



## COURT MARTIAL

**Citation:** *R. v. Cooper*, 2018 CM 2013

**Date:** 20180312

**Docket:** 201705

Standing Court Martial

Halifax Courtroom Suite 505  
Halifax, Nova Scotia, Canada

**Between:**

**Her Majesty the Queen**

**- and -**

**Master Seaman D.T. Cooper, Accused**

**Before:** Commander S.M. Sukstorf, M.J.

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**Restriction on Publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.**

### **REASONS FOR FINDING**

(Orally)

#### **The case**

[1] Master Seaman Cooper is charged with one offence under section 130 of the *National Defence Act* (NDA), that is to say, sexual assault contrary to section 271 of the *Criminal Code* and a second offence under section 95 of the NDA for ill-treating a person who by reason of rank or appointment was subordinate to him. The particulars of the two charges read as follows:

**“FIRST CHARGE      AN      OFFENCE      PUNISHABLE      UNDER**

Section 130 of the  
*National Defence Act*

**SECTION 130 OF THE NATIONAL  
DEFENCE ACT, THAT IS TO SAY,  
SEXUAL ASSAULT, CONTRARY TO  
SECTION 271 OF THE CRIMINAL CODE**

*Particulars:* In that he, on or about 10 November 2015, onboard HMCS ATHABASKAN, at or near Rota, Spain, did commit a sexual assault on B.H.J.

**SECOND CHARGE**  
Section 95 of the  
*National Defence Act*

**ILL-TREATED A PERSON WHO BY  
REASON OF RANK OR APPOINTMENT  
WAS SUBORDINATE TO HIM**

*Particulars:* In that he, on or about 10 November 2015, onboard HMCS ATHABASKAN, at or near Rota, Spain, ill-treated B.H.J by touching his genitals.”

[2] In reaching the Court’s decision, I reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on each of the charges.

***Evidence***

[3] The following evidence was adduced at the court martial:

- (a) In court, testimony of the prosecution’s witnesses being that of the complainant, B.H.J. as well as Able Seaman Cameron;
- (b) In court, testimony of Master Seaman Cooper (accused) testifying in his own defence;
- (c) Exhibits 3-1 and 3-2, Admissions by the accused;
- (d) Exhibit 4: Binder of photographs totaling ten;
- (e) Exhibit 5: DVD entitled "2015 - 22819";
- (f) Exhibit 6: Transcript; and
- (g) The Court also took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence (MRE)*.

**Factual overview**

[4] The two charges before the court emanate from one incident when the accused, Master Seaman Cooper, and the complainant, B.H.J. were members of Her Majesty's Canadian Ship (HMCS) *Athabaskan* based in Halifax, Nova Scotia. In the fall of 2015, both were onboard HMCS *Athabaskan*, at or near Rota, Spain when the alleged incident occurred.

[5] The complainant, B.H.J., alleged that on 10 November 2015, after an evening of drinking, he went to bed around 1:00 a.m. and at approximately 4:30 a.m., he awoke with the accused, a superior, in his bunk performing fellatio on him.

[6] The accused, Master Seaman Cooper, admitted that:

- (a) on 10 November 2015, between 0001 hours and 0530 hours, he carried out a sexual act in the form of fellatio on B.H.J. (i.e. the accused put his mouth on and around B.H.J.'s penis);
- (b) the sexual act occurred in B.H.J.'s bed-space (commonly referred to as "rack"), in 13 mess onboard HMCS *Athabaskan*, while HMCS *Athabaskan* was at or near Rota, Spain; and
- (c) B.H.J. and Ordinary Seaman Cameron first reported the alleged sexual assault to Sub-Lieutenant Stacey and Lieutenant(Navy) Shields between 0500 hrs and 0530 hrs on 10 November 2015.

### **First charge – sexual assault**

#### ***Issue***

[7] In light of the admissions made by the accused, it is found that a sexual act occurred. The critical issue for this court martial to decide is whether the prosecution has proven the complainant's absence of consent beyond a reasonable doubt and that the accused knew or should have known of that absence of consent.

#### ***The complainant's version of the sexual assault***

[8] B.H.J. told the court that after 0800 hours on 9 November 2015, when he finished his duty watch, he took a cab to join a few shipmates at a hotel located about 15 minutes from the ship. He told the court that his duty shift had started at 4 a.m. and that he had only had a few hours of sleep the previous night, perhaps two or three.

[9] He told the court that he did not get a room himself as he did not have a leave pass and so he knew he would have to return to the ship by the curfew. Although he could not specifically recall when the curfew was, he told the court he respected it and returned on time. While at the hotel, they relaxed on the patio, at the bar and pool area

enjoying drinks. For lunch, he did not eat anything but he thinks he drank about three or four beer during that time frame.

[10] He stated that he had more drinks later in the afternoon. He told the court that they met up with Master Seaman Cooper later in the day at the hotel before supper and a group of them went to supper together where he enjoyed more drinks. He said that when he met up with Master Seaman Cooper, he would not classify himself as drunk and that he really did not become drunk until later in the night. On 9 November 2015, he stated that he drank beer (believes it was Corona beer) and he might have had a sangria. He does not remember taking any shots, spirits or drinking wine.

[11] He told the court that the group took a cab to the restaurant which was located approximately five to ten minutes away from the hotel. At the restaurant, he stated he intermingled with the group, but does not remember who was sitting next to him. In his recollection, there were four of them in total. After supper, they took a cab back to the hotel. He said that once back at the hotel, they visited together for a short while and then he and Master Seaman Cooper returned to the ship. He told the court that Master Seaman Cooper told him that he did not have a leave pass and he also had to return to the ship before curfew.

[12] He stated that they returned to the ship at approximately 10 p.m. B.H.J. paid for the cab and they eventually made their way to the main cafeteria (Main Cave) to have a few more drinks. He stated that there were approximately six to ten people in the Main Cave when they got there. He said he had two beer (Alexander Keith) at the Main Cave and defence proposed to him that he had a third drink paid for by Master Seaman Cooper.

[13] B.H.J. told the court that around 1 a.m., he called it a night. He stated that, at that point, he was definitely slurring his speech and struggling to walk. He said he left the main cave with Master Seaman Cooper and stopped at the washroom. He stated that he went into the stall and Master Seaman Cooper waited outside the stall. He said he thought Master Seaman Cooper stayed with him to make sure he did not fall and hurt himself. B.H.J. admitted that he was staggering and losing his balance. The corridors are about six to seven feet wide and he admitted he hit the walls when he walked.

[14] In descending the ladder, he does not recall how he went down, but he specifically remembers going down because he struggled. He believes that he faced the stairs because he was drunk. He stated it was not the usual way to descend but it was the safest way, having three points of contact. He said Master Seaman Cooper went ahead of him and waited for him.

[15] After that, he told the court they both said good night and Master Seaman Cooper went to his rack and B.H.J. went to his. B.H.J. told the court that once he was in his bed space, he took off his sweater and jeans removing them while he was in his rack which was located on the top of three bunks. He said, once in his rack, he fell asleep in a few minutes. He said he felt very drunk which is why he fell asleep so quickly. When

asked to describe his usual practice in going to sleep, he told the court that it was his practice to close the curtains which he would have done on that evening.

[16] He testified that at approximately 4:30 a.m., he awoke from his sleep with a man's mouth on his penis. B.H.J. told the court that he was groggy and tried to figure out what was going on. He told the court that in terms of time, it was only a few seconds that the man's mouth was over his penis and then, ten seconds later, the man's mouth was going up and down using his tongue and mouth, performing fellatio. He does not remember feeling anything else. He stated that this went on for a few seconds before he heard him say, "Come for me, B.H.J. Come for me," in a sexual and whisper-like voice. He told the court that he did not recognize the voice until about 20 seconds into the incident.

[17] B.H.J. told the court that when he woke up and realized what was happening, he was in shock and he froze. His first thought was for his own safety before trying to remove the person. He told the court that while lying as still as possible, he tried to wake Able Seaman Cameron in the rack below him saying, "I think I am getting raped. I need your help." He told the court that he used a whisper voice to not alert the person assaulting him. He told the court that he was lying on his back and he continued to attempt to reach Able Seaman Cameron in the rack below him, reaching down with his left hand. B.H.J. thinks he touched Able Seaman Cameron's arm and shoulder as he hit him trying to get him to stir. The complainant recounted that, he whispered "Help me. I need you to get up. I am pretty sure I am getting raped right now." He told the court that Able Seaman Cameron responded, but that he did not believe him. His response was "You are drunk. I have duty in a few hours. Go back to sleep."

