

Particulars: In that he, on or about February, 2018, at or near CFB Petawawa, Ontario, did commit a sexual assault on S.B.”

Uncontroversial evidence

[2] In her examination-in-chief, S.B. testified that:

- (a) she first met Sergeant Tait sometime in 2017 while she was working the drive-through at McDonald's;
- (b) the incident occurred after Valentine's Day 2018 and before March 2018;
- (c) before the alleged incident in February 2018, she was already engaged in an intimate relationship with Sergeant Tait that began in January 2018;
- (d) even though Sergeant Tait previously had a vasectomy and S.B. knew that she could not get pregnant from engaging in sexual relations with the Sergeant Tait, up until the night in question, Sergeant Tait had used condoms;
- (e) on the evening of the alleged incident, S.B. was at church services when they mutually agreed that she would take a taxi and meet Sergeant Tait in his room on the base in Petawawa;
- (f) S.B. estimated that she arrived in Sergeant Tait's room around 7:30 or 8 p.m.;
- (g) Sergeant Tait's room was located on the first floor of building J101, his room as "L" shaped, with a couch, television, shelving unit, mini fridge, bathroom and bed;
- (h) when she arrived at Sergeant Tait's room, they greeted each other and then sat down on the couch and watched a movie;
- (i) while seated on the couch, they began kissing and making out and then they moved to his bed. She confirmed for the Court that this foreplay activity was consensual;
- (j) although originally unsure how long the intercourse lasted, she later estimated approximately fifteen or twenty minutes but admitted she did not know exactly;
- (k) they did not change positions during sexual intercourse and Sergeant Tait remained on top throughout;
- (l) After they finished having sex, at her request, Sergeant Tait took her home;

- (m) she does not recall any specific conversation between the two of them from when they had sex and he took her home;
- (n) she estimated that she returned home around 9 p.m. that evening as that was the time that her church would normally finish so she wanted to be home by then. She estimated she lived about a five-minute drive from Sergeant Tait's room;
- (o) she was upset because of what happened that evening, but did not discuss the reasons with Sergeant Tait during their drive back to her home;
- (p) during their sexual relations, she wanted Sergeant Tait to wear a condom because she wanted to protect herself against any sexually transmitted diseases (STDs); and
- (q) as soon as she got home, she called her sister O.M.

Controversial evidence

[3] It is what happened during the alleged offence where the facts diverge and there is inconsistency in the evidence. In her examination-in-chief, the complainant testified that:

- (a) once they moved to the bed, they continued making out, necking and petting and when they were about to become intimate, she asked Sergeant Tait to get a condom;
- (b) she described this moment as when their clothes were coming off, although she could not recall what either of them were wearing;
- (c) after she asked Sergeant Tait to get a condom, he did so and placed it on the side of the bed;
- (d) she did not realize until halfway through intercourse, when she saw the unopened condom in its wrapper, that Sergeant Tait had not put the condom on;
- (e) when she realized Sergeant Tait was not wearing a condom, she asked him to stop and he did not; and
- (f) up until she saw the condom in the unopened wrapper, she thought he was using a condom. She then stated that he held her down and continued to have sex with her.

[4] Under cross-examination, much of the above evidence was challenged and her answers differed or revealed frailties in her memory. The inconsistencies will be discussed within the forthcoming analysis.

[5] Since the defence made known that they were relying upon a defence of consent and bias or motivation to fabricate, the prosecution called O.M. the complainant's sister who confirmed that on the night of the incident, S.B. sent her a text and they engaged in a FaceTime conversation about what had transpired.

Presumption of innocence and reasonable doubt

[6] Sergeant Tait entered these court martial proceedings presumed innocent. That presumption of innocence remains throughout the court martial until such time as the prosecution has, on all the admissible evidence, satisfied the Court beyond a reasonable doubt that Sergeant Tait is guilty of the charge before the Court.

[7] 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, but its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320, paragraph 39):

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.

[8] In essence, this means that even if I believe that Sergeant Tait is probably guilty or likely guilty, that would not be sufficient. If the prosecution fails to satisfy me of his guilt beyond a reasonable doubt, I must give him the benefit of the doubt and acquit him.

[9] 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. Therefore, in order to find Sergeant Tait 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 charge set out in the charge sheet. (see *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, paragraph 242)

Legal framework

Applicable legislative provisions

[10] The general offence of assault is found in section 265 of the *Criminal Code*, R.S.C. 1985, c. C-46:

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;

[. . .]

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

[11] Sexual assault is found at section 271 of the *Criminal Code*:

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 or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

[12] The definition of consent is found in subsection 273.1(1):

273.1 (1) Subject to subsection (2) and subsection 265(3), **consent** means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[13] Subsection 273.1(1) is subject to subsections 265(3) and 273.1(2), which set out circumstances where, regardless of the complainant's voluntary agreement to the act in question, no consent is obtained. Subsection 265(3) reads as follows:

Consent

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

[14] In *R. v. Barton*, 2019 SCC 33, the Supreme Court of Canada (SCC) wrote at paragraph 88:

[88] “Consent” is defined in s. 273.1(1) of the *Code* as “the voluntary agreement of the complainant to engage in the sexual activity in question”. It is the “conscious agreement of the complainant to engage in every sexual act in a particular encounter” (*J.A.*, at para. 31), and it must be freely given (see *Ewanchuk*, at para. 36). This consent must exist at the time the sexual activity in question occurs (*J.A.*, at para. 34, citing *Ewanchuk*, at para. 26), and it can be revoked at any time (see *Code*, s. 273.1(2)(e); *J.A.*, at paras. 40 and 43). Further, as s. 273.1(1) makes clear, “consent” is not considered in the abstract. Rather, it must be linked to the “sexual activity in question”, which encompasses “the specific physical sex act”, “the sexual nature of the activity”, and “the identity of the partner”, though it does not include “conditions or

qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases” (*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55 and 57.
[Footnote omitted.]

