



COURT MARTIAL

Citation: *R. v. Nordstrom*, 2018 CM 4011

Date: 20180704

Docket: 201651

Standing Court Martial

3rd Canadian Division Support Base Edmonton
Edmonton, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Captain S.J. Nordstrom, Accused

Before: Commander J.B.M Pelletier, M.J.

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during these proceedings as the complainant, including the person referred to in the charge sheet as “J.L.”, shall not be published in any document or broadcasted or transmitted in any way.

REASONS FOR FINDINGS

(Orally)

Introduction

[1] Captain Nordstrom is facing two charges under section 130 of the *National Defence Act*, in relation to two events involving the complainant identified as J.L. on the charge sheet. The first event constitutes the background for the first charge, as it is alleged that on or about 20 February 2015, at or near the Greater Toronto Area, Captain Nordstrom committed a sexual assault on J.L. contrary to section 271 of the *Criminal Code*. The second charge alleges that, on or about 14 March 2015, at or near the Greater Toronto Area, Captain Nordstrom committed an assault on J.L. contrary to section 266 of the *Criminal Code*.

The evidence

[2] The prosecution's only witness in support of the charges was J.L. She described her background as a forestry student at Laval University and her decision to study medicine and join the Canadian Armed Forces (CAF). She provided her version of the two distinct events grounding the charges, which occurred while she was a student on the Operational Flight Surgeon course held in February and March 2015, the first two weeks and last week of which were conducted on military facilities in Toronto while students were accommodated in a hotel nearby. The accused, Captain Nordstrom, was a fellow student on that course.

[3] The evidence relating to the first charge consists of several incidents of unwanted touching which the prosecution argues may be considered as distinct sexual assaults. The first of those incidents occurred during the evening of Thursday, 19 February 2015 when J.L. went out with seven colleagues from the course to a Scottish pub for a Scotch tasting event. Captain Nordstrom was sitting next to her. She testified that when she came back to sit on her chair after taking a picture early in the evening, he had placed his hand, palm up, on her chair and grabbed her genitals. He then kept placing his right hand on her left thigh and up her skirt throughout their time there, despite repeated requests to stop.

[4] A limousine had been chartered to take the group back to their hotel at the end of the Scotch tasting. In the limousine, J.L. let Captain Nordstrom know that she was willing to visit a strip club with him, as they had discussed previously in class. She stated that she saw Captain Nordstrom speak with the limousine driver and a short time later the car stopped. They both exited and went on foot to a strip club nearby. Once there, however, the place was not what J.L. had expected and she was keen to leave, especially since Captain Nordstrom kept touching her on the thighs, tried to lift her skirt and shirt and kissed her when they were at the club, sitting together right in front of the stage, after they had ordered a drink. She said she reluctantly let him kiss her but told him to stop touching her, especially lifting up her skirt and shirt as she does not like being undressed in public. Captain Nordstrom agreed to leave and obtained a taxi just outside the strip club to take them back to the hotel.

[5] During the taxi ride, Captain Nordstrom continued to touch her, even more aggressively, as he sat partly on her and tried to kiss her, inserting his tongue in her mouth.

[6] Once at the hotel, J.L. said she was relieved, at that time, that she would soon part company from Captain Nordstrom. However, Captain Nordstrom followed her through the lobby, into the elevator and towards her room. They did not talk in the corridor, she did not invite him in her room but felt she was stuck, did not know how to stop him. She let him into her room. When asked how she felt, she testified that she thought things would be fine, that he was her friend. However, he proceeded to undress her and perform cunnilingus as she was lying on the bed. He was dressed at the time.

She told him to stop and he did cease oral sex but then inserted a finger into her anus, without her permission. She asked him to leave the room. He said he had to use the bathroom first. Again, she said she was relieved to learn that he was about to leave. However, when Captain Nordstrom exited the bathroom, he was fully naked and J.L. said she was horrified. As he took a step towards her, she panicked and blanked out. The next thing she remembers is that he had positioned himself behind her in bed and was attempting penetration from behind. When she attempted to roll over to get away from him, he placed his arm around her neck to restrain her. She said she thought she was going to die. She was able to move more aggressively and he finally let go of her. She said he then got his clothes back on and left at her request, in the early hours of 20 February 2015.

