. He formed the opinion that the Complainant had consumed alcohol but not to the point of heavy intoxication. Finally, I note that Master Corporal Hirwa (the Duty Officer at Camp Aldershot on the night in question) believed that the Complainant was sufficiently sober to prepare a handwritten statement;

2. The Complainant and the Accused had quickly become close friends and were flirting. This conclusion is exceedingly obvious based on the Facebook Messenger messages in evidence and, as well, the fact that the Accused and the Complainant agree that there were engaged in mild, consensual activity leading up to the alleged assault.

3. The Complainant and the Accused began kissing for a period of time before moving to the Complainant's bunk bed. As they were moving across the room, I find that the Accused picked the Complainant up and then gently dropped her on the bunk bed;

4. The Complainant asked the Accused to remove his shoes. She did so because she understandably did not like having a person in her bed with dirt or shoes still on their feet. I find that the Complainant made this statement because the Accused would be lying in the bunk bed beside her – and not simply lying on top of her while she was reclining on the side of her bed. I also find that the Complainant would have made this statement just before asking the Accused to turn out the light and with the understanding that he would return to the Complainant's bunk bed; and

5. It is agreed that the Accused asked the Complainant if she wanted "[his] cock in [her] pussy". It is further agreed that the Complainant declined. I find that, for a period of time after this statement was made, the Accused and the Complainant continued their mild sexual interactions.

[48] Before continuing, I am compelled to repeat what was stated earlier. I have made factual findings regarding the Complainant's level of intoxication and the decision by the Complainant and the Accused to engage in mild sexual activity prior to the allegations of sexual assault. I do not find, and I expressly reject any suggestion that the Complainant impliedly consented to the sexual activity that followed or provided her advance consent to ongoing sexual contact. I also do not find and reject any suggestion that the Complainant's decision to engage in this mild sexual activity makes her less worthy of belief. Instead, I make the findings of fact summarized above because they highlight inconsistencies in the evidence that bear upon my findings of credibility and reliability regarding the issue of consent.

[49] With that, I compare the factual findings summarized above against the Complainant's evidence:

1. As to the Complainant's level of intoxication, the Complainant's evidence was inconsistent and prone to exaggeration. During her examination in chief, the Complainant testified that she bought 12 alcoholic "Twisted Lemonades" and drank 6-8 of them on the night in question. However, at the preliminary inquiry, she said that she only drank 4. In addition, in her statement to the Military Police shortly after the alleged sexual assault, the Complainant stated that she was "drunk as a skunk". During her Preliminary Inquiry, she stated that she and the Accused were "very intoxicated". I find her evidence on this point to be an overstatement;

2. As to the nature of the Accused's relationship with the Complainant, I find that the Complainant downplayed and diminished the close connection she developed with the Accused. When giving a statement to the Military Police shortly after the alleged assault, the Complainant described the Accused as a "passing acquaintance". However, they were more than that. During the preliminary inquiry, she qualified her evidence and acknowledged that she and the Accused were "friends". Nevertheless, I find that the Complainant's original statements to the Military Police created the impression that she and the Accused were not particularly close, and that the Accused took advantage of somebody he did not know very well. This impression is inconsistent with the evidence and my findings of fact. At trial, the Complainant similarly denied any romantic attraction to the Accused. And she took the position that, in her view, her communication with the Accused set clear boundaries. She points to the Facebook Messenger message after she shared in graphic terms an intensely private sexual experience and then said that they were now stuck being friends. Respectfully, the evidence does not accord with the sort of clear romantic boundaries the Complainant states were set;

3. As to the manner by which the Accused and the Complainant moved from kissing in the middle of the room to the Complainant's bed, in her original statement to the Military Police, the Complainant said that the Accused "threw" her on the bed. The investigating officer taking her statement shortly after the alleged assault used the word "slammed" when confirming his understanding of the Accused's actions. I acknowledge and accept that she subsequently clarified that the activity was still consensual at this point and not aggressive. At trial, she acknowledged that she may not have properly articulated the

Accused's actions during that point of the narrative but that she did not intend to communicate aggressive behaviour. Nevertheless, her choice of words conveyed a certain level of physical dominance at this stage in the evening that did not exist;