Issues to be decided

[15] In accordance with the Military Rule of Evidence 37(b), for the purpose of dispensing the prosecution from having to prove certain facts beyond a reasonable doubt, Sergeant Tait admitted the following:

- (a) the identity of the person having committed the alleged offence as indicated in the particulars of the charge sheet dated 22 September 2020; and
- (b) the place of the alleged offence as indicated in the particulars of the charge sheet dated 22 September 2020.

[16] Based on the admissions and the evidence before the Court, the critical issues remaining for this court martial to determine are the following:

- (a) did the prosecution prove beyond a reasonable doubt the complainant’s absence of consent? In other words, did the prosecution prove that S.B. did not consent to the sexual act or acts in question or, if she consented, whether that consent was vitiated by subsection 265(3) of the *Criminal Code*; and
- (b) did the prosecution prove beyond a reasonable doubt that Sergeant Tait knew or should have known of that absence of consent?

[17] Given the evidence at trial, these issues are inextricably linked to the credibility and/or reliability of the witnesses, primarily the complainant.

Analysis

[18] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the essential elements of the offence, I now turn to address the legal principles.

[19] In conducting my analysis, I proceeded first in assessing the evidence and credibility of the complainant and determining whether the particulars and the elements of the charge have been made out.

Credibility of the witnesses

[20] Given that the event in question took place over three years ago, it is not unusual that the evidence presented before the Court is contradictory. Witnesses may have different recollections of the events and the Court has to determine what evidence it finds credible and reliable.

[21] 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? 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?

[22] A court may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings.

[23] The *viva voce* evidence, which is the live testimony before the Court, consisted of the complainant S.B., and her sister O.M. Sergeant Tait did not testify.

Credibility of the complainant

[24] In assessing the credibility of S.B., I closely reviewed the substance of her testimony. Originally, I found that her version of what transpired was indeed plausible and was likely to be true. It is true that she never wavered in her assertion that she did not want to have sex without a condom that night, as she was concerned about contracting STDs as she believed that she was not Sergeant Tait's only sexual partner.

[25] The Court found that S.B.'s memory of her own personal action was strong and she displayed humility and did not hesitate to admit unflattering things that she did in a desperate attempt to either salvage her relationship with Sergeant Tait or gain necessary closure. From this perspective, her evidence was balanced and I felt that she was making every effort to be honest. She did not shy away from admitting when she lied to one of Sergeant Tait's friends in a text message and she also did not shy away from admitting she created as many as fifteen (and possibly more) fake Instagram accounts in a desperate attempt to speak with Sergeant Tait. When questioned whether she sent Sergeant Tait texts with threats that she was going to report him to police for what she described as an alleged rape, she clarified that she did not send him any texts in this regard, but admitted that she sent him emails. Her memory recall on her own personal action was quite precise.

[26] She readily admitted to some of the problems within their relationship and that Sergeant Tait often ignored her and how much that upset her. She appeared frank and honest about her reaction to them breaking up at a time when they just started to engage in the type of relationship that she always wanted.

[27] There was independent supporting evidence provided by O.M. that the Court could rely upon to bolster S.B.'s credibility. O.M. confirmed that S.B. called her on the evening of the alleged sexual assault. O.M. described S.B. as agitated and upset about how her evening with Sergeant Tait had unfolded. Based on O.M.'s testimony, I find that something happened on that evening in question which upset S.B.

[28] However, that same independent evidence by O.M. also revealed inconsistencies with S.B.'s in-court testimony as well as with the account she provided to the military police during their investigation. In short, these inconsistencies revealed a tendency of S.B. to colour her perspective based on how she was feeling or how she wanted certain events to be viewed by others.

[29] As she recounted her version of events related to the sexual assault, I found S.B. to be unnecessarily difficult with both the prosecution and defence counsel who independently attempted to very professionally guide her through her testimony. At the beginning of her testimony, she was so hostile to the prosecution, I felt that the prosecution purposely limited their direct examination because of this.

[30] Originally, I dismissed S.B.'s conduct as arising from nervousness and an understandable sensitivity to discussing very private details of an alleged sexual assault in open court. However, as her testimony continued and she was asked to respond to counsel's questions, she became increasingly contentious and hostile. It quickly became apparent that her memory of the surrounding details of the alleged sexual assault was either very limited or she was unable to or deliberately refusing to answer the questions.

[31] When asked to provide important specifics related to the alleged sexual assault, she repeatedly stated that she could not remember. By comparison, when she described sending the text to Sergeant Tait's friend, which she confirmed contained an outright lie, she could recount what she wrote, how she felt; she told the court she was laughing when she sent it, and she easily explained why she sent it. However, that type of detail and granularity were noticeably missing when she recounted the events that were relevant to the alleged sexual assault.

[32] It is possible that she has suppressed a great deal about both the relationship and the alleged sexual assault and when questioned, she was subconsciously resentful with having to resurrect details she wished to forget. This might also account for the hostility and contrariness when she was being questioned by both the prosecution and the defence. After her direct testimony, the complainant and her counsel requested that she be permitted to testify without seeing Sergeant Tait. In response, Sergeant Tait volunteered to attend the proceedings virtually so that S.B. could be in the courtroom and more at ease. Every effort was made by all parties to accommodate the uneasiness of S.B. Unfortunately, she remained hostile and antagonistic.

