



COURT MARTIAL

Citation: *R. v. Stewart*, 2021 CM 5013

Date: 20210624

Docket: 202025

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sailor 3rd Class J.G. Stewart, Accused

Before: Commander C.J. Deschênes, M.J.

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as “A.R.”, shall not be published in any document or broadcast or transmitted in any way.

FINDING

(Orally)

Introduction

[1] Sailor 3rd Class Stewart is facing two charges of sexual assault, offences found at section 271 of the *Criminal Code* and laid pursuant to section 130 of the *National Defence Act* (NDA). The particulars of the first charge allege that he, on or about 9 August 2018, in Kingston, Ontario, did sexually assault the complainant, A.R., by kissing or touching her. The second charge has the same particulars, without the mention “by kissing or touching her”. I heard the evidence during a six-day trial and will now deliver my reasons for the verdict.

Context

[2] The charges against Sailor 3rd Class Stewart were preferred on 1 June 2020. The Court Martial Administrator (CMA) convened a Standing Court Martial on 18 January 2021 for the trial to be held from 10 to 14 May 2021 in Kingston, Ontario. On 22 March 2021, the CMA received an application, dated 19 March 2021, where the defence challenged the constitutionality of sections 278.93 and 278.94 of the *Criminal Code*. These sections came into force in December 2018. They set out a statutory scheme applicable for an accused seeking to adduce evidence related to the complainant's sexual activity other than the one that forms the factual foundation of the charges. A notice of application served by the prosecution seeking to have the constitutional challenge summarily dismissed was denied on 23 April 2021. A second application dated 2 May 2021 was served by the defence, requesting a stay of proceedings on the contention that the accused's right to make full answer and defence, protected by section 7 of the *Charter*, had been breached by the loss, destruction and failure to preserve evidence by the prosecution. The hearing of this application was held on 10 May 2021 in lieu of the constitutional challenge. I dismissed this application on 14 May 2021, finding that there was no *Charter* breach, since the defence failed to prove, on a balance of probabilities, that records which may have been relevant to impeaching the credibility of the complainant had been lost or destroyed. Following the hearing held on 14 May 2021, I also dismissed the application related to the constitutional challenge of the new statutory scheme on 3 June 2021.

The undisputed facts

[3] During the trial, the following facts were accepted as true by both parties: Around April 2018, the accused and the complainant met and became friends while both were members of the basic training list (BTL) in Kingston, Ontario. The accused also met Private Lévesque around that same time and Sailor 3rd Class Stewart began to hang out with him, first at work, then outside of the work environment. While the accused was closer to Private Lévesque and spent more time with him, the three would socialize together on occasions.

[4] At the material time, Sailor 3rd Class Stewart had recently moved to a private military quarter (PMQ) on base in Kingston, Ontario with his roommate, Aviator Fadus. On 9 August 2018, the complainant and Private Lévesque arrived at the accused's residence between 2030 and 2100 hours after receiving an invitation from Sailor 3rd Class Stewart to attend an informal impromptu gathering at his place, where other attendees had gone fishing that day and brought their catch in order to use Sailor 3rd Class Stewart's barbeque and serve it for supper. Accompanied by Private Lévesque, the complainant drove her car to the accused's residence. She had recently broken up with her boyfriend, had a stressful week, and wanted to socialize. She had not recently eaten, and did not eat anything substantial during the evening, as only chips and fish were offered and she has an intolerance to fish. When they arrived, Sailor 3rd Class Stewart and other attendees were in the living room at his residence socializing. Upon her arrival, a bottle of Fireball Whisky, which contains thirty-two or thirty-three per cent alcohol, was retrieved from the liquor cabinet located in the living room. Shots were poured for Sailor 3rd Class Stewart and the complainant, and she started drinking them. Between twenty and forty-five minutes later, Sailor 3rd Class Stewart and the complainant went separately into the kitchen. A

kiss did occur between them. Sailor 3rd Class Stewart also grabbed the complainant's buttocks. The details surrounding what exactly happened in the kitchen are contested.

[5] Later on, following a short tour of the PMQ, the complainant and Private Lévesque accompanied Sailor 3rd Class Stewart in his bedroom. Both the complainant and Private Lévesque sat at the end of the bed while the accused sat on the desk chair located at the foot of his bed. The group talked and watched YouTube videos on the computer located on the desk. During this time in his bedroom, Private Lévesque left the room on at least two occasions for short periods of time. During his absence, the accused and the complainant had sexual intercourse. When Private Lévesque returned to the bedroom the last time and opened the door, he saw the complainant and the accused facing each other, standing up by the foot of the bed. The complainant had the button of her shorts undone, and the accused was close to her, facing her, also standing. It was awkward. Private Lévesque and the complainant then left the bedroom to depart the residence. Testimonies as to what happened in the bedroom when Sailor 3rd Class Stewart was alone with the complainant and thereafter, while Private Lévesque and the complainant left the residence, vary.

[6] After they left, the accused had a brief text message exchange with Private Lévesque at 2218 hours where Private Lévesque wrote being "so sorry". The next day, the accused and the complainant briefly saw each other at a ruck march they both participated in. Sailor 3rd Class Stewart also sent the complainant text messages the following Sunday, 12 August 2018, where he wrote, in summary, that he did not intend for this to happen and that he was not thinking at the time.

Issue

[7] The contentious part of the charges before the Court turns on consent and the complainant's capacity to consent in engaging in the sexual acts that formed the basis of the charges. I must also determine if the defence of honest but mistaken belief in communicated consent is open to the accused. The determination of this case, therefore, boils down to the credibility and reliability of the witnesses, including the accused's and the complainant's.

Position of the parties

Prosecution

[8] The prosecution contends that on the evening of 9 August 2018, Sailor 3rd Class Stewart preyed on the complainant. In highlighting the evidentiary issues of the case, the prosecution recognizes that the issue of consent is directly related to a credibility assessment. For this reason, the prosecution submits that the only relevant evidence is Sailor 3rd Class Stewart's, Private Lévesque's and the complainant's testimony. Further, the testimony of the other defence witnesses were inconsistent and should be given little weight. In particular, Aviator Fadus' testimony is not credible nor reliable because he only saw a hug happening, but did not provide details. During his testimony, he appeared to fill memory gaps. He offered no information when contacted by the investigator in 2019. It is only in May 2021 that he did share this information with the investigator.