[7] J.L. testified that she then went to bed and slept. The next day she said she went to class in Toronto intending to sit away from Captain Nordstrom. As it turns out, this was not necessary as he was not sitting at his usual seat next to her in the class. She said she felt unsafe at the hotel over the weekend and called her husband to invite him to stay with her in Toronto, telling him that something had occurred, that she was afraid to be alone but not sharing with him the details, fearing he would be mad. She said she spent the weekend with her husband in Toronto.

[8] As for the second charge, J.L. said that on the last day of the course, that is Friday, 13 March 2015, as they were back in Toronto for one last week, Captain Nordstrom leaned heavily against the backpack she was wearing in the classroom, feeling the progressive force of his weight on her. This, she said was the culmination of a number of incidents she found intimidating or unwanted, including exchanges of text messages between the two, of which a printout was produced as Exhibit 4. She said she immediately turned around and angrily asked Captain Nordstrom to stop harassing her.

[9] Following the course, J.L. continued to engage with Captain Nordstrom through text messages, up to 23 March 2015, when she revealed that she had sold her house. J.L. left the CAF in the fall of 2015 and filed a complaint against Captain Nordstrom shortly thereafter to ensure, as she said, that he would not do something like that to others.

[10] In cross-examination, J.L. was asked to provide details about two previous statements she had made. One was contained in a PDF document she had provided to police and the other was simply the transcription of her interview with a police investigator. She discussed a few differences between her statements and her memory at the time of testifying, including a previous mention to the effect that Captain Nordstrom undressed her in her room, a fact she had no recollection of. She testified that she has no memory of what happened between the time that Captain Nordstrom walked out of the bathroom naked and the moment he was behind her in bed.

[11] As it pertains to the events at the pub, J.L. said in cross-examination that she told Captain Nordstrom, 50 to 100 times, to stop touching her and she is certain he heard her. She said she was very clear that she did not want to be touched. She complained that nobody helped her when she was repeatedly touched by Captain

Nordstrom even if her colleagues were in proximity to her at the table, as evidenced by the picture at Exhibit 3. She cannot recall any conversations at the pub, but was adamant that nobody asked her if she was okay. At the same time she did not ask for help. She said she froze and felt ashamed as she did not want anyone to imagine she could have this kind of relationship with Captain Nordstrom. She said she did not speak to Captain Nordstrom nor does she recall any conversations with anyone in the limousine; however, at one point she signified by words or gesture that she was ready to go to the strip club.

[12] J.L. stated that she thought that Captain Nordstrom was “creepy” and not a companion even if she wanted to go to the strip club with him. She did say that she let Captain Nordstrom kiss her briefly at one point, but that she did not consent to being touched the way he did. She was pushing him back. Describing the events in the taxi between the strip club and the hotel, she mentioned that she did not consent to him putting his tongue into her mouth and resisted the suggestion made by defence counsel that she kissed him back. She cannot recall any conversations in the lobby of the hotel or in the elevator. She resisted the suggestion that she took Captain Nordstrom by the hand upon leaving the elevator and led him to her room. She is adamant he followed her.

[13] She said she was not sure if there was kissing when she entered the room and said she was not 100 per cent sure if Captain Nordstrom initially undressed her or if she undressed herself. She agreed that at no time Captain Nordstrom forced her towards or in the bed. She stated again that she was not 100 per cent sure of any conversation that had taken place. However, she did recall, at that point in the cross-examination, one conversation she had not previously mentioned in her statement and to police, as she did not remember it at the time of her interview. She did not mention that conversation in direct examination as she did not think it was important. It had to do with whether she was the type of person to have sex facing her partner or with her back to him. This related to a previous conversation with Captain Nordstrom. As for the sexual acts performed in her room, she agreed she did not resist the touching to her vagina and anus. She was adamant though that she told Captain Nordstrom to stop and stepped out of bed at one point. She said that she got dressed by herself while Captain Nordstrom went to the bathroom, but was not able to explain how she would have been undressed later because she has no memory from the time that he took a step towards her upon exiting the bathroom and the time he was behind her in bed.

[14] Again in cross-examination, J.L. was asked about going back to class the next day, but could not exactly recall how the group made it to school and reiterated that she was concerned with sitting next to Captain Nordstrom. She confirmed that out of concern for her safety, her husband spent the weekend with her at the hotel in Toronto. She was then shown a schedule for the course and had to accept that, in fact, on that Friday morning, the group had travelled by van to Canadian Forces Base (CFB) Trenton for the next phase of the course. She consequently could not have spent the weekend with her husband in Toronto. She had very poor memory of the transfer to Trenton and the first day the course spent there.