[33] Despite her best efforts to be truthful, the reliability of her evidence is dependent upon her memory and more specifically her ability to describe the alleged sexual assault with sufficient detail to give the Court the necessary confidence to assess the pivotal

issues. Unfortunately, it was S.B.'s inability to remember accurately or alternatively her inability to recount the important details that relate specifically to the alleged sexual assault itself that raised the greatest concern for the Court.

[34] Under cross-examination, there were several conflicts with the internal consistency of her testimony before the Court. In addition, it also became evident that S.B. had offered materially different versions of the events on other occasions. As noted above, S.B. had tendency to colour her view of events based on how she was feeling and this accounts for some of the variability in her testimony, which the Court had to be alert to and scrutinize. I will discuss these concerns below.

Absence of consent

[35] It remains very important to be aware that, notwithstanding the chain of command's and the investigators' responsibility to believe a complainant when they report misconduct, a court martial must not fall into the trap of automatically believing that a complainant's testimony is truthful. 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 Sergeant Tait's presumption of innocence.

[36] The role of the court martial is to determine whether or not the alleged offence has been proven beyond a reasonable doubt and the Court recognizes that it may never be able to determine what exactly happened.

[37] Although there were no witnesses to support this specific allegation, there is no legal impediment to a Court convicting an accused based on a complainant's uncorroborated evidence, provided that through the evidence put before the Court, the prosecution proves the particulars and the elements of the offence to the evidentiary standard of proof beyond a reasonable doubt. However, it does require the Court to carefully scrutinize the evidence.

[38] For example, some understanding of how those critical moments unfolded that make up the offence before the Court is imperative in order to make a determination as to whether or not S.B. consented and, if not, whether Sergeant Tait knew that she had not consented.

[39] The absence of consent is subjective and is determined by reference to the complainant's internal state of mind. The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence, including any ambiguous conduct she may have displayed. The Court must assess whether the totality of the complainant's conduct and her statements are consistent with her claim of non-consent. The test is not whether she later regretted her decision or whether she would have made the same decision if she had the time to reflect upon it and do it again, but rather, the test is whether, on that evening, at the time that they allegedly had sex without a condom, she did not want to and that she made her intentions clear.

[40] S.B. was clear and unequivocal in asserting that she did not consent to having sex with Sergeant Tait without a condom. The Court reviewed the consistency of S.B.'s evidence provided both in direct and cross-examination, with what she said in her police statement as challenged in court, as well as the testimony of O.M. regarding the statements S.B. made to her after the alleged incident. It is true that at its core, S.B. has been somewhat consistent with this assertion, but her statement to O.M. which will be discussed later, did raise some concern. Importantly, it is important to keep in mind that a bare assertion by itself is not sufficient to prove an offence to the required evidentiary standard.

[41] As stated above, the Court noted many inconsistencies within her in-court testimony itself, some of which related to non-vital issues, but some of the inconsistencies were germane to the Court's assessment of whether or not the offence of sexual assault was committed. I very thoroughly examined those issues that touch on the elements of the offence.

Difference in description of the alleged sexual assault

[42] It was suggested by defence counsel that, S.B.'s version of the alleged offence shared in court was different from what she told the police. In S.B.'s examination-in-chief, she told the Court that during foreplay, as their clothes were coming off, she stopped and asked Sergeant Tait to get a condom. She later qualified that when she asked him, Sergeant Tait was still wearing his pants. She stated that Sergeant Tait got the condom from a cupboard which she guessed was approximately fifteen feet from the bed.

[43] When S.B. was asked in examination in chief about what occurred, her description of events suggests that the sexual intercourse was consensual until she realizes that the condom wrapper is unopened.

“Q. Okay. So at which point do you ask him to stop? A. When I realized he wasn't wearing the condom.

Q. And at which point did you realize he wasn't wearing a condom? A. Oh God; when I looked down at the side and it wasn't open.

Q. Okay. And at that stage, have you, have you started engaging in intercourse at that stage? A. Yes.

Q. Okay. And how are you positioned in relation to him? A. I'm on the bottom.”

[44] She told the Court that she thought Sergeant Tait had put the condom on and then described having sexual intercourse for about seven to ten minutes before she noticed the unopened wrapper on the bed and, it was at that time, she told him to stop. She further suggested that he ignored her request to stop and held her down.

“Q. No? What does he do? A. Held me down. Like he was, he put his weight on me. He was holding me down. I was a smaller person at the time.

Q. And when you say you were a smaller person at the time? A. Like I was lighter in weight.

Q. Understood. So he’s positioned on top of you? A. Yes.

Q. And he’s putting his weight on you? A. Yes.”

[45] In light of that description, in questioning S.B., defence counsel broke down the alleged assault into both Part 1 and Part 2 with Part 1 being where they had consensual sex while S.B. did not notice that Sergeant Tait did not have a condom on and Part 2 which occurs after she notices and tells him to stop and he allegedly holds her down.

Part 1 – without knowledge that Sergeant Tait was not wearing a condom

[46] Under cross-examination, when S.B. was asked for more specifics on Part 1, S.B. explained that normally she could see and notice right away when Sergeant Tait put on a condom, but, that time, she did not. She just assumed he did because he had gone to get the condom.