4. As to the Accused removing his shoes, the Complainant's evidence was equivocal and imprecise. During her evidence at trial, the Complainant agreed that the Accused probably removed his shoes while they were in the "vicinity" of her bed. She explained she hated it when people have their shoes on her bed. However, she denied that the Accused was ever lying beside her in the bunk bed and that her request to take his shoes off was probably made simply because the Accused was in the vicinity of the bed or perched over the bed. I do not accept the Complainant's evidence on this point. Rather, I accept the evidence of the Accused that he complied with the Complainant's request to take off his shoes before he lay in bed with her and, as well, that the Accused did lie fully in bed beside the Complainant and with the Complainant's consent;

5. There is a question as to when the Accused asked the Complainant whether she wanted "[his] cock in [her] pussy" and the impact this statement had on her. The Complainant testified that he made this statement while the Accused was lying on her in the bunk bed. She further said that this statement chilled her desire to continue any further sexual activity and that, shortly after he made this comment, she asked the Accused to go to another bunk and turn out the light. She said that she then turned over in bed and immediately went to sleep. The Accused agreed that he made this statement but that it was made while the two were still standing in the middle of the room, kissing. The Accused said that after he made this statement, the Complainant declined but that the two continued with this mild sexual activity. On this issue, I accept the evidence of the Accused in that I find this statement was made before the Accused took off his shoes and lay beside the Complainant in her bed, with the Complainant's consent.

[50] There were certain additional issues. For example, the Complainant stated that when she awoke, the Accused was vigorously penetrating her vagina and that she could feel his fingernails scratching, and the force of his actions was pushing her head into the pillow. No evidence of such aggressive scratching was presented

although, as indicated, the Complainant was examined by a S.A.N.E. nurse soon after the events in question. That said, to be clear, when assessing the Complainant's credibility and reliability, I ascribe little weight to lack of physical evidence to corroborate this aspect of the Complainant's testimony. I am not prepared to diminish the Complainant's personal sensitivities and emotions to those that which might (or might not) be found by a S.A.N.E. nurse.

[51] Despite these issues, I do not find that the Complainant's evidence was entirely lacking in credibility or reliability. On the contrary, I accept portions of her evidence. For example, I agree that it was the Accused who usually volunteered compliments. The Accused was constantly complimenting the Complainant. She accepted those compliments. The reverse is not true. The Complainant did not reciprocate by complimenting the Accused. Moreover, the Accused clearly took the lead by initiating the more personal aspects of their online discussions.

[52] The Complainant also demonstrated self-awareness and candor when she described herself as a person who "overshares". I agree with her assessment. I further agree that this was a difficult time for the Complainant and that she was looking for a comforting presence. She and her boyfriend had recently split up and her continued communications with him often left her emotional, lonely and with a degree of personal fragility. She was searching for new friendships and hoped to replace the close sense of military camaraderie she established with certain members in her original platoon.

[53] Finally, the uncontradicted evidence is that the Complainant became extremely angry and upset at the end of her interaction with the Accused. By way of response, the Accused quickly complied with her demands to leave the room. He then repeatedly apologized to the Complainant. That said, these events occurred after the alleged assault. While they may be relevant, I am extremely hesitant to assign undue weight to the reactions of the parties after the event in question. There could be numerous reasons motivating the parties' various responses. Given the evidence before me, the actions of the parties after the events in question are not determinative of the Accused's guilt and, more importantly, they do not dispel the significant concerns I have regarding the Complainant's credibility on the issue of consent.

[54] Overall, the concerns I have regarding the Complainant's credibility and reliability particularly with respect to the facts leading up to and immediately

preceding the alleged assault. Those concerns around credibility and reliability leave me with a reasonable doubt regarding the Complainant's testimony around what actually occurred in the early hours of April 27, 2019, and, in particular, the issue of consent at the time of the sexual activity which forms the basis of this criminal proceeding. In the circumstances, it would be unsafe to convict the accused while harbouring these concerns around the Complainant's credibility and reliability.

[55] The Crown has failed to prove this essential element of the offence (i.e., the lack of consent) beyond a reasonable doubt.

[56] I find the accused not guilty of the charges set out in the Indictment against him.

Keith, J.