[15] As for cross-examination on the events relating to the second charge, J.L. said that she could not remember changing clothing on that final day of the course. She acknowledged suggestions from defence counsel that her classmates and her had checked out of the hotel on the last day of the course; that everyone's luggage was in the classroom or adjoining hallway and that they changed from one military uniform to their distinctive environmental uniform (DEU) that afternoon. She acknowledged not seeing Captain Nordstrom coming behind her, as she had her backpack, but she said that she felt someone leaning into her, feeling an increasing weight on her. When it was suggested to her that she could not say that he deliberately banged into her from behind, she acknowledged it is true because he was behind her.

[16] The first three witnesses for the defence were character witnesses providing evidence of the good reputation of Captain Nordstrom in the community. Major Altemeyer was on the same Operational Flight Surgeon course attended by Captain Nordstrom and J.L. He never noticed any bad feelings or concern as it pertains to the relationship between the two during the course. He mentioned that Captain Nordstrom's general reputation was good. He has never heard anything negative about Captain Nordstrom in terms of integrity or violence. For his part, Captain Martin spoke about his relationship with Captain Nordstrom, whom he first met at the clinic on CFB Shilo in June 2016. He has seen him interacting with staff and patients, including female staff and said that he is always professional, open and easy to talk to. He has a general reputation of being very well liked and respected as a clinician. The third character witness was Mrs Shelley Wray, who is the base addiction counselor and has worked at CFB Shilo for close to thirteen years. She says she has often dealt with Captain Nordstrom and that he is very competent and one of the medical officers that would make himself available for any need that patients might have. She says he is very respectful of staff, regardless of rank and that includes the very good treatment of women, who constitute the majority of staff in the mental health cell. His general reputation in the community for honesty and respect is excellent in her opinion.

[17] Captain Nordstrom testified in his defence. He explained his background, including his career in the CAF which includes a period of time as a medical technician in the reserve force immediately before his transfer to the regular force in 2007 to attend medical school. He described his daily routine as a clinician and his intention to leave the military to be better able to care for his children and obtain geographical stability. Captain Nordstrom described the routine for the Operational Flight Surgeon course held in Toronto, including the hotel and transportation back and forth to the school. He discussed the seating arrangement and said that he had a very friendly relationship with J.L. That relationship grew stronger as the course progressed. He said that the conversations between them became more personal and included details regarding, for instance, the size of the penis of an instructor and the issue of going to attend a strip club in Toronto and the possibility of doing the same in Cold Lake.

[18] As for the events of the night of 19 February, he described attending the pub, but denied having placed his hand on J.L. the way she described, at any time. He said he put

his hand up her skirt at no point in the evening. He does not recall anyone questioning his conduct. He never heard J.L. say stop at any time. He said that there was a discussion with J.L. at the pub about going to a strip club. He remembered the name of a club from articles he had read about celebrities going there. Therefore, before entering into the limousine, he spoke to the driver and asked him to go by that place. When they got closer, the limousine driver signaled that they were approaching the club and that is how the limousine stopped and they went in the strip club.

[19] He did acknowledge touching J.L. at the club, putting one of his arms around the back of the chair she was sitting on and the other one by her knee. He said that there was a bit of superficial kissing at the time but insisted that any kissing or touching was entirely consensual. He described the taxi ride as involving more consensual kissing and touching. He described going into the hotel and taking the elevator with J.L. He said that when the door of the elevator opened, she took him by the hand and led him to her room. Once she had unlocked her door, she led him by the hand inside the room. He said the kissing grew more intense and was reciprocated. Captain Nordstrom could not recall who undressed who, but remembers lying on the bed, beside J.L., kissing and performing oral sex. He said that during oral sex, J.L. was making sounds of pleasure, she was putting her legs around his head to bring his head closer. He stated that there was no indication, at any point, that she did not want this to happen. It stopped only because he needed to go to the bathroom. At that point, she stood at the end of the bed. He recalled that when he got back towards the bed she said, "We can't do this, Steve, I'm married" to which he replied, "Are you sure?" and she said, "Yes." This marked the end of the intimate interaction between them. He said he picked up his clothes, put them on, kissed J.L. goodnight and left. He denied, at any time, having placed his hands on her neck. He denied inserting his finger in her anus. He denied penetrating or trying to penetrate her from behind.