[47] S.B. also went on to confirm that she did not notice Sergeant Tait was not wearing a condom when he penetrated her as she could not see based on the position she was in. She described herself as lying on her back and was clear that at that point, she was not being held down. She said: “No one was holding me down on the bed—my head on the bed.”

[48] However, a little later under cross-examination, in describing the activity in Part 1, S.B. suggested that during this early part, Sergeant Tait also held her down, but that she did not say anything.

“Q. Okay. And you indicated in the first part, like you didn’t say anything to him at that time about the fact that he was holding you down? Like, did you comment on that? A. Well, you see, he’s kind of kinky, so I let it, okay?”

[49] However, when S.B. was asked specifically if Sergeant Tait was holding her hands down, she said she could not remember. The exchange went as follows:

“Q. Yeah. You said that he held you down using his body weight?
A. Hum, hum.

Q. His hands were on the bed? A. . . .

Q. So he didn't hold you down using his hands? A. No.

Q. Your arms were free? A. I don't remember.

Q. Is it possible that he was holding your arms down? A. I don't remember.

[. . .]

Q. So you say the sex was 15 to 20 minutes and you noticed he didn't have a condom on halfway through? A. Yes.

Q. Is your testimony that he held you down for the entire portion of the 15 to 20-minute intercourse? A. Yes.

Q. So you felt like he was holding you down, forcing you to have sex against your will for up to 20 minutes? A. Yes.”

[50] Given S.B.'s change in evidence that she was forced to have sex for the entire period of 20 minutes, defence counsel tried to clarify what S.B. was suggesting:

“Q. Although the first half, he was holding you down, you said that you felt it was because, for a different purpose, because that you interpreted it as him being, I think you used the word 'kinky'? A. Yeah.

Q. Okay. So you consented to that style of— A. I didn't really consent to it; I just, it's just who he was. I didn't say yes and I didn't say no.

Q. So when you say he was holding you down, it's because he was in a sex position on top of you? A. No.

Q. No? So it wasn't like in a missionary-style position? A. Well it was, but—I don't know, I don't understand how you're trying to ask this question. I'm just trying to . . .

Q. I'm trying to ask sort of how his body was physically positioned while he was holding you down. A. He was on top of me.”

[51] However, this position directly contradicts with S.B.'s earlier response where she clearly confirmed that for the first part, she was lying on her back and “no one was holding me down on the bed.”

Inconsistency with event recounted in police statement

[52] When defence counsel put it to S.B. that in both of her police interviews she made it sound like she realized as soon as Sergeant Tait penetrated her that Sergeant Tait did not have a condom on, she adopted her earlier statement given to the military police as true. Defence counsel clarified this several times by rephrasing the question and each time, S.B. explained that since she does not really remember she accepts it.

“Q. Okay? You agree that that’s true? A. Sure.

Q. So you agree it’s true that you . . . A. Yeah, cause I don’t remember everything. So now you’re telling me that it was in my testimony? I agree that it’s true.

Q. You agree it’s true that you . . . A. If it’s in my testimony, I agree that it is true.

Q. I just want to be fair to you, S.B. I want to clarify for the record. My question is: did you suggest, make it sound to the police like you realized right away he didn’t have a condom on? A. Maybe I did. I don’t remember.”

[53] When defence counsel referred S.B. specifically to her police statement, S.B. read aloud the relevant statement from the police transcript:

“He was on top of me and I asked him to put the condom on. And he went to go get the condom and then he got back on top of me and he didn’t put it on, and he entered me. I asked him to stop and I said no.”

[54] After S.B. read aloud her earlier police statement, she stated, “So that’s what happened.” S.B. explained that the inconsistencies in her account given in court resulted from being asked different questions. She explained that in court, she was specifically asked to estimate timelines, which led her to guessing how long it was before she noticed Sergeant Tait was not wearing a condom. Whereas at no time during any of her police interviews was she asked to estimate this same length of time.

[55] I believe that S.B.’s response with her statement “So that’s what happened” was her acknowledgement that the description of events, she provided in the police interviews was different because, as soon as she stated it, she became very angry and stormed out of the courtroom, while calling defence counsel a “fucking bitch.”

[56] Although there are no temporal indicators within the police statement, her statements do suggest that as soon as Sergeant Tait penetrated S.B., she realized that he did not have a condom on and she told him to stop. There is no mention of S.B. coming to the realization Sergeant Tait was not wearing the condom when she sees an unopened wrapper. In fact, there was no reference to any wrapper at all. Depending on what evidence the court finds credible, these nuances of what transpired and a rough timing

of how the activity unfolded makes a difference in how the Court analyzes the issue of consent.

[57] For example, if the Court finds that the evidence supports the fact that S.B. realized immediately upon penetration that Sergeant Tait was not wearing a condom and she told him to stop and he subsequently continues holding S.B. down for all of the sexual activity, then I must assess whether the totality of the S.B.'s conduct and her statements are consistent with her claim of non-consent and if so, that Sergeant Tait Sergeant Tait knew or should have known that she had not consented.

[58] However, if the sexual activity did unfold in two parts and depending on what evidence the Court accepts, then there could be two different scenarios that need to be considered.

[59] Firstly, if the evidence with respect to Part 1 suggests that Sergeant Tait did deceive S.B. into having sex while S.B. believed that he was wearing a condom, then the Court must engage in an analysis following the SCC decision in *R. v. Hutchinson*, 2014 SCC 19 where any consent that S.B. had given is vitiated by evidence of fraud (see also *R. v. Kirkpatrick*, 2020 BCCA 136). Consequently, in reviewing the evidence, I was particularly mindful of the limitations set out at subsection 265(3) of the *Criminal Code* that stipulates conditions where consent is vitiated.