[9] The prosecution reminded the Court of the concerns related to myths and stereotypes surrounding sexual assault cases, in particular, conduct of the complainant post-incident. The prosecution also alluded to how collateral facts in the case at bar, such as the time the complainant arrived, are not relevant since no evidence was adduced to prove a motive to fabricate. In summarizing the essential elements to prove a sexual assault, the prosecution contends that the accused forced sexual intercourse onto the complainant that night. Sailor 3rd Class Stewart was intoxicated, as he had five to six drinks. The prosecution is of the view that the accused admitted not obtaining a verbal consent from the complainant prior to engaging in sexual activity with her. Although the complainant had a spotty memory, she is a credible witness as she was consistent in her evidence and did not try to fill gaps. Private Lévesque was also a credible witness. He admitted when he did not remember. Additionally, the complainant did not have an operating mind that evening, so she was unable to consent.

[10] Lastly, the prosecution claims that the accused took no steps to obtain consent from the complainant, therefore, the defence of honest but mistaken belief in communicated consent is not available in this case. The accused was wilfully blind. The prosecution also contends that the accused's timeline was inconsistent. Therefore, the Court should find Sailor 3rd Class Stewart guilty of both charges.

Defence

[11] The defence provided a very lengthy account of what he viewed constituted inconsistencies in the prosecution's evidence that impeach the credibility of its witnesses. In other words, he contends that these inconsistencies render the testimonies of the complainant and Private Lévesque not credible, and they should be rejected. In particular, the timeline provided by Private Lévesque is not reliable because he initially said he left the accused's bedroom for two minutes then later said he had left for five minutes. His testimony is, therefore, inconsistent. He asks this Court to reject it entirely. He further contends that the investigation of the allegations was very much one-sided. This cannot be held against defence witnesses who are reliable witnesses. Sailor 3rd Class Stewart's testimony is credible since there is no evidence that contradicts his version of events while the complainant had a very spotty memory of the events.

[12] Referring to *R. v. R.(D.)*, [1996] 2 S.C.R. 291, the defence submits that if collateral evidence undermines the credibility of witnesses, it is relevant to an issue at trial. To further demonstrate the inconsistencies of the prosecution evidence, he refers to the complainant's evidence saying that she found the accused "creepy" and said she stuck by Private Lévesque after the kitchen incident; however, she still hung out with the accused throughout the evening. She indeed chose to stay in the accused's bedroom, having a heart-to-heart conversation with him. There was a mood of trust. She chose to stay with the accused alone in the bedroom, actively sought his company with the door closed at all times, getting closer to him. She fabricated her evidence. She was deceitful. He further contends that the hug Aviator Fodus witnessed is the same hug which initiated the sexual interaction in the kitchen.

[13] From the defence's perspective, the complainant's intoxication is material to this case. In her testimony, she said she was not really experienced with alcohol. This is contradicted by Private Lévesque. She was aware of what was happening in the bedroom. Her entire testimony

should be rejected. The defence also contends that Private Lévesque fabricated his evidence since he first said the accused was fastening the button of her shorts, and later indicated he was not sure what Sailor 3rd Class Stewart was doing with his hands. This would constitute a false memory. The defence also contends that the text message Private Lévesque sent to the accused shows that he believed what he saw was consensual when he opened the door to the accused's bedroom. He asks the Court not to draw any adverse conclusion regarding the text messages Sailor 3rd Class Stewart sent to Private Lévesque on 14 August 2018, as this message showed that the accused panicked, realizing that he was the subject of false accusations when his friend was no longer responding to his text messages. Defence calls into question the impartiality of Private Lévesque in relation to the conversation Sailor 3rd Class Stewart and he had in the CANEX parking lot when Private Lévesque recorded the conversation unbeknownst to the accused in order to record some admission on the part of the accused. Defence nevertheless asks the Court to accept the portion of Private Lévesque's testimony regarding the level of intoxication of the complainant, where he said that the complainant was "a little bit tipsy", or "a little bit drunk". He further submits that no expert evidence was adduced to demonstrate that the level of intoxication of the complainant that evening amounted to incapacity to consent. The evidence rather supports that she had an operating mind at the time of the sexual activity.

[14] Lastly, defence counsel explained the context in which the Instagram messages were sent by Sailor 3rd Class Stewart to the complainant. The complainant was alluding in her message to feeling that she was taken advantage of by the accused because she was drunk or emotional during the sexual activity. The defence contends that in his response, the accused was not admitting to committing a sexual assault on the complainant; rather, Sailor 3rd Class Stewart recognized regretting having sex with a friend while she was drunk or emotional. Defence counsel explains that this evidence is not determinative, and certainly does not constitute an admission of guilt. Lastly, he contends that the complainant had an operating mind; therefore, she was capable, and did consent, to the sexual activity that took place; one that happened "in the moment". Should the Court believe that the complainant was not consenting, the evidence shows that Sailor 3rd Class Stewart took reasonable steps to ascertain her consent both in the kitchen and in the bedroom, and therefore he had an honest but mistaken belief in communicated consent. The Court should, consequently, acquit Sailor 3rd Class Stewart of both charges.

The evidence adduced at trial

[15] The prosecution called two witnesses in support of its case: the complainant, A.R., and Private Lévesque and introduced the following exhibits:

- (a) Exhibit 3 - a pair of jean shorts the complainant was wearing the night of the alleged sexual assaults; and
- (b) Exhibit 4 – a copy of a screenshot of Instagram text messages between Sailor 3rd Class Stewart and the complainant, which was introduced pursuant to sections 31.1 to 31.8 of the *Canada Evidence Act* following a *voir dire*.

[16] The defence called the following witnesses, in order of appearance:

- (a) Aviator Fadus;
- (b) Signaller Kwan;
- (c) Corporal Mong who was a private at the material time of the alleged offences; and
- (d) Sailor 3rd Class Stewart testified in his own defence.

[17] At the request of defence counsel, since the prosecutor agreed, I ordered both Signaller Kwan and Corporal Mong to appear and give their testimony by video link in accordance with article 112.65 of the *Queen's Regulations and Orders for the Canadian Forces (QR&O)* – APPEARANCE OF WITNESSES – VIDEO LINK. The defence also filed the following exhibit after the prosecution waived the *voir dire* requirement: Exhibit 5 - a one-page copy of a screenshot of text messages between the accused and Private Lévesque.