[20] As for the second charge, Captain Nordstrom testified that he recalls that on Friday, 13 March, the final day of his course in Toronto, he was trying to navigate his way around luggage around the classroom and, at one point, accidentally collided with the backpack J.L. was wearing. He said he recalls this otherwise unspectacular event because she quickly turned around and appeared quite upset. He said, "I'm sorry", but her reaction was out of proportion with the gravity of the accident, as he perceived it. He said that he did not deliberately touch her. He just bumped into her accidentally.

[21] In cross-examination, the prosecutor discussed a previous conviction for breach of conditions imposed at the time of the arrest of Captain Nordstrom and a previous statement given by the accused in family court proceedings. Captain Nordstrom denied ever having made inappropriate remarks in relation to a server at a supper previously during the course as it would be against his values. He agreed that he found J.L. attractive and that alcohol could make him less inhibited. He denied having attempted to force sex with her, basically saying, once again, that he stopped when she said no. He denied being annoyed at that point or sexually frustrated, saying that he understands people can say no.

[22] The prosecution was granted its request to introduce rebuttal evidence as it pertains to the good character evidence introduced by the defence. Lieutenant-Commander Nicole Bennett-Boutilier testified by video link from Germany and said that she developed a very negative opinion of Captain Nordstrom following an incident during the Operational Flight Surgeon course when he had made a misogynistic comment in relation to a server at a restaurant. Even if some of her colleagues from the course thought she should give him a second chance, she said she would not trust him as a professional with patients.

Issues

Areas of contention

[23] As confirmed during submissions of counsel, it became clear that the parties are *ad idem* on a number of facts as it relates to the sequence of events pertaining to both charges. Essentially, both parties agree that my assessment of the credibility of both main witnesses, that is, J.L. and Captain Nordstrom, will inform the findings of facts I need to make on the following contentious issues:

- (a) Whether the touching in the pub, described by J.L., occurred at all;
- (b) As it pertains to the incidents of unwanted touching at the strip club, in the taxi returning from the club and in J.L.'s hotel room both before and after Captain Nordstrom used the bathroom, the evidence of both participants is to the effect that most of the touching occurred; the question to be resolved is whether the absence of consent to this touching on the part of J.L. has been proven beyond a reasonable doubt. For the acts of anal and vaginal penetration described by J.L., the issue is whether these occurred;
- (c) Finally, as it pertains to the second charge, it is once again agreed that touching did occur, the issue is whether that touching was voluntary or rather accidental.

Application of the law to the facts

[24] As to the law, counsel agree on the essential elements of both offences, which do not need to be stated. The elements of identity and place are not the subject of contention. The essential element of time has been the subject of some debate in relation with the second charge which alleges an assault "on or about" 14 March 2015, a day when Captain Nordstrom woke up in Winnipeg and subsequently travelled to Brandon, near Shilo, where he works. It was clear from the facts that the alleged offence would have been committed the previous day, which is Friday 13 March, as both Captain Nordstrom and J.L. testified about a physical contact between them that day. It is unfortunate that the charge was laid alleging the wrong date. However, the jurisprudence has recognized that the words "on or about" mean the period of time

surrounding that date, for instance in *R. v. Goudreault*, 2005 ABQB 699 at paragraphs 14 and 15. Given that the offence has been shown to be committed within a period that is within a reasonable approximation to the date specified on the charge sheet, the fact that the date is not correctly stated would not preclude a valid verdict of guilty. I do find that 13 March was proximate enough to 14 March, the date on or about which the offence is alleged to have been committed. As the defence has clearly not been prejudiced, I find that this element of time in relation to the second charge has been proven.

[25] As it pertains to the first charge of sexual assault, both counsel agree that I need to look at each separate incident, six of them according to the prosecution, where a sexual assault would have been made out on the facts according to the prosecution. As for the first of those incidents, the touching at the pub, it is the essential element of intentional application of force that is at issue. If I accept the version of J.L. as it pertains to this event, the offence would have been proven as I could hardly dismiss her evidence to the effect that she did not consent and that the accused would have known she did not consent. As for the other sexual assault incidents, both counsel agree that the element in contention is primarily the issue of whether the prosecution has proven beyond a reasonable doubt the absence of consent. Alternatively, the accused argued that if the Court was to find that element to have been proven, I should conclude that on the facts, it had not been proven to the required standard that the accused knew that J.L. was not consenting. On that argument, the prosecution's position is that the defence of honest but mistaken belief in consent is not open to the accused on the facts of this case as his belief arose from recklessness or willful blindness. According to the prosecutor, the accused has failed to take reasonable steps to ascertain that J.L. was consenting.