[60] Secondly, the Court must also consider whether or not S.B.'s plea for Sergeant Tait to stop was ignored and he held her down, then the Court must conduct a consent and non-consent analysis.

[61] In final submissions, the prosecution suggested that S.B.'s police statement was not inconsistent as it simply outlined the steps or events that unfolded that night and S.B. had not been asked to provide a timeline in her police interview. It is appreciated that S.B. might only have been asked for an estimate of time while in court. However, defence counsel's suggestion that S.B.'s description of the alleged sexual assault given to the military police was different appeared to be adopted by S.B. prior to her storming out of the courtroom in a highly disrespectful manner. In the Court's view, defence counsel was not badgering or attacking S.B., but rather she conducted a patient and effective cross-examination in order to get an understanding of how the alleged sexual offence unfolded. S.B. should have expected and been prepared to answer questions related to the alleged sexual assault itself.

[62] In follow up questioning, when counsel for Sergeant Tait suggested to S.B. that she realized that Sergeant Tait was not wearing a condom prior to penetration her answers were confusing.

“Q. So it's that kind of style of question again. So I'm not trying to belabour points or badger you with questions, I just have to gotta get them all out. Okay? So I'm going to suggest to you, again, that on the night in question, when Sergeant Tait was about to penetrate you without a

condom, you knew right away he didn't have it on? A. No. I didn't know until I saw the condom lying next to me.

Q. Okay. A. That it wasn't on him.

Q. Okay. I'm going to suggest that when he was about to penetrate you and you knew he didn't have a condom on, that it's possible you got worried about it? A. Yes.

Q. Because as you said, you had concern about STDs at the time? A. . . .”

[63] Although the above question and answer exchange was for the purpose of putting the defence's theory to S.B., which was that she consented at the time and then regretted it later, S.B.'s answers to the last two questions are confusing. Defence then rephrases and asks the questions again.

“Q. No? So what I'm gonna suggest to you is that in the moment after you two talked about the condom, you decided to go ahead and have sex without the condom. A. No.

Q. Okay. I'm gonna suggest to you that, so understanding my theory is that you agreed to have sex without the condom— A. —no.

Q. I'm going to suggest to you that after this happened, you realized shortly afterwards that you weren't happy about it. A. Of course not.

Q. Okay. I'm gonna suggest this is because you knew he was seeing other people and you were concerned that maybe he did have STDs? A. No.”

[64] S.B. admits that she was not happy about what occurred, but then she later rejects the proposition that she was unhappy due to her belief that Sergeant Tait might have an STD. It is possible that she was concerned and was simply rejecting the theory of the defence, but it is unclear, even when the question is asked a few times.

[65] Depending on the thought process of S.B. at the time this question was asked, her response conflicts directly with the position she took earlier in her direct examination as to why she insisted on Sergeant Tait wearing a condom.

“Q. What were your concerns with respect to that at the time? A. I just didn't want to get a STD because I knew of his promiscua—how promiscuous he was. So I was just protecting myself.”

Interaction with Sergeant Tait

[66] When questioned on what Sergeant Tait said or did when she told him to stop, S.B. first testified that he ignored her and then just held her down. Then when asked in cross examination, she told the Court, she does not remember. This is critical evidence

relevant to the court's assessment of whether Sergeant Tait was aware of the lack of consent of S.B. and the Court needs to scrutinize.

“Q. Okay. And how did he react to this? How did he respond? A. I don't remember.

Q. Does it appear that he hears your request to stop? A. . . .

Q. Take a moment, take a moment. You can drink some water. A. It's two years, you know; almost three. I don't, honestly, I don't remember.

Q. Okay. Do you remember the words you used to . . .? A. I asked him to stop.

Q. Okay. And how does he, does he respond? Does he acknowledge?
A. No.”

[67] However, when her memory was refreshed with her police transcript, she admits that Sergeant Tait did respond.

“Q. So maybe you did say something to him. Maybe it was “No” or “Stop”, as you've testified, but I'm gonna suggest it also could have been something like, “Are you sure you want to do this?” or “Is this what you want to do?” or something, something like that? A. I said that to him at one point, “Are you sure?” I said, “No, stop, are you sure you want to do this?”

Q. “Are you sure you want to do this”? A. Yeah. Not in a “Oh; are you sure you want to do this?” It was like, “Are you sure you want to do this?”

Q. Okay. A. Like I was angry.

Q. Okay. A. Okay.

Q. I'm gonna discuss that maybe you even had a longer discussion about the condom in that moment? A. Ah . . . no.

Q. No? Okay. I'm gonna suggest that at some point, Sergeant Tait replied to you? A. No.

Q. So he said like, “It's okay, I'm fixed. We talked about that”? A. Yeah, but that's irrelevant.

Q. Maybe he said something else, like, “I do want to do this” or “I'm good to go”? A. No.”

[68] The above words in isolation are not indicative of either consent or non-consent, but they are evidence that there was an actual discussion on the issue of consent with respect to the wearing of a condom that occurred at some point which is inconsistent with S.B.'s assertion that Sergeant Tait did not reply at all to her request to stop and forced her.

[69] S.B. also confirmed under cross-examination that she did not report the alleged incident at the time it occurred because she wanted to move forward in their relationship. She stated: "Yeah; I just figured if I stayed with him, it would make, I wouldn't feel so bad about myself and it would make it go away and I'd feel better about myself."