[18] The Court also took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence*.

Prosecution witnesses

Testimony of A.R.

[19] During her testimony, A.R. explained that her close friend, Private Lévesque, was invited to attend a barbeque at the accused's place on 9 August 2018. Since she was staying at Private Lévesque's place for the week, and he did not have a car, she was invited to tag along. She drove both of them to the accused's house on 9 August 2018. She described wearing a pair of jean shorts and a t-shirt for the occasion, as the temperature that day was hot and humid, and the PMQ did not have central air conditioning. They arrived at the residence at 2030 hours. Members of the BTL were in attendance: she named Sailor 3rd Class Stewart, Aviator Fadus, an individual named "Bantayan", and another person whose name she could not recall because she did not know him and she was not sure if he was also a BTL member. Everyone was in the living room. Attendees were chatting about various topics and she believed some of them might have included work-related topics. She also remembered seeing a six-pack of Corona beer on the table of the living room, where attendees were gathered. During her detailed description of the layout of the PMQ, she testified that there was a liquor cabinet in the living room. She also described the galley-type kitchen being narrow, with the fridge occupying the left side.

[20] She explained feeling stressed out and just wanted to go out, see coworkers and have a few drinks. She started drinking shots of Fireball whisky almost immediately after her arrival. As she is intolerant to seafood, she did not eat anything offered other than a few snacks, such as chips. She did not believe she ate before leaving for the accused's residence. She started socializing with the group. No one was drinking a lot, as it was a casual gathering. She was the only female attendee. She said she drank quite a lot in a short period of time. When asked to clarify, she revealed having a first shot of Fireball whisky or maybe two, with Sailor 3rd Class Stewart seated at the table. She estimated consuming a total of five shots of Fireball whisky within an approximate forty-five-minute timeframe.

[21] She believes she was in the living room for about forty to forty-five minutes when she felt quite intoxicated. She went to the kitchen to look in the fridge to find something to eat. She explained that from the living room, the only angle that allows an unobstructed view into the kitchen is from the back wall. As attendees were either seated on the couch or by the table, they could not view inside the kitchen from where they were seated. She initially was alone in the kitchen when she opened the fridge door. Because the side of the fridge was against a wall, the space was constrained. She bent over to look into the fridge when she felt someone grabbing her buttocks. She described herself being cornered. She stood up, turned around, and that's when the accused forcibly kissed her on her mouth. The kiss lasted a few seconds. As she was not consenting, she believed she shoved or pushed her way out to pass by the accused and went back to the living room. She said she felt quite shocked. The incident lasted less than a minute. The complainant could not remember if she was staggering at the time, and believes that nothing was said when this happened.

[22] Once back in the living room, she continued socializing with others but testified that she stuck by Private Lévesque as a result of the incident in the kitchen. She said she drank a lot of Fireball whisky the following thirty minutes; however, she was able to carry a conversation. As Sailor 3rd Class Stewart had recently moved into the PMQ with his roommate, he gave her and Private Lévesque a very brief tour of the PMQ. The three of them started by going from the hallway to see Aviator Fatus' bedroom, then to Sailor 3rd Class Stewart's bedroom, where the three of them spent some time. This is where the second sexual assault allegedly took place.

[23] As they arrived at the accused's residence around 2030 hours and arrived back at Private Lévesque's residence at 2230 hours that night, she estimated that the three of them went to Sailor 3rd Class Stewart's bedroom around 2145 hours. Private Lévesque and she sat at the foot of the bed, where the headboard would normally be, while the accused sat on the desk chair, situated between the other end of the bed and a desk where the television was located. She testified being highly intoxicated at that point, feeling spaced out, in a state of black out and having patchy memories of what unfolded next.

[24] She remembers that the three watched funny YouTube and "[adult-swim]" videos, some of which she recommended, on Sailor 3rd Class Stewart's television with the accused and Private Lévesque. After Private Lévesque left the room, she indicated not remembering much. She only remembers that she felt a hand on the back of her head, then her face forcefully pushed on the mattress, her lower half being moved. She does not remember if her legs were off or on the mattress. Then she testified feeling "what sex feels like," clarifying that she felt the accused's penis inside her vagina. She also felt hands on her hips to hold her up like a rag doll because she was unable to move and being forcibly moved into different positions. Her shorts were still on, but were pushed to the side. She felt a hand going around her midriff to undo the button of her shorts. She then heard moaning sounds and she shut her eyes as hard as she could. She is unsure of the accused's position during the act, whether a condom was used, whether he ejaculated, how long it lasted and whether she was awake during the duration of the sexual activity.

[25] She describes having an "out of body experience". She testified not consenting to this sexual activity. She estimated the sexual activity lasted around ten minutes. She said that the act

ended when Private Lévesque opened the door and walked in. She could not button her shorts, and does not remember if the accused or Private Lévesque helped her button her shorts up. She told Private Lévesque she wanted to leave immediately. They departed through the living room without speaking to anybody. Private Lévesque drove them back to his residence. She does not remember if anything, or what, was said. She believed she passed out on the couch. She later testified not remembering a lot about how the sexual act started, and how it ended.

[26] The next morning, she was trying to “piece things together”. She felt violated and disgusted. She also testified that Private Lévesque had some questions for her, as he relayed to her that during their drive home the night before she said she did not want to talk about what happened. When she saw the accused the same day, 10 August 2018, at physical training (PT) during the ruck march, she knew she was not okay with what had happened the night before. Sailor 3rd Class Stewart tried to approach her on a few occasions to speak to her, but he was unable to because she avoided him during that day.

[27] Then on Sunday, 12 August 2018, she received an Instagram message from the accused. She felt shocked and took some time to respond. A short exchange ensued. She perceived from the messages that the accused was talking down to her when he acknowledged his wrongdoing, referring to the sexual assaults. She was emotional, and responded, “Leave me alone”, inferring that she wanted the accused to stop trying to corner her at work. She took a screenshot of the text exchange and blocked his account. She spoke to Private Lévesque, to his roommate and his roommate’s girlfriend about the incident. When she reported to her unit the following Monday, 13 August 2018 at 0930 hours, she spoke to her chain of command about her allegations.

Testimony of Private Lévesque

[28] Private Lévesque met Sailor 3rd Class Stewart on BTL in 2018. He started hanging out with the accused in the summer of that year. He describes Sailor 3rd Class Stewart as a friend. The two were close then, but the friendship ended when the complainant shared her allegations against the accused.