[18] B.H.J. said he tried three times to get Able Seaman Cameron's help. However, as soon as the person removed his mouth, he sat up and said, "Look, I am not gay." The person said, "Oh sorry" and immediately left. B.H.J. told the court that when the person left, Able Seaman Cameron realized that something had in fact happened and he got up to check on him. He told the court that Able Seaman Cameron told him to get dressed and meet him on top of the ladder. B.H.J. told the court that both he and Able Seaman Cameron reported the incident immediately.

[19] B.H.J. was firm in his testimony that the incident began when he was asleep and that he did not in any way invite Master Seaman Cooper into his rack. He emphatically stated that at no point did he initiate any physical act, consent to fellatio or any other sexual activity.

#### ***Master Seaman Cooper's version of the sexual encounter***

[20] Master Seaman Cooper told the court that he had checked into the hotel on the 8th of November, the day before B.H.J. went to the hotel. He was with numerous other members of his department. He told the court that since their deployment was over, the drinking restrictions had been removed and the shore visit was a decompression period.

[21] He said that normally the bar on the ship would close at midnight, but bar hours were extended to 2 a.m. for the first four evenings they were alongside and leave expired at 1 a.m. He told the court that he was not due back to the ship until the following day and could have stayed overnight at the hotel as he had a leave pass.

[22] He explained that on the evening in question, a group of them went to a restaurant to eat and since they had no reservation, they were there when it opened at 6:30 p.m. He stated that supper lasted about one to one and a half hours. When asked to explain his level of intoxication, he said that he had “a good buzz”, but did not feel that he was fully intoxicated. He told the court that they returned to the hotel around 8-8:30 p.m. and they sat around the pool area chatting. He told the court that he ordered two more pitchers of sangria which were shared. He said that close to midnight he went back to his hotel room to use the bathroom and, when he returned, only B.H.J. was there as the others had gone to other areas or had retired for the night.

[23] Master Seaman Cooper stated that he asked B.H.J. if he had a leave pass for the evening as he would have let him stay in his room overnight. However, since he knew that B.H.J. had to be on HMCS *Halifax* at 8 a.m. the next morning to do training, he did not think B.H.J. was in a state to get back to the ship by himself. When asked to describe B.H.J.’s level of intoxication, he told the court that he did not believe he was so drunk that he was incoherent, but he still thought he should accompany him back to the ship. Master Seaman Cooper told the court that, just after midnight, he got his stuff, checked out of the hotel and they headed back to the ship.

[24] By the time they got back to the ship and to the Main Cafeteria (also referred to as the Mess or the Main Cave), he told the court it was about 1:15 a.m.

[25] He told the court that while they were down in the Main Cave, at one point, B.H.J. went to get another beer and bought one for him and then he put his arm around Master Seaman Cooper’s shoulders and said, “So, Cooper, I heard from the others that you were gay.” Master Seaman Cooper told the court that he was taken aback by such a comment as he did not know B.H.J. that well. He said he was not offended by the comment, but his sexuality was not something that he was very open about. He told the court that it was a one-time statement by B.H.J. and there was no further discussion about this subject after that. He told the court that, at that stage, B.H.J. was intoxicated and was getting wobbly on his feet when he got up abruptly and left the mess. He stated that B.H.J. went into the Chief and Petty Officers’ heads and wash place and puked in the far shower stall. He told the court that he had followed B.H.J. to make sure he was all right and saw B.H.J. Vomit. He told the court that he, Master Seaman Cooper, cleaned it up and washed it down because he did not want the duty personnel doing cleaning stations to have to deal with it.

[26] He stated that after that they went back to the main cave, finished their drinks and the bar closed and they made their way down the flats towards 13 mess. He told the court that on their way to 13 Mess, they went into No. 3 heads and wash place. He

stated that B.H.J. went into the first stall and got sick again or at least he retched. He stated that he waited for B.H.J. outside the stall.

[27] Master Seaman Cooper said that once B.H.J. had finished in the stall, B.H.J. said that it was best that he went to bed. Master Seaman Cooper told the court that he went down the ladder first and B.H.J. followed, wobbling as he descended. In his direct examination, Master Seaman Cooper said that once they were down the ladder, they moved over to the settee area where they started chatting about the events of the night and the upcoming training the next morning. Master Seaman Cooper told the court that B.H.J. changed at his locker to go to bed and then after changing himself, Master Seaman Cooper came back to see if B.H.J. was okay. Also, in his direct examination, he told the court that he did not think that either of them were so drunk that they were slurring their words.

[28] He told the court that it was at that point he noticed that B.H.J. had an erection which showed through his underwear. He said B.H.J. laughed. Master Seaman Cooper said he asked B.H.J., "Do you want me to help you out with that?" to which he told the court that B.H.J. replied, "Yeah, I guess."

[29] Master Seaman Cooper stated that he was also very drunk because he would not normally have made a pass at someone he works with. He told the court that because he was inebriated, his inhibitions were reduced. He stated that B.H.J. then said, "I am going to go to bed now," and Master Seaman Cooper asked him again, "You sure you want me to help you out?"

[30] He told the court that he felt that they were both able to coherently discuss having sex and he had no indication that B.H.J. was not receptive to his offer. He stated that B.H.J. motioned for him to follow him to his rack, saying that in his experience this is the motion that someone would use to indicate when they want to do something together. He said that, at that point, he asked him again, "Are you sure you want?" He stated that he asked B.H.J. again before he got into the rack, "Are you okay with it?"

[31] He told the court that B.H.J. got into the bunk first and he followed. He testified that he started to stroke B.H.J.'s erection through his underwear which remained erect the entire time. He stated that B.H.J. was clearly enjoying it, as he was groaning. He told the court he took these signs as an indication to continue, so he stroked B.H.J. before he pulled down B.H.J.'s underwear and then started to thrust B.H.J.'s penis with his hand. He stated he stroked him a few more seconds before he proceeded to perform fellatio. He stated that B.H.J. shifted upwards to make it easier for him to remove his underwear and he pushed himself back towards his pillow so he could pull them down easier. He told the court that B.H.J. did not say anything to express objection. He did not say "stop" or that he did not want it.

[32] He told the court that during the activity he did not ask B.H.J. verbally whether he could continue, but he was paying attention to how B.H.J. was reacting, groaning, etc. He stated that he pulled B.H.J.'s underwear down to his knees. In his direct

examination, he told the court that when he performed the fellatio, he could feel B.H.J.'s left hand on his shoulder, pushing him down for about ten minutes or so. He stated that, through the duration, B.H.J.'s hand was on his shoulder, pushing him down a bit. He told the court that at one point, he pulled off him a bit and B.H.J. sat up a bit and said, "Hey man, I'm not gay. Can you stop?" Master Seaman Cooper told the court that he felt that B.H.J. asked him to stop because he clearly did not want him to "finish him." Master Seaman Cooper stated that, after that, he returned to his own rack.

### ***Events immediately after the alleged sexual assault***

[33] Able Seaman Cameron and B.H.J. immediately reported the incident. They spoke with Sub-Lieutenant Stacey in the combat office, who advised Lieutenant(Navy) Shields who was the Officer of the Day.

[34] They estimate that they reported the incident around 0500 hours that morning. Both Able Seaman Cameron and B.H.J. stated that B.H.J. was in shock at that time. However, B.H.J. said that the incident sobered him up. After he reported it, Lieutenant (Navy) Shields brought him to HMCS *Halifax* to see the doctor. A rape kit and swabs were subsequently completed.

### ***Other relevant evidence – testimony of Able Seaman Cameron***

[35] Able Seaman Cameron testified that he had a professional relationship with B.H.J. and although they were friends at work, they did not have a friendship outside of work. He confirmed for the court that on the night before the incident, he was on duty and went to the Main Cave as soon as he got off duty, around 12:30 a.m., where he spoke to B.H.J. and noted that he was intoxicated.

[36] Able Seaman Cameron told the court that he had only gone to the Main Cave for water, so he did not stay there long and went to bed right after. He did not notice when B.H.J. went to bed. He told the court that he was sleeping in the bunk immediately below B.H.J. with his curtain closed when he woke up around 4:30 a.m. when his curtain hit him in the face.

[37] Able Seaman Cameron told the court that approximately five to ten minutes after he woke up from someone hitting his curtain, he heard B.H.J. telling him that there was someone in his rack "sucking his dick." Able Seaman Cameron told the court that he thought B.H.J. was drunk and being stupid. Able Seaman Cameron said he just wanted to get B.H.J. to stop. Able Seaman Cameron confessed to the court that he was frustrated and told B.H.J. to "fuck off," as he needed to sleep because he was on duty the next morning. He told the court that at pretty much every foreign port people are screwing around so he thought that B.H.J. was just acting stupid.