Bias or motivation to fabricate

[70] In examining the evidence, the Court noted a tendency for S.B.'s perspective to change. As an example, under cross-examination when asked if during the time of their relationship she loved Sergeant Tait, she quickly denied this and said it was impossible given the length and nature of their relationship. However, when her memory was refreshed with the transcript of her police interview, she accepted that was how she likely felt at the time. Understandably, her retrospective view of the relationship three years later is different from the perspective she provided in her police statement when the break-up was still fresh and her feelings were very raw. It is likely that her realization that what they shared was not "love" was an important aspect of her personal resilience that helped her move forward and overcome what was described as an extremely upsetting break-up.

[71] Whether her feelings were that of love or infatuation as O.M. described, they were strong enough to have somewhat changed S.B. from the person she said she normally was and motivated her to consider uprooting her life to move with Sergeant Tait to Meaford, Ontario. When S.B. was shown her prior statement in her police interview, she accepted that, at the time she provided the statement, she felt that she loved Sergeant Tait.

[72] As another example, while under examination in chief, S.B. confirmed for the prosecution that she began an intimate relationship with Sergeant Tait in January 2018. However, when defence counsel asked her the same question, S.B. was argumentative and denied that there had been any relationship between her and Sergeant Tait.

[73] In her examination in chief, her responses to the prosecution were as follows:

"Q. Fair enough. Now before the day of the alleged incident, you were engaged in an intimate relationship with Sergeant Tait? A. That's correct.

Q. And the intimate relationship started in January of 2018? A. Hum, hum. Yes."

[74] Similarly, at the start of the cross-examination, the term “relationship” was referred to without too much of a problem. However, as the cross-examination progressed and S.B. became agitated, she became almost combative about the use of the term “relationship”.

“Q. Okay. And your relationship was, I’m gonna say, on and off for about a year and a half in total; does that sound about right? A. We didn’t have a relationship. We did not ever have a relationship. [. . .] There was no relationship, there was no “Let’s go on vacations, there was no “Let’s make dinner, there was no relationship. It was meet once in a while, have sex and leave. That’s all it was.”

[75] Later, defence counsel tried to resolve S.B.’s opposition or rejection of the term “relationship” and eventually they agreed upon the term “friendship” to refer to S.B. and Sergeant Tait.

“Q. So, and I’m using the term “relationship” loosely as described as, you know, times you would see him, talk to him and times you wouldn’t—
A. —it’s friendship, you would say. It was never a relationship.

Q. Okay. “Friendship” is a good term; let’s use that. A. Yeah.

Q. Your friendship was on and off? A. Yes.”

[76] However, S.B.’s admission that upon Sergeant Tait’s posting to Meaford, she was prepared to move with him, suggests that there was indeed something more between them than a friendship. S.B. does admit that both she and Sergeant Tait became closer and at one point acknowledged their association as being akin to dating.

[77] After an on and off closeness that S.B. and Sergeant Tait shared spanning a year and a half period, in the spring of 2019, Sergeant Tait was posted to Meaford and they discussed trying to make it work, with S.B. agreeing to relocate from Petawawa to Meaford with him. However, before the posting, their relationship started to break down and eventually Sergeant Tait broke up with S.B. via text message.

[78] Based on the evidence, it appears that S.B. was devastated by the break-up and she desperately tried to get Sergeant Tait to contact her. Eventually Sergeant Tait changed his phone number.

[79] S.B. admitted to making multiple Facebook and Instagram accounts, as many as fifteen, in order to get in touch with Sergeant Tait.

[80] In addition, she texted one of the Sergeant Tait’s friends with an outright lie and an urgent plea for Sergeant Tait to contact her. Under questioning, S.B. admitted that it was a lie and she was trying everything just to get Sergeant Tait to contact her.

[81] S.B. also admitted that she sent the Sergeant Tait multiple emails to the effect that “you raped me” and “I’m gonna go to the police” and “call me.” The evidence suggested that these threats were motivated by S.B.’s desire to have Sergeant Tait contact her.

“Q. Okay. So I’m gonna suggest, as you agreed, you’d been telling Sergeant Tait in emails, prior to your police report, that you were planning to report him to the police? A. Yes.

[. . .]

Q. Yeah; I don’t have the contents of that email. So I’m suggesting to you that in that email, you basically suggested to him that if he didn’t call you, you would report him to the police for sexual assault? A. That’s correct.”

[82] However, S.B. later testified that she was not sending the emails as threats that she was going to go to the police unless he called her.

[83] Finally on 4 September 2019, S.B. learned that Sergeant Tait had a new girlfriend when the new girlfriend found her on Facebook and sent S.B. a number of messages. S.B. and the new girlfriend exchanged a series of messages where the new girlfriend did everything to upset S.B., including telling her that she was lying about the rape allegations that S.B. had emailed Sergeant Tait about. Under cross examination, S.B. explained her reason for making the complaint as follows:

“Q. Okay. Why did you decide to go to the police and make a complaint on the 6th of September 2019? A. I was trying to forget about it, right? Living my life, trying to forget about it, and then we were talking, me and his, his girlfriend and we were arguing or whatnot, and then she brought that up and she’s like, “Oh, he never raped you”, “He never did this to you” and bla bla bla. And I’m like, really? And she made me really upset and then I started thinking about that night. And I’m like, oh well. And I went in and reported it.”

[84] On the 6 September 2019, S.B. provided her first police statement.