[26] As it pertains to the second charge of assault, counsel argued that the sole issue to be determined is whether Captain Nordstrom applied force to J.L. intentionally when he bumped or leaned into her during the course's final moments on 13 March 2015.

[27] Clearly then, counsel agree the issue to be resolved is one of credibility of witnesses, first to establish the contested elements beyond a reasonable doubt and, as required, accept or reject the defence put forward alternatively by the accused. I will therefore commence my analysis by addressing the issue of credibility.

Analysis

Credibility analysis generally

[28] This is a case of two conflicting testimonial accounts where the credibility of those conflicting accounts are at issue. The Supreme Court of Canada has developed a framework to explain what "reasonable doubt" means in a context such as this one in the case of *R. v. W. (D.)*, [1991] 1 S.C.R. 742. That framework, to be applied by trial judges, was stated by Cory J as follows:

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.

[29] This framework was developed to prevent trial judges from committing the error of resolving these conflicting testimonial cases on the basis of whom they were going to believe, the complainant or the accused. Indeed, the apparent logic of choosing between conflicting versions breaks down when the essential nature of a criminal trial is remembered. A criminal trial, including before a service tribunal, is not an inquiry into what happened, or whose version is stronger. The ultimate function of the trial, in which the complainant is not a party, is to determine whether the prosecution can prove the specific allegations it has made beyond a reasonable doubt. The trial judge may well prefer a complainant's narrative to the one offered by an accused, but that does not resolve whether he or she has a reasonable doubt about the accused's guilt. This is because there are other options requiring acquittal, including the legitimate possibility of the judge being unable to resolve the conflicting evidence and, accordingly, being left in reasonable doubt.

[30] This principle is particularly important to keep in mind in a case like this one, where the prosecution's evidence rested exclusively on the shoulders of the complainant, J.L. The ultimate decisions I have to make should not be seen as dismissal of her version of the facts or of the emotional difficulties that it inflicted on her.

[31] Although the *W. (D.)* framework refers to analysis under the heading "credibility", we must remember that this term refers to both credibility and reliability. Testimony has credibility problems if the witness is intentionally offering, in whole or in part, false, exaggerated, or minimized information. In effect, credibility addresses whether the witness is lying. In contrast, reliability is about honest mistakes. Evidence has reliability problems if an honest witness is inadvertently offering inaccurate information. Credibility problems can arise because the witness is not a trustworthy person but generally, credibility problems are almost always contextual. In particular circumstances, witnesses may choose to offer a fabricated, exaggerated, or minimized account. As with credibility problems, some reliability problems arise from a witness's personal circumstances but are more commonly situational.

[32] The most dependable way to evaluate credibility is to pay heed to the specific testimony offered, rather than the source or manner of presentation. I have considered a number of factors in this evaluation, including the plausibility of the evidence, the presence of independent supporting or contradicting evidence, the external and internal consistency of the evidence and the "balance" of the evidence.

[33] Many of the factors already identified as relevant in evaluating credibility can assist in making reliability conclusions. Accounts most rationally trusted for their accuracy are plausible; consistent with what can confidently be known to be true; may

even be supported by independent information; and the witness who provides that account will not have offered materially different versions on other occasions.

[34] At the close of this trial, there were three feelings which inhabited me as the judge of the facts in this case. First, I was determined to act judicially, leaving little to emotion, in order to arrive at a result that could be as objective as possible. Second, I was touched by the testimony of the complainant J.L., although I was concerned with some gaps in the narrative of events that she offered and about a portion of her narrative that was effectively challenged in cross-examination. Third, I could not find any reason to dismiss Captain Nordstrom's testimony as untrue. I will now address these issues.

The credibility of the accused

[35] Captain Nordstrom testified in a calm, straightforward and dispassionate manner, relating facts as he remembered them. He was precise in relation to the issues central to the case and provided a number of details on matters more peripheral, generally adding precision to the narrative he was relating. The accuracy of his account and its interaction with independent evidence such as the schedule of the course, entered as Exhibit 5, enhanced the plausibility of his testimony.