[38] He told the court that he then opened his curtain so B.H.J. would stop hitting it and then B.H.J. started to hit Cameron directly. And B.H.J. said, "There is someone in my rack," and B.H.J. kept hitting him. Able Seaman Cameron again told him to stop.

He said he could hear loud moaning voices which he described as “produced moaning” saying that it sounded very fake or produced, as if he was trying to get attention. Able Seaman Cameron told the court that he kept batting B.H.J. away as B.H.J. reached down and tried to grab him to get his attention. Able Seaman Cameron told the court that he was originally lying on his back, but he rolled over on his side to avoid B.H.J. hitting him, but B.H.J. continued.

[39] When his memory was refreshed with his statement, he said he heard B.H.J. say something like, “Get the fuck out.” Shortly thereafter, when Able Seaman Cameron saw a pair of legs coming from the rack, he got up and spoke with B.H.J.

[40] He stated that B.H.J. appeared to be in shock and he asked him, “What the fuck was going on?” to which B.H.J. replied, “Someone was in my rack.” He can’t recall the exact words that were said but that it was something like, “Someone sucked [his] dick.”

[41] After that, Able Seaman Cameron said he told B.H.J. to get out of his rack and told him to go up to the mess deck so they could discuss what happened. He does not recall B.H.J. telling him at that point, as to who the perpetrator was. Once up top, they discussed the incident and B.H.J. told him that it was Master Seaman Cooper. Able Seaman Cameron told the court that B.H.J. was “freaking out,” thinking that he would get in trouble because he recognized the person in his rack as being Master Seaman Cooper. Under cross-examination, he told the court that B.H.J. was worried that he was going to get in trouble, because Master Seaman Cooper was his boss and that nobody would believe him. Able Seaman Cameron told the court this is why he asked him several times to confirm his story. He told the court he wanted to make sure that B.H.J. did not make any allegations that were untrue. He said that B.H.J. was essentially a “wreck” and he could not really speak or form a sentence. So Able Seaman Cameron had to explain to Sub-Lieutenant Stacey what happened, but he froze himself and then B.H.J. blurted out, “I was just raped,” and then B.H.J. explained who the offender was.

[42] Able Seaman Cameron told the court that after that, they went down to the Coxswain’s office and provided separate statements. Able Seaman Cameron said he waited outside while B.H.J. provided his statement. He confirmed for the court that he personally provided his statement at 0530 hours that morning.

[43] When asked about how he felt after telling B.H.J. to “fuck off” when he was asking for his help, Able Seaman Cameron said he had absolute remorse, and that he felt like a “piece of shit.”

### **Theory of the prosecution**

[44] It is the prosecution’s position that the complainant B.H.J. did not consent to any sexual activity with Master Seaman Cooper and that he is credible and should be believed. The prosecution suggests that during some of the sexual activity, B.H.J. was asleep, after being intoxicated and that he lacked the capacity to consent. The

prosecution says that Master Seaman Cooper knew that the complainant did not consent and would not have consented.

### **Theory of the defence**

[45] The position of the defence is that the complainant consented to the sexual activity and that Master Seaman Cooper's evidence is credible and should be accepted. He submitted that Master Seaman Cooper took steps to ensure that the complainant consented. At a minimum, the defence says that Master Seaman Cooper's evidence raises a reasonable doubt with respect to the complainant's consent. In the alternative, the defence's position is that the complainant's evidence revealed that he had a patchy memory of events on a broad range of issues, undermining his reliability as a witness. He argued that he should not be believed as his lack of memory placed the defence in a position where he was not able to obtain any viable and meaningful cross-examination. He argued that the complainant's defensive approach and unwillingness to volunteer details that might place him in a bad light undermines his reliability and credibility. Finally, the defence says that Master Seaman Cooper's evidence should at least give rise to a reasonable doubt.

### **Applicable legal principles**

#### ***Presumption of innocence and the standard of proof beyond a reasonable doubt***

[46] Before providing an assessment of the charges before the court, it is appropriate for the court to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt.

[47] It is important to remember that the accused, Master Seaman Cooper, enters these proceedings presumed to be innocent. The burden of proof with respect to the charges remains on the prosecution. That presumption of innocence remains throughout the case until such time as the prosecution has, on the evidence put before the court, satisfied the court beyond a reasonable doubt that the accused is guilty on each of the charges.

[48] It is important to note that a trial judge must not apply a stricter standard of scrutiny to the evidence of the accused than it does to the evidence of the complainant. (See *R. v. H.C.*, 2009 ONCA 56, 241 CCC (3d) 45, paragraph 62). The prosecution's case is not made out simply because the testimony of the complainant might be preferred to the testimony of Master Seaman Cooper. In fact, it is possible to not believe some of what Master Seaman Cooper has testified to, but still be left in doubt as to whether the prosecution has established each of the elements of the offence beyond a reasonable doubt.

[49] So, what does the expression "beyond a reasonable doubt" mean? The term "beyond a reasonable doubt" is anchored in our history and traditions of justice. It is so

entrenched in our criminal law that some think it needs no explanation, yet its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320):

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[50] In essence, this means that even if I believe that Master Seaman Cooper is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to him and acquit because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt.

[51] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high.

[52] Therefore, in order to find Master Seaman Cooper guilty of the charges before the court, the onus is on the prosecution to prove something less than an absolute certainty, but something more than probable guilt for the charges set out in the charge sheet. (see *R. v. Starr*, [2000] 2 S.C.R. 144, paragraph 242)

### **First charge – section 130 of NDA**

[53] As stated earlier, the accused is facing one charge under section 130 of the *NDA*. The charge alleges that Master Seaman Cooper committed an offence under section 130 of the *NDA*, that is to say, sexual assault contrary to section 271 of the *Criminal Code*. It is particularized as follows:

*Particulars:* In that he, on or about 10 November 2015, onboard HMCS ATHABASKAN, at or near Rota, Spain, did commit a sexual assault on B.H.J.

### **Assessment of the evidence**

#### ***Essential elements of sexual assault***

[54] Section 271 of the *Criminal Code* reads, in part, as follows:

271. Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years.

[55] The predicate of sexual assault is that of the common offence of assault. Paragraph 265(1) of the *Criminal Code* sets out the elements of assault and reads, in part, as follows:

265(1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

[56] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, the Supreme Court of Canada (SCC) established that a conviction for sexual assault requires proof beyond reasonable doubt of two basic elements: that the accused committed the *actus reus*; and that he had the necessary *mens rea*, which is the mental intent.

[57] The *actus reus* of sexual assault requires:

- (a) the application of force, which the SCC in *Ewanchuk* recognized as any degree of force including touching is sufficient;
- (b) the second aspect is that the force must be sexual. There is no mental element associated with it being sexual. Rather, the test is whether the conduct in question, visible to a reasonable observer can be considered to be of a “sexual” nature. (see *R. v. Chase*, [1987], 2 S.C.R. 293)
- (c) the third aspect is that the touching must be without the consent of the complainant. For the purpose of this portion of the test under the *actus reus*, consent involves only the complainant’s internal state of mind. At this stage, it does not factor in what the accused thinks or what the accused was thinking. Is it the voluntary agreement of the complainant that the accused did what he did in the way in which he did it and when he did it? In other words, did the complainant want the accused to do what he did? There is no such thing as implied consent. A voluntary agreement is one made by a person, who is free to agree or disagree, of his or her own free will. It involves knowledge of what is going to happen and voluntary agreement to do it or let it be done.

[58] The *mens rea* or the mental element, is the intention of the accused to touch, knowing of, or being reckless of or willfully blind to, a lack of consent, either by words or actions, from the person being touched. It contains two elements: intention to touch; and knowing of, or being reckless of or willfully blind to a lack of consent on the part of the person touched.

[59] Based on the admissions by Master Seaman Cooper, in terms of the two charges before the court, there is no dispute regarding the elements concerning identity, date, location, as well as the occurrence of a sexual act or sexual touching.

[60] The issue for the court to determine is that of consent. The prosecution must prove that B.H.J. did not consent to the sexual touching that occurred and that the accused touched B.H.J. knowing of or being reckless of or willfully blind to, a lack of consent, either by words or actions of B.H.J.

### ***Application of the reasonable doubt principle in sexual assault cases***

[61] Having instructed myself on the presumption of innocence, reasonable doubt, the prosecution's onus, the required standard of proof and the essential elements of the offence, I now turn to the questions in issue and address the legal principles.

[62] Based on the nature of an act underlying a sexual assault, there are seldom eye-witnesses, other than the complainant or the accused. The court must not fall into the trap of believing that a sexual assault complainant is always truthful or that when they come forward they must be believed. To do this, would in effect transfer the burden of proof from the prosecution to the defence. This would be an error of law and would violate the accused's presumption of innocence.