Rebuttal - Discussion with her sister

[85] Defence counsel was straightforward from the beginning of the court proceedings that Sergeant Tait’s defence was based on bias and motivation to fabricate. It was the defence’s position that due to S.B.’s anger over the nature of their break-up, in retaliation S.B. made an exaggerated claim against Sergeant Tait. The allegation of fabrication or concoction was also made expressly by defence counsel during the cross-examination of S.B. Essentially, the issue of fabrication arises if the witness is believed to have made up a false story at some point in time after the event that is the subject of his or her testimony actually occurred.

[86] After defence counsel cross-examined S.B. on the defence theory of fabrication, the prosecution called S.B.'s sister O.M. to rebut this theory. It was accepted by counsel and the Court that a discussion between S.B. and O.M. that occurred the evening of the alleged assault was relevant. The defence viewed the statements made by S.B. to have merit based on their inconsistency, whereas the prosecution viewed the statement as a prior consistent statement which was important to rebutting the allegation of bias or fabrication.

[87] The Court was extremely careful in how it treated the testimony of O.M. accepting it into evidence for the purpose of considering whether or not there was any fabrication of the allegation itself. In *R. v. Stirling*, [2008] 1 S.C.R. 272, the SCC provided the following guidance:

As an exception to the general exclusionary rule, prior consistent statements can be admitted where, as here, it has been suggested that a witness has recently fabricated portions of his evidence. Although these statements have probative value where they can illustrate that the witness's story was the same even before a motivation to fabricate arose, any admitted prior consistent statements should not be assessed for the truth of their contents. It is impermissible to assume that because a witness has made the same statement in the past, he is more likely to be telling the truth. However, prior consistent statements may impact positively on the witness's credibility where admission of such statements removes a motive of fabrication. It is permissible for this factor to be taken into account as part of the larger assessment of credibility.
[References omitted.]

[88] The Court had no problem confirming that the conversation did in fact take place. O.M.'s testimony was extremely credible and reliable and it confirmed that from S.B.'s perspective, something indeed occurred on that given evening. O.M. was professional, knowledgeable and avoided any conjecture. Her responses to questions regarding her potential bias towards her sister were dismissed with effective reasoning.

[89] Military Rule of Evidence 100 permits the Court to admit the statement, but similarly, it is not admitted as evidence of the facts therein, but may be considered insofar as it is relevant to the credibility of the witness. I was attentive to the danger of considering that just because S.B. made statements to her sister on the evening in question that, S.B. is more likely to be telling the truth. I did not assess the statements made for the truth of their contents.

[90] As mentioned above, defence viewed the statement made to O.M. as an inconsistent statement and asked the Court to examine it from that perspective. Under cross-examination, S.B. was asked about the conversation she had with her sister the night of the alleged assault, which she confirmed. However, in her testimony at trial, S.B.'s view of that conversation was different from what her sister, O.M. recounted to the Court.

“Q. You called your sister? A. That’s correct.

Q. You told her about what happened? A. That’s correct.

Q. And then she convinced you that you were sexually assaulted? A. She didn't convince me.

Q. Okay. A. We were talking and she had told me, 'It sounds like you were sexually assaulted.' And I'm like, 'I agree with you.' She did not convince me.

Q. Okay. So she suggested it to you and you agreed with her? A. Hum, hum."

[91] However, shortly thereafter, when counsel suggested that, at that time, she did not agree with her sister, it generated the following response:

"Q. Okay. I'm gonna suggest to you that when your sister told you you were sexually assaulted that you said no, you weren't. A. I don't know. No.

Q. You don't know or no? A. I did not, I don't recall saying that to her.

Q. You don't recall saying, "no, no"? A. Yeah; I don't recall saying that to her.

Q. Okay. Do you recall, after her suggestion that you were sexually assaulted, do you recall not talking to her for four days? A. I really don't remember.

Q. Do you recall hanging up on her? A. I don't remember."

[92] In her direct examination, O.M. gave a different version of events from what S.B. provided in her testimony:

"Q. [S]o you mentioned earlier that you had suggested it was sexual assault. What was S.B.'s reaction to that? A. My sister got quite upset with me. She hung up. I don't ever lie to my sister. And this was a time that I felt that I just needed to tell her exactly how I felt. She hung up. I didn't speak to her for a few days."

[93] Under cross-examination, O.M. also confirmed that, at first, S.B. told her she was held down and then afterwards told her she was not.

"Q. So she told you about the incident, correct? A. Yes she did.

Q. And she told you that he held her down? A. Yes, she did.

Q. But then, afterwards, she told you that he did not hold her down? A. . . .

Q. Is that correct, O.M.? A. Yes. She contradicted me during an argument. She did not—I was saying something and she contradicted me during an argument.”

[94] Later this issue was re-examined by the prosecution where O.M. explained S.B.’s change in perspective. The exchange went as follows:

“Q. Okay, perfect. Okay. During cross-examination, defence counsel read to you a portion of page 10 of your transcript where it discusses a contradiction with regards to being held down or not held down? A. Yes.

Q. And you said it’s not how it happened? A. No.

Q. What was your understanding as to why S.B. contradicted herself about being held down? A. My understanding is that she felt I was attacking someone she wanted me to like. For me to like him, she would contradict anything I would say, ‘No, he’s not short; no, he’s not fat; no, he didn’t hold me down.’”

[95] In short, the answer provided by O.M. as to why S.B contradicted herself pretty well sums up the problem I have identified in assessing the evidence in this case. Depending on the nature of the examination, S.B tended to view and characterize events differently depending on how she was feeling or the perspective or narrative she wanted adopted.