[29] He testified that A. R., a close friend of his, was invited to Sailor 3rd Class Stewart’s place for a gathering and he tagged along. He does not remember the exact date of the event, but recalled it was a Thursday. He confirms the complainant drove her car to the accused’s PMQ with him as a passenger. It is about a fifteen-minute drive from his place. They arrived at about 2030 hours. Aviator Fadus and Privates Mong and Bantayan, Sailor 3rd Class Stewart and possibly another attendee were in the living room socializing. Some of them were sitting on the couch while others were around the table where cooked fish was offered. As part of the description of the layout of the PMQ, he confirms seeing a liquor cabinet in the living room.

[30] Sailor 3rd Class Stewart gave him a beer five to ten minutes after they arrived and he engaged in conversation with Private Bantayan by the living room table. He observed the complainant drinking a lot of straight Fireball whisky; however, he does not know for certain how much she had. He saw her pour shots for both Sailor 3rd Class Stewart and herself, where they both cheered. When asked to estimate how much he believed she drank, he responded that the complainant had at least five shots of Fireball whisky. He also observed the accused drinking

Fireball whisky, and because Sailor 3rd Class Stewart was drinking with the complainant he believes the accused too had five shots of Fireball whisky, and some gin mixed with lychee juice. He estimates the accused drank between five to seven drinks during the time Private Lévesque was at the gathering. He himself only had one beer, and no other drinks that evening. The complainant and he, and possibly Sailor 3rd Class Stewart, sat on the couch at some point before the house tour. He believes spending a total of fifteen to thirty minutes in the living room before migrating to Sailor 3rd Class Stewart's bedroom.

[31] Then Sailor 3rd Class Stewart and Aviator Fadus gave him, the complainant and possibly another person a tour of the rooms at around 2100 hours. The tour would have taken less than a minute. This is when the accused, the complainant and Private Lévesque moved into Sailor 3rd Class Stewart's bedroom because he had invited them to enjoy the cooler temperature of the room, as it had an air conditioning unit. The accused sat on a desk chair located by the foot of the bed while he and the complainant sat on the other end of the bed where the pillow was. He recalls talking about the content of Sailor 3rd Class Stewart's library and the specific subjects of his books. The three also talked about relationships, watched some videos, amongst other things, and Private Lévesque used his personal phone. He cannot recall if the accused or the complainant were drinking while in the bedroom, but testifies that the complainant was "more than tipsy" because she seemed very relaxed. He did not observe the accused exhibiting clear signs of intoxication.

[32] He estimates that after fifteen to twenty minutes of being in Sailor 3rd Class Stewart's bedroom, Private Lévesque walked out to go to the bathroom. He further remembered in cross-examination Sailor 3rd Class Stewart signaling to him that he wanted to talk to the complainant alone, so Private Lévesque absented himself that first time because he needed to go to the bathroom anyway. However, he did not go to the bathroom as Aviator Fadus intercepted him in the living room. After a short exchange with Aviator Fadus, realizing that he had left his phone in Sailor 3rd Class Stewart's bedroom, Private Lévesque went back to Sailor 3rd Class Stewart's bedroom to retrieve his phone. He was out of the bedroom for what he believes was approximately one to two minutes, but is certain that it was less for than five minutes when he returned. Once in, he observed the accused and the complainant had changed positions. Sailor 3rd Class Stewart and she were both laying on the bed, stretched out, on their stomachs, facing the foot of bed and the computer screen. Private Lévesque then reached across the bed to retrieve his phone which was on a radiator or windowsill. He also solicited cigarettes from the complainant. She responded that they were in her car and tossed her car keys in his direction, which he caught. He closed the door on his way out. When it was suggested that the complainant sat on the accused's lap around this time, he answered that it could have happened while he was busy with his phone, but does not remember this happening.

[33] Private Lévesque testified leaving the bedroom a second time to go to the bathroom, closing the door behind him, this time with his phone and the complainant's car keys. After going to the bathroom, he went to the living room for a chat and, realizing that there was no one to have a cigarette with, he returned to the bedroom to ask the complainant if she would have a cigarette with him. He testified wanting to leave after having a cigarette as it was late, approximately 2200 hours. He was out of the bedroom this second time for a total of five to ten minutes. When he went back, he believes it is possible he may have knocked on the door before

he opened the door, but clarified that even if he did knock, he entered immediately. He does not believe the accused said “Come in,” before entering the room. When he did open the door to the room, although it was dark, he saw the complainant standing at the foot of the bed. Sailor 3rd Class Stewart was also standing about a foot or two away, facing her while helping her button her shorts. In cross-examination, he admitted not being sure if Sailor 3rd Class Stewart was helping her with the button of her shorts, but he remembers the accused’s hands were near her. Although he felt he had walked into something compromising, he testified not knowing what to make of the situation, but he knew something had happened and it was uncomfortable. He does not recall if he or the complainant talked to anyone on their way out. However, he testified sending Sailor 3rd Class Stewart a text from the complainant’s car, thanking him for the invite, and apologizing for barging into Sailor 3rd Class Stewart’s bedroom.

[34] On the drive back, he observed the complainant seemed flustered and there was an uncomfortable silence. He asked if something was wrong. She answered she was fine. He saw her the next morning, but as they did not have time to talk because they had to get up and go to PT, they were going to talk about the previous night later that day. She did mention, however, that she was uncomfortable with what happened the night before. Around 1500 hours that day, they discussed the matter during a fifteen to twenty-minute conversation. She asked him not to talk to Sailor 3rd Class Stewart about it.

[35] Private Lévesque also testified meeting Sailor 3rd Class Stewart in Sailor 3rd Class Stewart’s car in the CANEX parking lot, to discuss the situation the following week. He did not remember the accused talking about the event, but he said that Sailor 3rd Class Stewart stated, “When I look at myself in the mirror, I don’t see a rapist.” He recorded this conversation without the accused knowing but deleted it when he was under the impression that this would have been unlawful. Once his memory was refreshed with his statement to the Canadian Forces National Investigation Service (CFNIS) by the prosecution in re-examination, Private Lévesque remembered Sailor 3rd Class Stewart telling him that he had sex with the complainant that evening in his bedroom.