[63] Pragmatically, there may be no other witnesses, nor physical or other corroborative evidence to support an allegation. What this means is that the prosecution faces particular challenges when allegations are not supported by anything other than the complainant's word. Nonetheless, there is no legal impediment to a court convicting an accused based on uncorroborated evidence of a single complainant. However, in assessing the facts, trial judges must avoid deciding the case based on the more credible version of the two accounts.

#### *Assessment of conflicting versions of events*

[64] With respect to the facts giving rise to the charges before the court, the accused and the complainant gave diametrically opposed versions of events with respect to the sexual encounter. In assessing a case with competing versions of what happened, where credibility is a central issue and the accused has testified, the SCC recommended that the issue be considered in three steps (commonly referred to as the *W.(D.)* instruction):

- (a) first, if I believe the evidence of Master Seaman Cooper, I must acquit;
- (b) second, if I do not believe the testimony of Master Seaman Cooper, but I am left in reasonable doubt by it, I must acquit;
- (c) third, even if I am left in doubt by the evidence of Master Seaman Cooper I must ask myself whether, on the basis of the evidence, which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[65] In *R. v. H. (C.W.)*, (1991), 68 C.C.C. (3d) 146 (B.C. C.A.), Wood JA suggested an addition to the second part of the three-part test set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. At paragraph 50 of *R. v. H. (C.W.)*, *supra*, his Lordship said:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[66] Generally, the outcome of a sexual assault trial will depend on the reliability and credibility of the evidence given by the complainant. The appropriate approach to

assessing the standard of proof is to weigh all the evidence and not assess individual items of evidence separately.

### ***Credibility of the witnesses***

[67] It is not unusual that that evidence presented before the court is contradictory. Witnesses may have different recollections of events and the court has to determine what evidence it finds credible and reliable.

[68] Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect?

[69] A court may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. In other words, credibility is not an all or nothing proposition. A finding that a witness is credible does not require a trier of fact to accept all the witness's testimony without qualification. Importantly, credibility is not co-extensive with proof. (see *R. v. Clark*, 2012 CMAC 3)

[70] There are other factors that come into play as well. For example, does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial?

[71] The *viva voce* evidence before the court consisted of the oral testimony of the complainant, B.H.J., and Able Seaman Cameron as well as the testimony of Master Seaman Cooper, the accused, who testified in his own defence.

[72] It is critical that the court avoid turning the fact-finding exercise into a choice in selecting the more credible version of the events. It is not a credibility contest. To do so would also improperly shift the burden of proof.

[73] In applying the SCC's *W.(D.)* instruction to the facts of a case, it is generally appropriate to begin with an analysis of the evidence of the accused. I must direct my mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt about his guilt.

### ***Credibility and reliability of Master Seaman Cooper***

[74] During direct examination, Master Seaman Cooper appeared very sincere, calm, composed, well-spoken and well prepared. Under cross-examination, he was forthcoming and candid and responded calmly and decisively to challenges by the prosecution.

[75] It is dangerous for a court to determine credibility based simply on demeanour; however, in this case the accused's demeanour provides a useful means in weighing his responsiveness to questions. In his testimony before the court, Master Seaman Cooper held a steady and very confident composure which the prosecution noted was very consistent with the calm, smooth and confident demeanour he displayed while being interviewed by the military police. In that interview with the military police, Master Seaman Cooper admitted that he refrained from offering all the details on the sexual encounter, but he assured the court that the rest of his statement to the military police was 100 per cent accurate.

[76] When challenged by the prosecution on his prior inconsistent statements and his apparent ease and capacity to appear truthful and sincere when he was not being truthful, he told the court that he simply told the story to the military police as far as he could and omitted the part of the sexual act. He stated that he did not take out other portions of the story nor did he fabricate anything. He explained to the court why he did not feel comfortable sharing the details of this homosexual encounter with the police who he did not feel would understand.

[77] As prosecution established in his cross-examination, in trying to avoid telling the military police about the sexual encounter in question, he, in effect, lied to the military police on a number of issues. When challenged on why he should be believed in court when he displayed the same demeanour that he displayed with the military police while lying, he testified that he was just uncomfortable going into the specific details with the military police and that they had been hostile and that they were not interested in hearing his side of the story. As the prosecution noted, the interview itself was clearly voluntary and, in the video, the military police were very patient and were definitely not pressuring him in any way. Although the court is sensitive to his concerns, it did note that he testified with the same level of confidence and demeanour with respect to very personal and explicit sexual details before this court martial, which is a public proceeding, attended by the general public, including journalists who are likely reporting the details across the country.

[78] Also, in assessing credibility, I must consider whether the witness's testimony is consistent with itself and with the undisputed facts. This is important because a witness whose evidence on an issue is not credible, cannot give reliable evidence on the same point. (see *H.C.*)

### ***Inconsistencies in the evidence***

[79] The court found that when Master Seaman Cooper's testimony was compared to the evidence as a whole, it was evident that his sincere and accurate recollection of the facts was, at times, inconsistent with both the evidence as a whole, as well as his own evidence given within the court martial itself. The specific inconsistencies in Master Seaman Cooper's evidence are summarized and assessed as follows:

### ***Timeline in leaving hotel***

[80] There was inconsistency in the version of events that Master Seaman Cooper recounted in leaving the hotel with the evidence as a whole. In my view, the discrepancies on timings here are not pivotal to the actual alleged assault, but the court highlights them as they do impact the timeline of the evening and their accuracy becomes important in assessing the reliability and credibility of Master Seaman Cooper's version of the events.

[81] Master Seaman Cooper told the court that they returned to the hotel from dinner around 8:00 to 8:30 p.m. and they sat at the pool area where they had more drinks. He told the court that he ordered two more pitchers of sangria to be shared. He stated that they stayed in the patio area chatting until close to midnight, when he went back to his hotel room to use the bathroom. When he returned he saw B.H.J. sitting alone, left there by himself while the others had gone to other areas or had retired for the night. He told the court that they stayed there until just after midnight and that he asked B.H.J. if he had a leave pass for the evening as he would have let him stay in his room overnight.

[82] However, he told the court that he remembered that B.H.J. had to be on HMCS *Halifax* the next morning at 0800 hours to do some training. And, as I already recounted in the facts earlier, he estimated that they got back to the Main Cave at approximately 1:15 a.m. However, when these facts are compared with the evidence as a whole there are discrepancies:

- (a) B.H.J. told the court that after they enjoyed dinner at the restaurant, they took a cab back to the hotel where Master Seaman Burt and Leading Seaman Weston got their rooms and Master Seaman Cooper and B.H.J. went back to the hotel about 20 minutes later. B.H.J. told the court that Master Seaman Cooper told him that his own leave pass would expire so he had to get back to the ship. B.H.J. estimated that they returned to the ship around 10 p.m. and then went to the Main Cave where there were about six to ten people. He told the court that he left the Main Cave to go to bed at approximately 1 a.m. after the bar closed.
- (b) Able Seaman Cameron who was the only witness, completely sober at the time of the incident, told the court that when he finished his duty at midnight, he went to the Main Cave to get water and B.H.J. came up to speak to him. Although he cannot recall what B.H.J. said, he confirmed that, at that time, B.H.J. was intoxicated and it would have been around 12:30 a.m. As Able Seaman Cameron had just finished his duty and had another duty in the morning, he went to bed. He said that B.H.J. was still in the Main Cave when he went to bed.
- (c) There was inconsistency in evidence as to whether the bar closed at midnight or 2 a.m. under extended bar hours. B.H.J. believed he left the Main Cave to go to bed around 1 a.m., whereas Master Seaman Cooper

seemed to believe that there were extended bar hours. What is consistent in their testimony is that they both stayed until the bar closed.

[83] Due to his intoxicated state, it may be understandable that B.H.J. could have made an error in his time appreciation, however, the fact that Able Seaman Cameron was sober, just finishing his duty at midnight, the court finds his testimony the most reliable. Able Seaman Cameron places B.H.J. in the Main Cave enjoying himself around 12:30 a.m. This would lead the court to believe that, based on the description of the routine in returning to the ship, dropping off their bags, getting through the jetty, crossing the HMCS *Halifax*, both Master Seaman Cooper and B.H.J. would have been back to the ship well before midnight and not at the timings suggested by Master Seaman Cooper.