[36] On cross-examination, Captain Nordstrom was not challenged on anything of substance as it pertains to the narrative but some time was spent on questions related to the printout of his exchange of text messages with J.L. at Exhibit 4. My interpretation of that evidence is that it shows a casual interaction between two persons who had become friends and were at times exchanging texts that reflected content that would not be meant to be shared publicly, including texts showing a certain level of sexual innuendo. The explanations offered by Captain Nordstrom satisfy me that there is nothing in this exchange that could indicate he was threatening or harassing towards J.L. and nothing that could affect his credibility. Some time was also spent confronting Captain Nordstrom with a family court affidavit in which the events were referred to as having happened in March as opposed to February 2015. I am satisfied with the explanations provided by Captain Nordstrom in that regard. I also note that Captain Nordstrom was straightforward in discussing a breach-of-condition charge relating to consumption of alcohol in June 2016, for which he admitted his guilt in the course of a summary trial. During arguments, the prosecutor conceded that there were no problems of plausibility with Captain Nordstrom's evidence.

[37] The character evidence presented by defence and rebutted by the prosecution did not carry much weight in my analysis in this case. The character witnesses testified mainly about Captain Nordstrom's professional life. The positive testimony relating to relations with women was countered by the negative testimony of Lieutenant-Commander Bennett-Boutilier. I note from that evidence that Captain Nordstrom may not be the type of person who would repeatedly assault a colleague in a public place such as a pub or club. However, for the behaviour which would normally manifest itself in private, as in this case, I am not placing much weight on the character evidence which I have heard to conclude whether the evidence of Captain Nordstrom is more

likely to be true or he is more likely to be credible. Overall, the character evidence is neutral.

[38] All things considered, I conclude that there is nothing in the substance of what Captain Nordstrom testified about or in the manner in which he gave his evidence that would cause me to disbelieve his evidence.

[39] However, this is not the end of the analysis. As evidenced by a recent article by David M. Paciocco, “Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment” (2017), 22 *Can. Crim. L. Rev.* 31, the *W. (D.)* framework does not need to be applied by analytical sequence. Instead, the rules are numbered simply to demonstrate a list of the possible conclusions that a trial fact-finder can arrive at when considering evidence inconsistent with guilt. Therefore, a proper application of the *W. (D.)* framework does not require me to decide whether I believe the exculpatory evidence of the accused, or if I am left in a reasonable doubt by it, before considering the sufficiency of the inculpatory evidence. In other words, I am not required to acquit if the exculpatory evidence cannot be rejected.

[40] In fact, evidence favourable to the accused is not to be assessed in isolation from the conflicting evidence offered by the prosecution. Even in applying the test of *W. (D.)*, the evidence in a criminal trial must be considered as a whole. As a result, it is permissible for a trial fact-finder to reject entirely the exculpatory evidence simply because of the imposing strength of the Crown case, even if no specific reasons can be articulated for why the accused’s evidence is disbelieved.

[41] In *R. v. D. (J.J.R.)*, (2006) 215 C.C.C. (3d) 252, Doherty JA of the Ontario Court of Appeal observed, “An outright rejection of an accused’s evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused’s evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused’s evidence.”

[42] Yet, I cannot simply accept the complainant’s evidence as credible and consequently reject the evidence of the accused. I need to address my mind to the third leg of the *W. (D.)* framework and question whether the evidence considered as a whole, including the complainant’s evidence, is compelling enough to remove all reasonable doubt. The credibility of inculpatory evidence must be particularly impressive before that evidence can be credited beyond a reasonable doubt in the face of facially unassailable exculpatory evidence. If I arrive at such a conclusion, I am bound to demonstrate that I have not convicted simply because I prefer the inculpatory version.

[43] I now need to look at the rest of the evidence, including J.L.’s version of the facts.

The credibility of the complainant J.L.

[44] I have noted at trial J.L.'s courage in testifying about what appears to be very troubling facts which left her in a state of emotional turmoil, as evidenced on several occasions in the course of her testimony.

[45] Yet, I have to act judicially. It would be imprudent on my part to simply assume that because J.L. showed distress and emotion in her testimony that the events she related must be true. It is perfectly possible for witnesses to become distressed and emotional when describing incidents such as those she testified about, whether or not their account is true. The presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying. I have to look beyond that.