Defence witness

[36] The defence called as witnesses some of the other individuals who attended the gathering that night: Aviator Fadus, Signaller Kwan and then-Private Mong. The first witness was the accused’s roommate at the time, Aviator Fadus, who testified to inviting the following three guests: Signaller Kwan, then-Private Mong and Private Bantayan. Aviator Fadus, Signaller Kwan and then-Private Mong told the Court that they did not see what happened in the bedroom, as they were socializing in the living room at the time of the alleged sexual assaults. They generally testified about what they observed during the evening, focussing on alcohol consumption and degree of inebriation of the accused and his guests, their interaction with each other as well as what they observed when the complainant and Private Lévesque left the residence.

Testimony of Aviator Fadus

[37] Aviator Fadus explained during his testimony that he met the accused for the first time while on basic training when he was posted to Canadian Forces Base Kingston. In June 2018, they became roommates when they moved together into a PMQ on base in Kingston. He explained not hanging out with the accused during this period, because of his perceived age gap with Sailor 3rd Class Stewart, but that they currently enjoy what he qualified as a long-distance friendship, where Sailor 3rd Class Stewart contacts him every couple of months to keep in touch. He explained that A.R. is an acquaintance whom he met in 2018 during her first week of her arrival on base when the accused and he were asked to give her a tour of the base. He also knows Private Lévesque through a mutual friend. Both the witness and Private Lévesque currently serve in the same unit, but their relationship is strictly professional.

[38] He further testified being present at the gathering, where a total of seven people were in attendance. He also said he did not drink that evening since he was working the next day. He confirmed that the accused had invited the complainant and Private Lévesque to the gathering and they were his guests. When they both arrived at the PMQ, everybody had already eaten. He heard the complainant saying she had a bad week. He saw the accused pour her the first shot of Fireball whisky, then saw the complainant pouring shots for both the accused and herself. She then poured herself more shots of Fireball whisky using little shot glasses. He could not remember if Private Lévesque was drinking shots. He explained that Fireball whisky has a thirty-two per cent alcohol content. He testified that the complainant was acting normal and was friendlier with the accused. He further explained that during the evening, he went into the kitchen which he describes as a five foot by ten foot room. While there, he observed the accused and the complainant standing in the kitchen, where she was hugging Sailor 3rd Class Stewart from behind. He confirmed that if he had walked into the kitchen, the accused and the complainant would have seen him.

[39] He witnessed the complainant consuming around five shots, then she had mixed drinks, but she did not seem inebriated. This is when he swapped her mixed drinks for juice, as he was concerned that she was consuming too much alcohol. He testified that he could tell she had several drinks, but he did not observe signs of intoxication as she could walk, talk and maintain a conversation. Aviator Fadus explained that his focus that evening was on his guests, Signaller Kwan, then-Private Mong and Private Bantayan. The complainant was mainly interacting with the accused and Private Lévesque.

[40] When Sailor 3rd Class Stewart, Private Lévesque and the complainant moved into Sailor 3rd Class Stewart's bedroom later on, Aviator Fadus confirmed that the door of the bedroom was kept closed. He explained that this was because there is no central air conditioning in the PMQ; however, there was an air conditioning unit in the bedroom. During that time, he saw Private Lévesque leaving and returning to the bedroom at least twice. When out of the bedroom, Private Lévesque sat with Aviator Fadus and his guests in the living room. On one occasion, when Private Lévesque returned to the bedroom, Aviator Fadus heard three short knocks then heard Private Lévesque open the door to the bedroom right away. He also explained that it is easy to hear everything in the PMQ, from anyone going in the bathroom to the television playing in the upstairs unit. The unit is only about 700 square feet. The distance between the bedroom door and the living room is short, and it is possible to see the accused's bedroom from the living room, but

he could not see it from where he was seated. That night, there was some music playing on low volume so attendees could converse.

[41] He described that Private Lévesque's mood had changed, as he sat quietly in the living room. He seemed down as if he was tired and ready to leave but he did not appear drunk. He believed Private Lévesque had a beer, maybe a total of three drinks, although he could not confirm if these drinks mixed with juice were alcoholic beverages. He testified that it was not only Private Lévesque who was in and out of the bedroom, but A.R. too who would come out and chat with those in the living room and go back in the bedroom. He estimated that Sailor 3rd Class Stewart and his guests spent about a total of one hour in his bedroom. The last time Private Lévesque left the bedroom, he was accompanied by the accused and the complainant. The witness then observed that the complainant seemed physically and emotionally normal. Those leaving said, "Bye" on their way out, and the accused walked them to the door. He confirmed that Sailor 3rd Class Stewart had drinks that night but does not know his level of intoxication.

[42] In cross-examination, he explained that he was not interviewed by the investigator when he received a phone call in 2019 and that he and the investigator only briefly talked. The details provided in his testimony had not been provided prior to 21 May 2021, although he recognized he had received an email from the CFNIS before and knew to contact the investigator if he had information regarding this case.

Testimony of Signaller Kwan

[43] Signaller Kwan testified that he knows Sailor 3rd Class Stewart from basic training in the summer of 2018. He is an acquaintance of his and vaguely knows the complainant, but knows Private Lévesque from the night of 9 August 2018. They have been roommates since 2020, but assured the Court that he and Private Lévesque did not discuss the case. He testified going over to Sailor 3rd Class Stewart's place to cook some fish with Privates Bantayan and Mong on 9 August 2018. He saw the complainant drink five to six shots of hard liquor which he believes were either Fireball whisky or Kraken rum. He himself was drinking ciders. He observed that the complainant was not heavily intoxicated. She was cheerful and gave more attention to Sailor 3rd Class Stewart, gravitating toward him. She even grabbed Sailor 3rd Class Stewart by the shoulder, although later in his testimony he claimed she grabbed him by the arms. He said he went inside Sailor 3rd Class Stewart's bedroom before the door was kept closed because he heard something playing on the screen and had a short conversation before going back to the living room.