### ***Timing of the incident***

[84] Although there is discrepancy about what time both the accused and B.H.J. went down the ladder to 13 mess to go to bed, ranging from 1:00 to 2:30 a.m. depending on which version is believed, even if the court accepts Master Seaman Cooper's version that they went down around 2:30 a.m., this still creates a significant gap in the timeline that is difficult to account for. Master Seaman Cooper stated that it took him only about a minute to change and that he came back to check on B.H.J. when he found B.H.J. leaning against a locker and that it was shortly after that that the two of them allegedly climbed into B.H.J.'s bunk. According to Master Seaman Cooper's version of events, they would have entered the bunk by about 3:10 to 3:15 a.m. and everything would have been over by 3:30 a.m. However, the evidence as a whole suggests that the alleged sexual encounter happened between 4:15 and 4:30 a.m. In terms of timelines, both B.H.J. and Able Seaman Cameron's version of the events are aligned. Able Seaman Cameron testified that he was woken up at first from the movement of the curtain about 15 minutes before B.H.J. tried to wake him. From the facts, the prosecution suggested that Master Seaman Cooper would have crawled into B.H.J.'s rack sometime between 4:15 and 4:30 a.m. The prosecution suggested that the commotion that unfolded where B.H.J. tells Master Seaman Cooper that he isn't gay and to get out clearly happened close to 4:30 a.m. This is reinforced by the evidence of Able Seaman Cameron, who told the court he heard B.H.J. tell Master Seaman Cooper to "Get the fuck out" around that time and that the incident was immediately reported thereafter. Master Seaman Cooper has admitted that the incident was reported between 5 and 5:30 a.m. In order to believe Master Seaman Cooper's version of the events, it would leave about one and a half to two hours unaccounted for and possibly over three hours unaccounted for, based on B.H.J.'s version of events.

[85] Based on the inconsistency of the evidence provided by the accused himself, and the evidence as a whole, the court believes the incident occurred before 4:30 a.m. I agree with the prosecution that the timeline suggested by Master Seaman Cooper does not seem plausible.

### ***Saying goodnight/locker story***

[86] The complainant told the court that after they both descended the ladder they said goodnight and headed to their respective bunks. With respect to what happened after they descended the ladder, the accused told three different versions of what happened, two of which were under oath before this court martial:

- (a) in his statement to the military police he said, “I followed him to make sure he didn’t topple down the ladder. Then, he got changed. I went and got changed. He went up to his rack. I made sure he didn’t fall out of his rack as he was climbing in, and then I went back to my rack and fell asleep.” In this version, he indicates that B.H.J. had already gotten changed before he himself went back to change. But it was clear they descended the ladder and then went to their racks;
- (b) however, under direct examination, Master Seaman Cooper told the court that after B.H.J. had used the bathroom, he descended the ladder first followed by B.H.J. who wobbled down the ladder after him. He then told the court that they moved over to the settee area and chatted about the events of the night. Before getting changed, he said they had a short discussion about what they had to do for training the next day. He does not recall that they were slurring their words. He said that they did not chat about anything “too prevalent,” but B.H.J. then said he was going to go to bed. He said that B.H.J. changed at his locker to get ready for bed and then Master Seaman Cooper came back to see if B.H.J. was okay. He said that B.H.J. was leaning up against the lockers, the mess was dark with a few red light areas so he could see B.H.J. fairly well. He told the court it did not take him longer than a minute to change before he made his way back and stood next to B.H.J. to chat. He told the court that when he returned to check to see whether B.H.J. had made it into his bunk, he saw him leaning against the lockers and noticed that he had an erection, as it was obvious from his underwear. He told the court that B.H.J. laughed and Master Seaman Cooper asked him, “Do you want me to help you out with that?” to which he said that B.H.J. replied, “Yeah, I guess.” Master Seaman Cooper told the court that he received no indication that B.H.J. was not receptive to his offer. He told the court that B.H.J. motioned him to go with him towards his rack – in his experience, that is the motion that an individual would use if he wanted someone to follow. He said that he asked him again, “Are you sure you want?” Master Seaman Cooper told the court that he then followed B.H.J. up into his rack. He said, B.H.J. was wearing a sweater and boxer briefs. Master Seaman Cooper stated that he asked B.H.J. before he got into the rack, “Are you OK with it?” Master Seaman Cooper also told the court that until he returned to see B.H.J. allegedly by the lockers, aside from B.H.J.’s query earlier asking about whether he was gay, there had been no mention of anything sexual nor was there any contact or discussion of sex;

- (c) under cross-examination, the prosecution questioned Master Seaman Cooper on what he told the military police. When he was challenged on his previous statement to the military police, Master Seaman Cooper confirmed that after they both descended the ladder, they both said goodnight and went their separate ways. He admitted that when he returned, B.H.J. was not expecting to see him again. On cross-examination, Master Seaman Cooper did not once refer to them chatting near the settees, but rather, his testimony was consistent with that of B.H.J. and his statement to the military police, in that after they descended the ladder they both went to their separate bed spaces. There was no mention of the settees or discussions about training the next day. When pushed for specifics on why he went back to see B.H.J., Master Seaman Cooper stated that he wanted to ensure that B.H.J. could get into his rack and that is when he found him leaning against his locker. However, also on cross-examination, he stated that he came back to B.H.J.'s bed space, but the court notes that B.H.J.'s bed space is not located next to the lockers where he told the court B.H.J. had been leaning against.

[87] Based on the inconsistency of the evidence provided by the accused himself, regarding the alleged conversation that occurred before bedtime, the court does not believe there was ever a conversation at a set of lockers where the complainant may have engaged in any conversation related to an erection. The accused's version is incoherent and his statements on what happened changed at least three times.

[88] We know that B.H.J. was drunk, had been awake for almost 22 hours, and he had said multiple times that he needed to go to bed. B.H.J. told the court, and the evidence is consistent with the fact, that he removed his clothes in his bunk and they were there the next morning. It does not make sense that he would change in his bunk and then get down and go to a locker in a different area to lean on it for no apparent reason. It seems most plausible that he went to bed and quickly fell asleep until he was awoken by the actions of Master Seaman Cooper between 0415 and 0430 hours.

[89] However, the court noted that Master Seaman Cooper was very sincere and convincing each time he provided a different version of the story confirming that his demeanour and honesty displayed in this court could not be trusted. A witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

### ***Evidence of B.H.J puking***

[90] Under cross-examination, when it was put to the victim that he had puked in the shower stall of the Chief and Petty Officers' washroom, he was insistent that it would not have happened. He said that despite how sick he would have been, he would have tried to make it to his own heads and if he would have been sick, he would have been sick in the hall rather than try to use the Chief and Petty Officers' heads. He

emphatically denied that it happened. In his direct examination, Master Seaman Cooper told the court that he had followed B.H.J. into the Chief and Petty Officers' heads and after B.H.J. was sick in the shower stalls, Master Seaman Cooper himself cleaned it up for B.H.J. He said he cleaned it up because he did not want the duty personnel doing cleaning stations to have to deal with it. However, the court noted that this was not what he told the military police. He told the military police:

“Q. And you helped him to go to the bathroom to puke?

A. The first time when he stumbled out of the mess and went towards the CPO's heads just right next to the main cafeteria, I followed him because I didn't know if he was all right or what not. And then, he cleaned up the mess after he puked in the shower, and then came back to finish his drink.”

[91] Master Seaman Cooper testified under oath in these proceedings that, aside from the sexual encounter, what he told the military police was 100 per cent accurate yet, he either lied to the military police or he lied to the court and this causes the court grave concern.

#### ***Inconsistency in evidence on consent***

[92] Master Seaman Cooper told the court that once they were both in the bunk, Master Seaman Cooper started to stroke B.H.J.'s erect penis through his underwear. He told the court that B.H.J. remained erect throughout that time and it appeared that B.H.J. was clearly enjoying it as he was groaning so he felt he could continue. He said that he continued to stroke B.H.J.'s penis before he pulled down B.H.J.'s underwear and started to masturbate B.H.J.'s penis with his hand stroking him a few more seconds before he proceeded to perform fellatio.

[93] When asked how he reacted, Master Seaman Cooper stated that B.H.J. shifted upwards to make it easier for him to remove his underwear and he pushed himself back towards his pillow so Master Seaman Cooper could pull them down easier. He told the court that B.H.J. did not say anything to him to express objection. He did not say “stop” or that he did not want it. He told the court that, at that point, he did not ask B.H.J., but that he was paying attention to how he was reacting, groaning, etc. so that is why he continued. In the direct examination, he specifically told the court that when he performed fellatio he could feel B.H.J.'s left hand on his shoulder, pushing him down for 10 minutes or so pushing him down. He said: “at one point, I pulled off him a bit and that's when he kind of sat up a bit and kind of leaned towards me and indicated, “Hey, man, I'm not gay. Can you stop, please?” He told the court that B.H.J. clearly did not want Master Seaman Cooper to “finish” him.