[46] In this case, J.L. testified, not without emotion, to the effect that she was so troubled after her interaction of 19-20 February 2015 with the accused that she no longer felt safe. She contacted her husband and asked him to join her at the hotel in Toronto over the weekend. She testified that she told him that something had happened and that she was afraid of someone but she did not tell him the details of what had occurred. As it turns out, when the schedule of the course was shown to her, she had to admit that her husband could not have come to Toronto to visit her at her hotel as she stated because she stayed on CFB Trenton that weekend. Even if her recollection was sketchy, she agreed that course participants had transferred to Trenton on the morning of 20 February. In re-examination, the prosecutor did not try to rehabilitate his sole witness to show that she may have been confused in relation to the exact moment or location of a visit by her husband. In my view, that contradiction in her testimony revealed a significant weakness in her ability to remember events accurately.

[47] My confidence was also shaken by J.L.'s inability to remember a number of details in her narrative, which leaves holes affecting the reliability of her testimony. For instance, I am left doubting how the visit to the strip club could have materialized given that she could not recall the most basic details of any discussion she would have had with Captain Nordstrom at the pub or in the limousine as to how, when or where they should go. She simply stated that she somehow signified to Captain Nordstrom "let's go" at one point in the limousine. She also did not offer any explanation as to why she wanted to attend a strip club with the person who had just been assaulting her repeatedly at the pub, despite her protests. She testified she was ashamed at the pub that others present may believe she had that kind of relationship with Captain Nordstrom but did not seem to have any concerns with the perception of leaving the limousine, late at night, alone with Captain Nordstrom. That leaves me in doubt as to the plausibility of her narrative as it pertains to events at the pub.

[48] J.L. also offered an explanation as to why she would rest her head on Captain Nordstrom's shoulder during the take-off phase of a flight from Toronto to Edmonton to the effect that her fear of flying was heightened, at that critical phase of the flight, especially after having recently seen pictures of crash victims during the course. In fact, these pictures were shown to her later in the course. The fact that she lay her head on the accused's shoulder is of no importance as victims of sexual assault may react in a

variety of ways after an assault. However, her over-justification of her reaction that day in her evidence reveals once again her confusion about the sequence of events, casting some doubt about the reliability of her testimony.

[49] I have also been concerned about a statement made by J.L. in cross-examination, pertaining to a discussion she appeared to recall for the first time about whether or not she was “a front or a back”, referring to an earlier conversation with the accused on the types of person who would have sexual intercourse facing each other or facing in the same direction. There was no mention of that conversation in earlier statements and that testimony was in contrast with her examination-in-chief to the effect that there was no or little conversation in her hotel room between her and the accused. It also contrasted with her initial difficulty in cross-examination to remember the details of any conversations with the accused. Perhaps the insistence of defence counsel helped to revive J.L.’s memory of events, yet I am concerned with the apparent ebbing and flowing of her recollection. This also causes me reliability concerns.

[50] However, there are things that did not concern me in J.L.’s testimony. Even if defence counsel confronted J.L. with a number of alleged inconsistencies between her two previous statements and her testimony in Court, the prosecution in re-examination was able to show, with the help of the transcript and recording of a previous statement given to police, a number of consistencies that are just as relevant to my assessment of J.L.’s evidence. Also, I find that J.L. was making efforts to be balanced in her testimony, conceding facts favourable to the defence especially when her memory did not allow her to come to definite conclusions. Finally, I do not attach any negative weight to the fact that J.L. waited to complain against Captain Nordstrom.

Conclusion on credibility

[51] In this case, as fact-finder, I am entitled to believe all, some or none of a witness’s evidence. I am not prepared to dismiss J.L.’s version as being entirely not credible but I believe there are significant reliability concerns with some important parts of her testimony. Even if she appears to be an honest witness, any honest witness may give what is or may appear to be an implausible account for a variety of reasons. I believe the inaccuracies noted in J.L.’s testimony by virtue of contradiction by other evidence and internal inconsistency are related to the reliability of her memory of the events and may denote honest errors.

[52] The contrast with the testimony of Captain Nordstrom is significant. In light of the fact that I am unable to think of any specific reason for why I could disbelieve his evidence, the uncertainties related to the reliability of the prosecution’s evidence make it impossible for me to reject entirely the exculpatory evidence. Simply stated, the prosecution’s case is not compelling enough to remove all reasonable doubt on the issue of credibility. This is not a case where the credibility of inculpatory evidence is so impressive as to be credited beyond a reasonable doubt in the face of facially unassailable exculpatory evidence.