[44] He believed the accused had three to four shots of alcohol, so he was slurring slightly but he was still composed. He testified that the complainant was also slightly to mildly slurring before going into the bedroom. He claimed that she was walking straight, assertively and was carrying on conversations. However, he also testified that he saw her leaning on the table for the last half of the evening. Further, he saw Private Lévesque drink one beer, but believed he had three to four beers throughout the evening. He too said that Private Lévesque knocked on the bedroom door before going in almost immediately, but said that Private Lévesque went to the bedroom only once. The witness noticed Private Lévesque being more "restless" during his visit to the living room from the bedroom. He stated that the bedroom was quiet during the fifteen to

twenty minutes that the accused and the complainant were alone in it. He later saw Sailor 3rd Class Stewart and his guests leaving the bedroom, the three of them smiling. He insisted during his testimony that the complainant wanted to drink more before leaving and even got involved in conversations with Private Bantayan. When asked to clarify, he explained that these discussions were about how to drive back home. He heard the complainant saying “Good night” while heading out, after putting her shoes on. He saw the accused being intoxicated. He finally admitted not providing these details to the CFNIS as he was not invited to do so.

Testimony of Corporal Mong

[45] Then-Private Mong was serving in Kingston in early summer 2018, where he met Sailor 3rd Class Stewart as they were working in the same group waiting to attend their respective course. He is an acquaintance of Sailor 3rd Class Stewart and of the complainant and Private Lévesque. He testified that the complainant is a friend of the accused. He testified that on 9 August 2018 he went fishing with Private Bantayan and another individual whose name escaped him. They asked the accused for permission to cook their catch on his barbeque. He believes Signaller Kwan may have been there, too. He said he did not drink that evening and was not paying attention to what others drank, but knew they were drinking.

[46] The complainant and Private Lévesque arrived after the group was done eating, when it was dark. Both of them were very sociable, and the complainant was the same social person as usual. He observed that Sailor 3rd Class Stewart was not showing signs of intoxication, as both his ability to converse and his composure were good. He affirms that the complainant was likewise able to have normal conversations with everyone and walked normally. She was talking mostly with the accused because she was his friend, and she did not talk to others that much. He testified that the complainant stayed in the kitchen for a while when they were eating, then she went into the living room. He confirmed that he was not paying attention to her, but does not believe she drank fourteen shots of liquor. He believes only A.R. and Sailor 3rd Class Stewart were in the bedroom, since Private Lévesque stayed with them in living room, but he later clarified Private Lévesque came out of the bedroom and into the living room on two occasions. He explained that Private Lévesque and the complainant left the PMQ for the night at the same time as the rest of the group. He says that the complainant looked normal but he could not gauge her level of intoxication. She did not look “super happy” and she wanted to leave. She just said “Goodbye.” She was coherent, although she did not say much. Sailor 3rd Class Stewart came back in the living room when all of the group was ready to leave: he did not seem “drunk”.

Testimony of the accused

[47] Sailor 3rd Class Stewart confirmed knowing Private Lévesque from BTL, and with time they became close. He also knew the complainant and socialized with her in the spring/summer 2018. He confirmed the other attendees at the gathering on 9 August 2018: Mong, Kwan, Fadus and Bantayan. Sailor 3rd Class Stewart indicated he invited A.R. and Private Lévesque to come over by sending the complainant a text message and she responded asking for the address. She arrived with Private Lévesque at 2045 hours and shared with the group that she had recently broken up with her boyfriend. She saw the bottle of Fireball whisky. She grabbed it, and she poured one shot for the accused and one for herself in a one-ounce shot glass. Then Sailor 3rd

Class Stewart poured the next two shots. After drinking their respective shots, she poured two more shots, one for each of them. Sailor 3rd Class Stewart refused this third shot as he was drinking beer, but she drank her third shot. She quickly drank the shot Sailor 3rd Class Stewart had refused to drink. Sailor 3rd Class Stewart's evidence regarding the complainant's alcohol consumption afterward is not clear. He said she was given a beer, then he said she was given a drink she did not like, so she was then given lychee juice mixed with gin.

[48] After hanging out in the living room for twenty minutes, Sailor 3rd Class Stewart testified that he went into the kitchen to get chips. The complainant walked in after him, saw the chips he had and told him they were her favourite type. She hugged the accused. Sailor 3rd Class Stewart is not sure if it was from behind, but he kissed her on the neck playfully. The accused testified that the complainant said, "That's my weakness." He explained that he felt it was an "amorous" attraction. This lasted five to ten seconds. He stopped kissing and he continued pouring some chips. Sailor 3rd Class Stewart insisted he was in the kitchen first, because it was his house, and people just do not go into other's kitchens to search for food as they do not know what is in the cupboard.

[49] Afterward, they both went back into the living room, with the chips. She seemed fine with the interaction in the kitchen and did not seem intoxicated. The accused thinks the complainant continued drinking the beer that was initially offered to her, but he does not believe she drank more. He gave a brief tour of the layout of the PMQ, the bedrooms in particular. He, Private Lévesque and the complainant decided to stay in the bedroom as the temperature was cool. The three suggested a variety of funny, "[adult-swim]" videos. Sailor 3rd Class Stewart indicated that when Private Lévesque suggested his videos, he had the keyboard. When the complainant suggested her videos, she sat on Sailor 3rd Class Stewart's lap. This lasted about five to ten minutes. Sailor 3rd Class Stewart and Private Lévesque exchanged a look, where the accused gave him a nod to leave the room. Private Lévesque acknowledged it and left to go to the bathroom.

[50] Once Private Lévesque left the bedroom, Sailor 3rd Class Stewart asked the complainant if she wanted a back massage, to which she replied, "I'd love one." She lay down on the bed on her stomach, and Sailor 3rd Class Stewart went on the bed behind her. He started giving her a massage, working his way from her back to her buttocks. She was shaking her buttocks side to side, which caused him to get an erection. Sailor 3rd Class Stewart then stopped, and she asked him why. Sailor 3rd Class Stewart had rolled down beside her, looking at her, and she kissed him and they started "making out". This lasted a minute or two. They were mutually caressing each other. After a minute, Sailor 3rd Class Stewart put his hand on her genitals, over her pants. She was moist so he started rubbing her. They continued making out for another minute. She told the accused not to leave a hickey as he was kissing her neck. Sailor 3rd Class Stewart testified to moving her shorts to the side and sliding his finger into her vagina. She was moaning and they continued kissing for another thirty seconds and, after this, the accused went behind her and penetrated her vaginally with his penis. They had sex for a minute to a minute and a half. It was uncomfortable as she still had her shorts on. She was moving side to side. After a minute, Sailor 3rd Class Stewart "pulled out and stopped". She went to pull down her shorts, but the accused said they should stop because they might get caught as Private Lévesque could come back at any time. She agreed, so they just lay down on the bed together and stayed like that until Private

Lévesque came back thirty seconds to a minute later. The complainant seemed upset, but not intoxicated.