[94] However, under cross-examination, when asked about whether he was aware that B.H.J. was trying to get the attention of his bunk mate below, Master Seaman Cooper said that he did not notice it and did not recall B.H.J. ever removing his hand

from his head at all (he did not mention his shoulder, as he testified in court the previous day). Under cross-examination, he was quite insistent, very confident and sure of this evidence. When asked by the prosecution whether B.H.J. was using his right hand, he stated that B.H.J. had guided his “head” with his left hand. Master Seaman Cooper’s response on cross-examination is inconsistent with his testimony in chief, the day before when he stated that B.H.J. had placed his left hand on his shoulder for ten minutes and at that time, did not mention a hand being placed on his head at all.

[95] Moreover, Master Seaman Cooper confidently asserted, that he does not recall B.H.J. “ever” removing his hand from his head at all, which is inconsistent with his earlier evidence that B.H.J. had pushed down on his shoulder for ten minutes during the fellatio?

[96] Further, this statement is inconsistent with the evidence as a whole where both Able Seaman Cameron and B.H.J. testified that, during the encounter, B.H.J. was lying on his back and was jabbing and hitting Able Seaman Cameron with his left hand to get his attention. The court has accepted Able Seaman Cameron’s evidence on this point and given the number of times he said that B.H.J. jabbed him and hit him, if B.H.J. did in fact use his left hand, then he would have had to remove it repeatedly from the accused’s shoulder or head depending on what version of the accused’s is to be believed.

[97] Under cross-examination, Master Seaman Cooper admitted that it was possible that B.H.J. was not fully awake the entire time which contradicted his previous strong assertion that B.H.J. was fully aware and consenting to what Master Seaman Cooper was doing. Although he advanced that B.H.J. had his hand on his head through the fellatio, he agreed on cross-examination that it is possible that it was not the case. However, it was noted that he was equally sure, smooth and insistent about the presence of B.H.J.’s hand on his shoulder, when he testified under direct-examination.

#### ***Alleged concern for welfare of B.H.J.***

[98] Master Seaman Cooper testified in court and stated in his interview with the military police that he was concerned for the welfare of B.H.J.

[99] In his testimony, the accused projects that he acted gallantly in checking out of his comfortable beachside room in a hotel to return back to the ship because he was concerned for B.H.J. and wanted to ensure that he got back to the ship safely. He told the court he was aware that B.H.J. had training the next day at 0800 hours. He also said that B.H.J. was in no shape to walk around by himself. He told the military police that he did not want to throw B.H.J. into a cab by himself in Rota, Spain since he did not speak any Spanish. B.H.J.’s inability to communicate with a taxi driver is unlikely since B.H.J. arrived at the hotel in a cab, so he was clearly capable of communicating with a Spanish-speaking driver. Although Master Seaman Cooper admitted that he did not speak Spanish himself, the inference he projected was that he was concerned for B.H.J. and intended to take care of him.

[100] However, the evidence before the court is that despite Master Seaman Cooper suggesting that B.H.J. was so drunk that he was in no shape to take a cab or to walk around by himself, thereby necessitating Master Seaman Cooper's assistance, when they returned to the ship, it appears that his concern for B.H.J.'s welfare quickly vanished. Rather than ensure B.H.J. got to bed, he took him to the Main Cave to consume more drinks.

[101] In his interview with the military police, he said that B.H.J. "was getting progressively drunk and I probably should have cut him off a little bit sooner than I did, but at the same time he seemed to be fine until he went and puked a few times, but besides that he was all right."

[102] However, the court noted that his testimony quickly changed depending on the line of questioning. Under direct examination, Master Seaman Cooper told the court that when they descended the ladder and shortly thereafter when they allegedly discussed B.H.J.'s erection, neither of them were slurring their speech. He said that, despite B.H.J.'s state of drunkenness, they were both sufficiently coherent to discuss whether they would have sex together.

[103] However, under cross-examination, Master Seaman Cooper told the court that they were both probably slurring their speech as he was definitely in an advanced state of intoxication. The accused also told the court that he was very drunk because he would not have made a pass at someone that he works with. He told the court that, because he was inebriated, his inhibitions were reduced.

[104] Upon reviewing all of the facts as proven, the court assessed whether Master Seaman Cooper was "taking care" of B.H.J. or was grooming him and lurking around him from dinner time on the 9th of November until the early morning hours on the 10th of November. In his testimony, he clearly said he took his responsibilities as a superior very seriously, and his concern for the welfare of B.H.J. might be considered noble in his mind, however, when considered in the context of the facts of this case, it could also be considered predatory.

[105] We know from the testimony of Able Seaman Cameron that B.H.J. was intoxicated and drinking in the Main Cave at 12:30 a.m. which means that according to the accused's testimony, upon returning to the ship, instead of "taking care" of B.H.J., the two of them continued to drink. Master Seaman Cooper told the court that B.H.J. was so sick that he felt he needed to follow him into the bathroom, not once, but twice, but he also admitted that B.H.J. had more alcohol after being sick and particularly before the bar closed at what he says was 2 a.m. According to Master Seaman Cooper's testimony, they returned to 13 mess around 2:30 a.m.

[106] If Master Seaman Cooper was in fact concerned for B.H.J.'s welfare, he would have ensured that, upon returning to the ship, B.H.J. sobered up and got to bed. B.H.J. had slept perhaps two to three hours the previous night and, at that point, had been

awake for about 22 hours. Based on these unrefuted facts, in addition to being intoxicated, B.H.J. would have been completely exhausted. Further, Master Seaman Cooper told the court that B.H.J. told him at least three times that he needed to go to bed, so Master Seaman Cooper was aware of B.H.J.'s state of exhaustion. Rather than let B.H.J. go to bed at 2:30 a.m. when he had training at 8:00 a.m., Master Seaman Cooper alleges that he went back to check on him and then went on to tell the court, very convincingly, that he found B.H.J. leaning against lockers with an obvious erection showing through his underwear.

[107] If the Court is to believe Master Seaman Cooper's account of B.H.J.'s state of intoxication, then it would follow that, if B.H.J. was not in his rack and was in fact leaning against lockers (which were not in the immediate vicinity of his rack), B.H.J. would have been in such a state that he could not climb up into his rack to go to sleep as he intended to do. Hence, he likely would not have had the capacity to consent to sex. Master Seaman Cooper told the court, in fact, that several hours earlier, well before midnight, that B.H.J. was too drunk to take a cab on his own. Hence, after Master Seaman Cooper described B.H.J. as too drunk to take a cab, the court noted that B.H.J. continued to drink for several more hours and became increasingly tired. Both B.H.J. and Master Seaman Cooper admitted that B.H.J. was so drunk that he could not walk straight. The fact that Master Seaman Cooper would think or, even further, suggest sex to a subordinate in these circumstances is completely inconsistent with his own narrative that he acted out of concern for the welfare of B.H.J. Master Seaman Cooper's motivations were clearly not honourable as he suggested.

### **Summary**

[108] For all the above mentioned reasons, I do not believe the accused's version of events. In short, his own testimony on the above critical matters is not consistent with the evidence as a whole and is inconsistent with itself. It is simply irreconcilable. Most particularly, I do not find the accused credible on the issue of consent and, as a result, none of his evidence on the issue of consent is reliable.

[109] In applying the SCC's W.(D.) test set out above, if the Court is left in doubt by the evidence of the accused, I must then ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused. At this point, I must assess the strength of the prosecution's case. So just because I do not believe the accused does not believe that the prosecution's case has been proved. It will rely upon the credibility and reliability of Able Seaman Cameron and the complainant B.H.J.

### ***Able Seaman Cameron***

[110] Able Seaman Cameron was the one witness who was completely sober at the time of the incident and, based on his duty schedule both on the evening before and the next morning, his evidence was helpful in clarifying timelines. Although he could only testify on limited details regarding this incident, he testified in an honest and forthright

manner despite his own embarrassment and sincere regret for not having assisted B.H.J. when he requested help.

[111] On cross-examination, when asked about the moaning he heard, he said it sounded like B.H.J. was trying to get attention and that it was not consistent with what he considered to be moaning in pain or pleasure. Defence counsel challenged Able Seaman Cameron on that assessment. He said that, since he had never heard B.H.J. moan before, he had no comparator so he could have no idea of what the moaning was for. When challenged, Able Seaman Cameron was not argumentative nor defensive and he responded appropriately recognizing that he did not have a comparator.