Application of credibility findings to the evidence

[53] As alluded to earlier, my assessment of the credibility of witnesses will inform the findings of facts I need to make on the contentious issues. First, the prosecution needed to convince me beyond a reasonable doubt that Captain Nordstrom touched J.L. repeatedly in the pub in the manner she described. I am not convinced at the required standard that this touching has occurred. Indeed, in the close-quarter sitting arrangements seen on the picture at Exhibit 3, it appears implausible for me that J.L.'s genital and thighs would have been touched up to one hundred times during the Scotch tasting event and the supper with her repeatedly moving Captain Nordstrom's hand away while saying no without anyone intervening or at least noticing. In her own testimony, J.L. complained angrily and emotionally that no one intervened. The implication is that they should have. I deduce from her testimony and the proximity of those involved that Captain Nordstrom's acts, and her reaction to them, both in words and actions, should have been noticed by those around them. It is difficult for me to accept that none of the seven doctors and officers tabled in close proximity to J.L. that evening would not bother coming to her assistance if the events occurred as she described. It is so especially after hearing the testimony of Lieutenant-Commander Bennett-Boutilier as to the bad character of Captain Nordstrom on the basis of an inappropriate remark made in the course of their short interaction on the course. She was sitting right in front of Captain Nordstrom and J.L. was sitting across the table to her left. Yet, she was not called to corroborate the version of J.L. Given the reliability concerns identified earlier, the plausibility of the events occurring the way J.L. described is too weak to sustain a conviction. The element of application of force has not been made out to the required standard.

[54] As it pertains to the various incidents of touching at the strip club, in the taxi returning from the club and in J.L.'s hotel room both before and after Captain Nordstrom used the bathroom, the question to be resolved is whether the absence of consent to this touching, on the part of J.L., has been proven to the required standard. There were only two persons who testified as to what has occurred on those occasions. The credibility findings I made earlier are sufficient to dispose of this issue. For the reasons I provided, the testimony of J.L. does not have the required level of reliability to prove the absence of consent to these incidents of touching beyond a reasonable doubt. The reliability does not reach the level required to allow me to dismiss Captain Nordstrom's testimony to the effect that the actions of J.L. in the course of their intimate interaction on 19-20 February 2015 showed that she consented to the kissing, the touching and the oral sex. Given the reliability concerns I have expressed, I am left with a reasonable doubt as to whether, as J.L. testified, the anal touching and attempted penetration from behind did occur because I cannot dismiss as untrue the evidence of Captain Nordstrom to the effect that they did not. I also cannot dismiss as implausible his evidence to the effect that he accepted the only "no" he was given when J.L. would have said that they could not do this as she was married.

[55] Consequently, the accused must be found not guilty of the first charge. In the circumstances, I do not need to address the mistaken belief in consent defence alternatively pleaded by defence counsel.

[56] As it pertains to the second charge, it is once again agreed that touching did occur, the issue is whether that touching was voluntary, as suggested by J.L. in her testimony to the effect that the force applied on the backpack she was wearing was gradual, hence intentional. For his part, Captain Nordstrom said the touching was accidental, as he was trying to manoeuvre in a space that was rendered confined by the movement of people getting in and out of the bathroom as they were trying to get changed, accessing their luggage that had been brought to class that day after hotel check-out.

[57] Once again, the prosecution's evidence is limited to the testimony of J.L. who could not remember precisely what the activities of the class were that day, the last day of the course. She did acknowledge that there would have been luggage around, and a need for her course mates and her to get changed. She also acknowledged that she had not seen Captain Nordstrom approach her and could not see Captain Nordstrom at the time he was applying force on her back. As conceded by the prosecutor in submissions, the feeling of J.L. that increasing weight was applied from behind by Captain Nordstrom is the only evidence of Captain Nordstrom's intention to apply force to J.L. Essentially, I am asked to infer intent on that basis alone. I recognize that J.L. may have honestly believed that force was applied intentionally, recognizing that she offered evidence of what she perceived to be harassing conduct from Captain Nordstrom in the period between the first event on 19-20 February and the alleged assault on 13 March. Yet the evidence of harassment is not convincing and the subjective impressions of J.L., even if honestly held, are not determinative. On the basis of all of the evidence, I am left with a reasonable doubt on the voluntary character of the force applied by Captain Nordstrom in the circumstances. The prosecution has therefore failed to convince me beyond a reasonable doubt that Captain Nordstrom applied force to J.L. intentionally.

[58] Consequently, Captain Nordstrom must be found not guilty of the second charge.

FOR THESE REASONS, THE COURT:

[59] **FINDS** Captain Nordstrom not guilty of all charges.

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh and Major M.E. Leblond

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