[51] When Private Lévesque came back, Sailor 3rd Class Stewart and the complainant were lying on the bed. He asked for her car keys. When the complainant left the room to go to the bathroom, Private Lévesque asked the accused what they both talked about. Sailor 3rd Class Stewart answered that “gentlemen never kiss and tell”. There was an exchange where a request was made by Sailor 3rd Class Stewart to be left alone with the complainant. After she came back, Private Lévesque left again for a smoke. Sailor 3rd Class Stewart explained that during Private Lévesque’s second absence, the complainant undid her shorts and stood in front of the bed. The accused undid his shorts and pulled them down. He also pulled down her shorts. She was either standing or on all fours, and she had her hand on the bed. As she leaned forward, the accused did not need to push her. He did not have an erection yet. The complainant shook her buttocks for thirty to forty seconds during which time the accused achieved an erection and they had sex for five to ten minutes. The accused clarified that the sexual activity lasted “maybe 6 minutes”. The complainant was moaning gently and she was doing all the work with Sailor 3rd Class Stewart just standing there.

[52] Then Private Lévesque knocked on the door. He did not immediately open the door, which gave them time to stand up and pull up their shorts. After they had both pulled up their shorts, Sailor 3rd Class Stewart said, “One second.” The same second, Private Lévesque opened the door. The complainant’s button was still undone. Sailor 3rd Class Stewart does not remember helping the complainant fasten her button, but he does remember Private Lévesque being embarrassed by what he had walked into. The complainant seemed to be embarrassed as well. Private Lévesque and the complainant left the room. Sailor 3rd Class Stewart testified that the complainant went back into the bedroom to retrieve her phone and glasses. She was not sober, but was intoxicated, although not to the point of staggering. As for himself, he had five to six drinks, with more drinks before.

[53] The next morning, Sailor 3rd Class Stewart had a ruck march that the complainant also participated in. He also recognized that the text messages sent to the complainant from “6jman” were from him. He explained sending her the message because he still cared about her and that he did not intend to have sex with her that evening, as he knew she was emotional. He did not want this to damage the friendship. The following Monday, Sailor 3rd Class Stewart received an unusual tasking from his chain of command. The day after he spoke to Private Lévesque, Sailor 3rd Class Stewart’s chain of command told him not to speak to Private Lévesque and the complainant, so he suspected something was going on.

The law

Sexual assaults – general principles

[54] It is alleged that Sailor 3rd Class Stewart committed two offences under section 130 of the *NDA*; that is to say, sexual assault, contrary to section 271 of the *Criminal Code*. In order to secure a conviction for a sexual assault offence, the prosecution must prove beyond a reasonable

doubt the identity and the place and date of the commission of the offences as alleged in the charge sheet. It must also prove the following essential elements:

- (a) the application of force. In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, the Supreme Court of Canada (SCC) recognized the application of force as any degree of force, including touching;
- (b) the application of force was intentional;
- (c) the complainant did not consent to the application of force, or a factor vitiated her consent;
- (d) the application of force by Sailor 3rd Class Stewart on the complainant occurred in circumstances of a sexual nature, such that the sexual integrity of the complainant was violated; and
- (e) finally, the prosecution has to prove that the accused knew, was wilfully blind to, or was reckless to the fact that the complainant had not communicated consent. Also referred to “as honest but mistaken belief in communicated consent”, this element can be established by evidence that he failed to take reasonable steps to ascertain that the complainant had communicated consent.

Intoxication

[55] Pursuant to section 273.1 of the *Criminal Code*, consent means “the voluntary agreement of the complainant to engage in the sexual activity in question.” This section also specifies that consent must be present at the time the sexual activity takes place. It also provides that no consent is obtained if the complainant is unconscious or incapable of consenting to the activity for any other reason, such as for reason of intoxication by alcohol. Furthermore, if the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity, then there is no consent.

[56] In the very recent case of *R. v. G.F.*, 2021 SCC 20, examining the application and interpretation of section 273.1 of the *Criminal Code* the SCC established at paragraph 56, that:

[I]n order to voluntarily agree to the sexual activity in question, the complainant must understand that saying “No” is an option. In *J.A.*, this Court held that consent requires that the complainant have “an operating mind” at the time of the touching, capable of evaluating each sexual act and choosing whether or not to consent to it: paras. 36 and 43-44. Thus, an unconscious complainant could not provide contemporaneous consent. It follows that where the complainant is *incapable* of understanding that they have this choice to engage or refuse to engage, they are incapable of consenting. Accordingly, a complainant who is unable to say no, or who believes they have no choice in the matter, is not capable of formulating subjective consent. [Emphasis in original. Citation omitted.]

[57] The context of the sexual assault in the case of *G.F.* happened when the complainant “was so intoxicated that she vomited repeatedly, passed out, felt ‘out of control’ during the

sexual activity, felt that she had no choice in the matter, and could not do anything to stop it.” The SCC further established the four cumulative factors must be established in order to support a claim that the complainant did have the capacity to consent:

[57] In sum, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:

1. the physical act;
2. that the act is sexual in nature;
3. the specific identity of the complainant’s partner or partners; and
4. that they have the choice to refuse to participate in the sexual activity.

[58] In this case, the SCC rejected the argument that, because the complainant had a memory of events, retained her motor skills, or was able to walk or talk, she had the capacity to consent.

Consent: question of credibility

[59] As for the question of absence of consent, the SCC decision in *Ewanchuk* is a seminal decision which had a significant impact in Canadian criminal law. It established that consent involves only the complainant's subjective internal state of mind toward the touching at the time it occurred. The intent, or thinking, of the accused in the context of this essential element is not pertinent. The Court is only concerned with the complainant’s perspective. Did she want the accused to touch her? The SCC also established that there was no such thing as implied consent. Moreover, the Court stated the following in *Ewanchuk*:

While the complainant’s testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant’s words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

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. The question at this stage is purely one of credibility, and whether the totality of the complainant’s conduct is consistent with her claim of non-consent. The accused’s perception of the complainant’s state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.
[Emphasis added.]

[60] Although the trier of fact must be alert to the pitfalls of myths and stereotypes when deciding on the guilt or innocence of an accused in sexual offences, evidence of the complainant’s conduct before or during the alleged sexual assault might undermine the credibility of her testimony in relation to her claim that she did not consent.