[96] The Court noted a consistency of similar contradictions that flowed throughout S.B.’s testimony itself, making it difficult to understand at times. I gave very little weight to the inconsistencies in the collateral matters of her testimony, such as whether she was in love, in a relationship, etc., but I highlighted them as examples of S.B.’s tendency to characterize certain events differently at various times.

[97] However, when analyzing those facts that are important to the elements of the offence of sexual assault, similar inconsistencies made it very difficult to assess the evidence.

[98] After reviewing all the evidence, I found that S.B. was consistently clear in her assertion that Sergeant Tait had sex with her without a condom against her insistence that he wear one. As explained earlier, the issue of consent with respect to the offence is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct she may have displayed. After the Court assessed whether the totality of the complainant’s conduct and her statements are consistent with her claim of non-consent, I was left in reasonable doubt as to whether or not she did not consent.

[99] As an example, she stated emphatically that she said, “No.” and “Stop” and Sergeant Tait completely ignored her request. When challenged under cross-examination, she then said she could not remember what Sergeant Tait said, then later

under further questioning, she admitted that Sergeant Tait had in fact responded and that there was a conversation regarding the fact that Sergeant Tait was “fixed”. She also admitted that during that exchange, she said something to the effect, “Are you sure you want to do this?” This inconsistency in the evidence runs contrary to her assertion that Sergeant Tait completely ignored her request.

[100] Additionally, based on S.B.’s evidence, the Court is still unsure if the discussion occurred almost immediately when they began sexual intercourse as her police statement suggests or whether it occurred approximately seven to ten minutes into through their sexual intercourse. As mentioned earlier, depending on what evidence the court accepts, this makes a difference in the analysis.

[101] The testimony of O.M. confirmed that something happened on that evening in question that upset S.B. It is distinctly possible that a sexual assault occurred, but it is also very possible that S.B. did consent to having sexual intercourse without a condom and then regretted having done so. The latter situation provides an explanation for the discussion S.B. had shortly thereafter with her sister. In their discussion, it is possible that S.B. tried to deflect personal responsibility for her decision by rationalizing that she was held down and could not resist. This would explain why O.M. tells S.B. that she was sexually assaulted, and S.B. angrily rejects her sister’s characterization of what occurred. It was clear that in the conversation with her sister, S.B. did not agree that she had been sexually assaulted.

[102] Aside from her shifting view as to whether a sexual assault occurred, there were similar inconsistencies in her testimony on essential facts directly related to the alleged offence itself, such as whether or not she was “held down.” This is problematic. This is an important fact to be considered in the determination of whether or not she consented. When being questioned by defence counsel on whether she could see Sergeant Tait penetrate her, she clearly states she was lying on her back, with her head on the bed. She clarified that she was not being held down and then further confirmed that she stayed in the same position throughout their intercourse which she then later describes as being held down. She did not recount any other form of restraint that was used other than Sergeant Tait’s body weight.

[103] It is recognized that the end of the relationship between S.B. and Sergeant Tait was traumatic for S.B. and that she was desperately seeking closure. It is distinctly possible that as the relationship soured, in an effort to feel better about herself, and to dull the pain of the rejection, she resurrected her sister’s earlier suggestion that what occurred that evening was a sexual assault. S.B. admitted to being very upset with Sergeant Tait for “ghosting” her which occurred at a point where she was about to uproot her life and move to Meaford with him. As defence counsel argued in closing submissions, there was a trajectory to S.B.’s conduct displayed from first sending threatening emails that she would report him to police, sending so many texts that Sergeant Tait eventually changed his phone number and sending one text to Sergeant Tait’s friend containing an outright lie to her creation of multiple fake Instagram

accounts all done for the purpose of trying to get Sergeant Tait to talk to her so she could gain some closure.

[104] The trajectory eventually culminated with S.B. making a formal complaint to the police after Sergeant Tait's new girlfriend, in a series of hateful messages, accused S.B. of lying about the threats she was making to Sergeant Tait. It appears that it was this upsetting exchange between the two that served as the catalyst or S.B.'s motivation to report the allegations to police. As she stated in her testimony, "And I'm like, really? And she made me really upset and then I started thinking about that night. And I'm like, oh well. And I went in and reported it."

Conclusion

[105] Based on the evidence before it, the Court does not know exactly what happened during that evening in question, but I do not need to.

[106] As I set out above, the Court had concerns with the credibility and reliability of the complainant's evidence. Her testimony was at times inconsistent with itself and inconsistent with what she previously told the military police and at times also inconsistent with what she told her sister O.M.

[107] Despite having a very precise memory on many of the events she described in her testimony before the Court, the most concerning issue was S.B.'s claim to not remember the most important details relevant to the sexual assault. In this case, the critical issue the Court had to decide was whether S.B. did not consent to sexual intercourse without a condom and that Sergeant Tait was aware of that non-consent. The onus was on the prosecution to prove this. Sergeant Tait does not need to prove he is innocent.

[108] Sergeant Tait is charged with sexual assault and, ultimately, I must ask myself whether I am satisfied beyond a reasonable doubt that the prosecution has discharged its onus that S.B. did not consent to sexual intercourse with Sergeant Tait without a condom. In this case, it depended on the reliability and credibility of S.B., which were just not sufficient to convince me.

FOR THESE REASONS, THE COURT:

[109] **FINDS** Sergeant Tait not guilty of the charge of sexual assault, contrary to section 271 of the *Criminal Code*.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois and Captains B. Richard and A. Sadler

Major F. Ferguson and Captain H. Venter, Defence Counsel Services, Counsel for
Sergeant C.A. Tait