[112] I found Able Seaman Cameron both credible and reliable in his testimony. As I stated earlier, it is possible for the court to make a finding of sexual assault based solely on the uncorroborated evidence of one witness, which is usually the complainant, however, standing on its own, measured against the required standard of proof for a criminal conviction, it can often be a challenge. As a result, a full assessment of the credibility and reliability of both the complainant and the accused is critical. However, in this case, Able Seaman Cameron's credible testimony provides the court with helpful assistance and corroborates critical facts regarding the incident and its timeline.

### **Credibility and reliability of the complainant B.H.J.**

#### ***Was the contact consensual?***

[113] Based on the admissions of the accused, the identity, date and place of the offence as stated in the particulars on the charge sheet as well as the first two elements of touching and the sexual nature of that touching have been met. In proving the absence of consent, the test for the *actus reus* is subjective and based strictly on the complainant's state of mind: did B.H.J. want the sexual activity to take place?

[114] The critical element now for the court to decide is whether the prosecution has proven beyond a reasonable doubt the absence of consent and the accused's knowledge of that absence of consent. In this case, the Crown called the complainant to establish the absence of consent. And B.H.J.'s testimony was clear and unequivocal that he did not consent to the contact in question.

[115] As I indicated earlier, based on the facts of this case, this trial comes down to a pure question of credibility. As I have already found the accused, Master Seaman Cooper, not credible and rejected much of his evidence, at this stage, I must now assess whether I believe the complainant's evidence on the issue of consent.

#### ***Essentially, if the complainant is believed then the actus reus is made out and the mens rea follows relatively straightforwardly.***

[116] The complainant testified in an honest, consistent and very straightforward manner. He provided accurate recollection of those facts that he would be expected to

remember and those aspects that he did not were understandable, particularly in the context of the day's events and the fact that this incident took place two and a half years ago. He admitted having been awake since 4 a.m. on the 9th of November when he started his duty shift and testified that after 0800 hours when he completed his shift, he went to join his shipmates who were staying in a hotel downtown where he drank beer for the better part of the day and evening.

[117] As the prosecution submitted, with respect to some of the details of that day, B.H.J. had no reason to pay particular attention to them. He was carefree, enjoying a rare day off in a foreign country and not really taking note of specifics throughout the day. The fact that he may or may not have miscalculated time spent at the hotel is not an essential factor in this case. As I explained in the assessment of Master Seaman Cooper's credibility, that portion of the timings is not critical, but it does provide us some assistance.

[118] Under Cross-examination, B.H.J. stated that he did not think he puked in the Chief and Petty Officers' heads, but he did admit that he was severely drunk and if, in fact, he did vomit, he said it would have been enroute to his heads as he would never have gone to the Chief and Petty Officers' heads, no matter how drunk he was.

[119] Both B.H.J.'s credibility and the reliability of his evidence were challenged on cross-examination by the defence. In responding to the challenges, B.H.J. was firm, direct and clear. At times, he became emotional, but in the context of the very personal nature of the events he was being asked to describe, it appeared to the court to be a natural reaction and not a forced or exaggerated response.

[120] Overall, the court found that the inconsistencies in B.H.J.'s testimony were either explainable or they did not depart dramatically from the truth. For example:

- (a) in his main testimony, B.H.J. stated that, at some point, he woke up to someone performing fellatio on him saying, "Come for me, B.H.J., come." He stated that he recognized Master Seaman Cooper's voice, after about 20 or 30 seconds. B.H.J. told the court that he tried to wake his bunk mate below saying, "Please help me. I think I'm getting raped."
- (b) however, defence drew B.H.J.'s attention to his statement to the military police during an interview on 16 November where he said he told his bunk mate, "I need your help. There is a man sucking my dick." Defence suggested to B.H.J. that his statement was inconsistent with what he said in court. However, B.H.J. responded very firmly, that in his mind, it was the same thing and had the same meaning. The court is in agreement with this assessment.
- (c) defence challenged the complainant on why he let Master Seaman Cooper continue performing fellatio once he was awake. He suggested that if B.H.J. had changed his mind on consent, his responsibility was to

tell Master Seaman Cooper and not his bunk mate. However, the court accepts that B.H.J. was in shock when he discovered his superior in his bed assaulting him and, consequently, reached out to his bunk mate to assist him. He explained to the court his fear of being injured in his genitals and he told Master Seaman Cooper, as soon as he could, to stop. B.H.J. is a young man and junior in rank at that time, in a foreign country, intoxicated, exhausted and woke up to find his superior assaulting him in the most intimate and violating way, so the manner by which he reacted is not of concern to the court. Trial judges must recognize that there is no inviolable rule how people who are victims of trauma like sexual assault with behave and react. (see *R. v. D.D.*, 2000 SCC 43)

- (d) defence also challenged B.H.J. on his level of drunkenness. Defence suggested that since B.H.J. admitted to being very drunk, it was probable that he could not recall all the specifics of the evening. B.H.J. was adamant that although he cannot recall every little detail of the evening, he remembers the incident vividly and that it sobered him up very quickly.
- (e) defence asked B.H.J. about his interview with investigators where they asked him specifically how he would rate his level of drunkenness. At the time of his statement, he stated that he remembered the night pretty well, as he had six to eight drinks between 10 p.m. and 1 a.m., and was not that drunk. Defence canvassed the inconsistencies in B.H.J.'s testimony about whether he was very drunk or not? Defence said that, now two and a half years later, B.H.J. is claiming that he was very drunk where B.H.J. countered that he believes that he was in fact very drunk. However, it is important to note that the accused's testimony itself confirms that B.H.J. was, in fact, very drunk.
- (f) with respect to the events underlying the alleged sexual assault, I found B.H.J. to be a credible witness. He was responsive to questions and appeared to be honestly trying to remember and to testify about what happened to the best of his ability.

### ***Reliability?***

[121] Although I found B.H.J. credible, in law, credibility is not an all-or-nothing proposition. A finding that a witness is credible does not require a trier of fact to accept all the witness's testimony without qualification. Importantly, as I stated earlier, credibility is not co-extensive with proof. (see *Clark*)

[122] It does not follow that because there is a finding that a witness is credible that all his or her testimony is reliable. In fact, a witness may be completely sincere and speaking to the truth as the witness believes it to be. However, due to a number of

reasons, including, but not limited to, the passage of time or memory, the actual accuracy of the witness's account may not be reliable. So, in effect, the testimony of a credible or an honest witness, may nonetheless be unreliable. (see *R. v. Morrissey*, (1995) 97 C.C.C. (3d) 193)

[123] Defence submitted that the complainant displayed a concerning lack of memory of events. He described his memory as "patchy." He submitted that on many occasions, he did not recall information, which incidentally were the same details that Master Seaman Cooper recounted. For example, at dinner that evening, B.H.J. stated that there were four of them that went in one cab, but Master Seaman Cooper stated that there were six of them as a second cab followed with a few other shipmates. In another example, regarding swimming at the hotel, B.H.J. was clear in saying that he had not brought his swimming trunks. Although he could not speak for whether other people had their swimming trunks, he was clear that he did not see anyone swim in the pool that day. Although his memory of the evening may not have been the same as that of Master Seaman Cooper, he was no less vague in responding to the many details pivotal to the incident when queried.

[124] He admitted when he was drunk and when he might have been mistaken, but generally, he provided answers that were consistent with the facts as corroborated by other evidence. When he was not sure or his memory was vague, he readily admitted it. For example, when queried on how he descended the ladder, he admitted to being drunk and said that he thought he descended the ladder by facing the stairs as he knew that it would be safer.

[125] On the critical details related to the incident, he did not claim gaps in his memory of no recollection. For example, he was insistent that there were no conversations or lounging on the settee after they descended the ladder. He was clear that they just said goodnight and went to their separate bunks. He was very emphatic that the version as recounted by the accused did not happen.

[126] In this case, the defence submitted that the complainant was not credible and therefore, on the narrow issue of consent, he was not reliable and should not be believed. I do not agree.

[127] Based on the evidence before the court and the admission by defence, the incident was reported between 5:00 and 5:30 a.m. on 10 November 2015, and the court found that the incident happened sometime after 4:15 a.m. Based on the evidence, the court accepts B.H.J.'s testimony that he was sleeping from 4:15 to 4:30 a.m. in the morning and woke up when he felt someone put their mouth on his penis. The court has rejected the evidence of Master Seaman Cooper that there had been a conversation at a set of lockers where B.H.J. allegedly invited Master Seaman Cooper into his bed. As discussed earlier, it is the court's assessment that Master Seaman Cooper's testimony is both inconsistent with itself and the evidence as a whole as it does not align with any of the other evidence, including the timeline that the court has accepted as fact.

[128] Even if such a conversation and invitation for sex had taken place, which the court does not believe it did, a conversation at 2:30 a.m. would not provide the requisite consent for Master Seaman Cooper to enter B.H.J.'s bed two hours later when B.H.J. was sound asleep. The law is crystal clear on consent. It must be voluntary, may not be given in advance and consent to one sexual act does not infer consent to another. Under cross-examination, when asked whether it was possible that B.H.J. would have been unconscious at some point during the sexual activity, Master Seaman Cooper said that he did not think so, but that it was possible. The SCC has been very clear that consent requires a complainant to provide actual "active consent throughout every phase of the sexual activity." It is not possible for an unconscious or sleeping person to satisfy this requirement even if he or she had expressed consent in advance. (see *R. v. Todorov*, 2014 QCCQ 3027, paragraph 11, as well as *R. v. K.E.*, 2015 ABPC 46, paragraph 59 and *R. v. Yilma Campbell*, 2012, ONCJ 86, paragraph 16)

[129] Further, Master Seaman Cooper's assertion that he believed B.H.J. was consenting because he responded with movement while he was masturbating him is also not sufficient to establish consent. "Any sexual activity with an individual who is incapable of consciously evaluating what they are consenting to is therefore not consensual within the meaning of the *Criminal Code*." (see *R. v. A. (J.)*, 2011 SCC 28, 2011, paragraph 66)

[130] The accused then testified that after he had masturbated B.H.J. for about ten minutes or so, he proceeded to perform fellatio. It is at this point that the versions of both the accused and the complainant intersect. B.H.J. told the court that he woke up with an erection and mouth over his penis and he froze, trying to figure out what was going on.

[131] The fact that B.H.J. froze and did not react immediately to Master Seaman Cooper's action is not indicia of consent. The SCC has been clear that a belief that silence, non-resistance, passivity or even ambiguous conduct constitutes consent is a mistake of law, and provides no defence. (see *R. v. M. (M.L.)*, [1994] 2 SCR 3)

[132] The accused testified that as soon as he pulled off B.H.J., that B.H.J. sat up and said, "Hey man, I am not gay. Can you stop?" and the accused ran away. B.H.J. testified that as soon as the person removed his mouth, he sat up and said, "Look, I am not gay" and the accused left right away.

[133] If I paraphrase terminology from a case, relied upon by the prosecution, of *R. v. Cornejo*, 68 O.R. (3d) 117 at paragraph 15, in the court's view, the facts of this case are best summarized as an absence of consent on B.H.J.'s part and a giant leap of imagination on the part of Master Seaman Cooper. In essence, it is the court's view that, after getting caught, the accused concocted a story to suggest that there was consent to the sexual act, then he attempted to rely upon the reaction of B.H.J. as the basis for his consent, because, while he was fast asleep, B.H.J. physically moved in response to Master Seaman Cooper masturbating him. The fact that a sleeping intoxicated person reacted and may even have woken up with an erection cannot reasonably give rise to an

assumption that he was consenting to the sexual activity. The facts as proven in the evidence do not provide an evidentiary foundation for the assertion that Master Seaman Cooper believed that B.H.J. was consenting.

### **Mistaken belief in consent**

[134] Based on the facts of this case, defence did not rely upon the defence of mistaken belief in consent and prosecution argued that there is no air of reality to this defence.

### **Conclusion on the charge of sexual assault**

[135] In conclusion, I find that the prosecution has proven beyond a reasonable doubt all the elements of the offence of sexual assault. For the reasons I outlined above, I conclude that the complainant B.H.J. did not consent to the sexual encounter and the accused knew that he did not consent.

### **Second charge – section 95 of NDA**

[136] The second charge and its particulars read:

<b>“SECOND CHARGE</b> Section 95 of the <i>National Defence Act</i>	<b>ILL-TREATED A PERSON WHO BY REASON OF RANK OR APPOINTMENT WAS SUBORDINATE TO HIM</b>
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*Particulars:* In that he, on or about 10 November 2015, onboard HMCS ATHABASKAN, at or near Rota, Spain, ill-treated B.H.J by touching his genitals.”

### **The law**

[137] For efficiency reasons, I will refer to the summary that I wrote on section 95 in my decision of *R. v. Young*, 2017 CM 2006 as referred to by the prosecution.

[74] Section 95 is a section of particular importance. In our hierarchical system of rank and command, subordinates are required to comply with the directions of their superiors. Insubordination offences and disobedience of lawful command offences support this goal. In return, superiors are persons in positions of trust and required to meet the highest standards of conduct. As my colleague d’Auteuil M.J. stated at paragraph 45 of his decision in *R. v. Murphy*, 2014 CM 3021:

It appears to the Court that Parliament enacted such provision in order to prevent any abusive behaviour by Canadian Forces members in positions of authority which would result in striking or using any other kind of violence toward any subordinate by reason of the existence of a ranking system in a military context.

[75] Further, the same judicial colleague, d'Auteuil M.J. emphasized its importance at paragraph 55 in *R. v. Laferrière*, 2016 CM 3016:

[TRANSLATION]

Every Canadian Forces member must respect the dignity of all persons, including those who by reason of rank are subordinate. The essence of this offence is to avoid situations of abuse of authority within the organization, which could undermine the trust, confidence and morale that must exist among soldiers so that they can carry out their mission.

### **Essential elements of the offence**

[138] The finding on the second charge, under section 95, depends not only on my assessment of the credibility of the witnesses described earlier, but also on whether the acts particularized in the charge sheet meets the definition of ill-treatment as adopted in the past by courts martial.

[139] Which basically means, the particulars have been proven; he did touch his genitals and all of the elements of the offence have been proved, but for the ill-treatment and blameworthiness.

[140] Section 95 of the *NDA* provides:

#### **Abuse of subordinates**

**95.** Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[141] The identity, date and place of the offence, as well as the fact that, by reason of rank, the alleged victim was a subordinate to the accused by rank or appointment were all admitted by Master Seaman Cooper's defence counsel. The remaining elements that the prosecution had to prove beyond a reasonable doubt were:

- (a) proof of the acts as particularized in the charges;
- (b) proof that the particularized acts meet the definition of ill-treatment; and
- (c) the accused had a blameworthy state of mind.

### **The particulars**

[142] With respect to the charge before the court, the prosecution was successful in proving the particulars as set out:

“In that he, on or about 10 November 2015, onboard HMCS ATHABASKAN, at or near Rota, Spain, ill-treated B.H.J. by touching his genitals.”

### **Ill-treatment**

[143] Once the particularized acts are proven beyond a reasonable doubt, then an assessment must be made as to whether, in the context in which the incident occurred, the act amounted to ill-treatment. The context is important in making a determination of whether the alleged conduct constitutes ill-treatment.

[144] The word “ill-treatment” is not defined in the *NDA*; however, on a strict reading of the section, there is no limitation imposed as to the nature or manner of ill-treatment envisaged. The words in the section read “strike or otherwise ill-treat” would include treating badly or mistreating a subordinate in a different manner other than by striking. But, it is not limited to physical violence or physical harm or injuries. It could be psychological, emotional or any harm or injuries of that nature.

[145] With respect to what constitutes ill-treatment, my colleague Pelletier MJ set out the following description of the test in *R. v. Duhart*, 2015 CM 4022:

[48] The test that has been developed over time by various courts martial appears to be based on dictionary definitions, specifically as it relates to the expression “ill-treat”, which translates as *maltraiter* in French. The relevant terms are defined as follows in the *Concise Oxford English Dictionary*, 11th edition and *Le Nouveau Petit Robert*.

“**ill-treat**” verb: act cruelly towards. DERIVATIVES: ill-treatment, noun.

“**cruel**” adjective: disregarding or taking pleasure in the pain or suffering of others. Causing pain or suffering. DERIVATIVES: cruelly, adverb.

“**maltraiter**” 1. *Traiter avec brutalité.* 2. *Traiter avec rigueur, inhumanité.* 3. *Traiter sévèrement en paroles (une personne à qui l’on parle, ou dont on parle).*

[146] In the view of this Court, once the particulars in the allegations are proven, the determination of whether something amounts to ill-treatment is determined objectively by applying the above definitions with regard to all the circumstances.

[147] Based on the analysis I conducted with respect to the first charge, and the fact that the act in question violated the sexual integrity of his subordinate, causing him emotional harm, I find that both the test of ill-treatment is met and that the accused had the requisite blameworthy state of mind for the second charge.

**FOR THESE REASONS, THE COURT:**

[148] **FINDS** Master Seaman Cooper guilty of the first charge of sexual assault, contrary to section 271 of the *Criminal Code* and guilty of the second charge of ill-treating a person who by reason of rank or appointment was subordinate to him, contrary to section 95 of the *NDA*.

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**Counsel:**

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