Honest but mistaken belief in communicated consent

[61] Before turning to the issue of assessment of credibility, counsel have referred many times to the SCC decision in the *R. v. Barton*, 2019 SCC 33 case, which established at paragraph 104 that:

[104] Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent — no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time. [Emphasis added.]

Credibility and reliability of witnesses

[62] As quoted from *Ewanchuk*, in sexual assault cases such as this one, it is not unusual that the crux of the issue is one of contradictory testimonies, since most times the only ones who were present during the alleged sexual assault were the complainant and the accused. The Court must therefore decide which evidence it accepts, and the weight to be given to it. When making that determination in the context of contradictory testimonies, the Court must assess the reliability and credibility of the witnesses who testified in court. Credibility and reliability are two different concepts. Reliability speaks to the ability of a witness to accurately observe, recall and recount the events, whereas credibility refers to the sincerity of the witness, and whether they are being truthful.

Reliability

[63] Many factors influence the Court's assessment of the reliability of the testimony of a witness. For example, a court will assess a witness's opportunity to observe events, their capacity to remember, as well as a witness's reasons to remember. Something specific, striking or unusual could have happened that helped the witness remember the details of the incident that he or she described. On the other hand, an event that is relatively unimportant would be understandably more difficult to recollect. This could explain, in part, why witnesses have different recollections of events. Due to a number of reasons including, but not limited to, the passage of time and alcohol consumption, the actual accuracy of the witness's account may not be reliable. So in effect, the testimony of a credible or an honest witness may nonetheless be unreliable (see *R. v. Morrissey*, [1995] O.J. No. 639).

Credibility

[64] Many factors also influence the Court's assessment of the credibility of a witness. 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? The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative? Finally, was the witness's testimony consistent with itself and with the undisputed facts? A witness whose evidence on an issue is not credible cannot give reliable evidence on the same point (see *R. v. H.C.*, 2009 ONCA 56).

[65] The assessment of credibility for the trier of fact is not an easy task and it certainly does not entail a ruling on every single detail of the answers of all witnesses. As stated by the SCC in *R. v. R.E.M.*, 2008 SCC 51 at paragraph 49:

[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

Possible outcomes

[66] A court may accept or reject some, none or all of the evidence of any witness who testifies in the proceedings. A finding that a witness is credible does not require a trier of fact to accept all the witness's testimony. A portion of it may be accepted as true while the remainder could be deemed not credible.

[67] The burden of proof with respect to the charge remains on the prosecution. The prosecution's case is not made out simply because the testimony of the complainant might be preferred to the accused's testimony. In fact, it is possible to not believe some of what the accused has testified to, but still be left in doubt as to whether the prosecution has established each of the elements of the offence beyond a reasonable doubt. The appropriate approach in assessing the standard of proof is to weigh all the evidence and not assess individual items of evidence separately. It is therefore essential to assess the credibility and reliability of individual testimony in light of the evidence as a whole.

[68] As stated by the CMAc in *R. v. Clark*, 2012 CMAc 3 at paragraphs 40 to 42:

[40] First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: *R. v. Thain*, 2009 ONCA 223, 243 CCC (3d) 230, at para 32.

[41] Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aguilera v Canada (Minister of Citizenship and Immigration)*, 2008 FC 507, at para 39; *R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 9-11.

[42] Third, as juries in civil and criminal cases are routinely and necessarily instructed, a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.

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

[69] It is the prosecution that bears the burden of proving guilt and guilt must be proved beyond a reasonable doubt. These two rules are linked to the presumption of innocence to ensure that no innocent person is convicted. The presumption of innocence remains throughout the case until such time as the prosecution has, on the evidence accepted at the trial, satisfied the Court beyond a reasonable doubt that the accused is guilty of the charge. This is not a standard of

absolute certainty, but it is a standard that certainly approaches that. Anything less entitles an accused to the full benefit of the presumption of innocence and a dismissal of the charge.

[70] The term “beyond a reasonable doubt” is anchored in our history and traditions of justice. 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 (see *R. v. Lifchus*, [1997] 3 S.C.R. 320).

[71] In essence, this means that even if I believe that Sailor 3rd Class Stewart is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give him the benefit of the doubt and acquit him because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt. 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 Sailor 3rd Class Stewart 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 (see *R. v. Starr*, 2000 SCC 40, at paragraph 242).

Analysis

Myths and stereotypes

[72] At the outset, there was a great deal of evidence adduced by the defence to downplay the complainant’s level of intoxication and to inflate the accused’s and Private Lévesque’s. There was also evidence adduced to prove that the complainant focused her attention on the accused during the evening, and that she was both happy and cheerful when she left his bedroom. It was apparent that the memory of certain details of Aviator Fadus, Signaller Kwan and Corporal Mong was not intact, as there were both internal inconsistencies and contradictions in their evidence. Except for the testimony of Aviator Fadus pertaining to what he contended he saw in the kitchen, evidence I will review as part of the first charge, the evidence of these witnesses pertain to collateral matters that bear little relevance to the matters of this trial and did little to impeach the credibility of the prosecution’s witnesses. Indeed, in her examination, the complainant did testify that she spent most of her evening socializing exclusively with the accused and Private Lévesque. She also said that she did not recall the details of what happened after she left the bedroom to go home, in particular whether she was smiling, whether she said, “Bye,” on her way out and so forth.

[73] This evidence did not assist in impeaching her credibility in regard to her behaviour when she was leaving the accused’s residence. More worrisome to the Court is that the evidence seemed to have been adduced to infer certain myths and stereotypes about complainants of sexual assault. For example, defence witnesses presented evidence that the complainant focused her attention on Sailor 3rd Class Stewart, and to show that she acted normally after leaving the bedroom. The Court gives little weight to the evidence presented by defence counsel regarding how the complainant acted with the accused throughout the evening, other than as part of the narrative which was already presented in the prosecution’s case. Further, this evidence of the complainant’s conduct after the alleged sexual offence purports to demonstrate the stereotype that a person who has been sexually assaulted would behave in a certain way, and would run or

scream or call the authorities immediately after. Since the complainant in this case did not adopt this behaviour, the implication is that she cannot possibly have been sexually assaulted. Consequently, I gave little weight to the evidence presented by defence counsel regarding how the complainant may have behaved right after the alleged sexual assaults.

Credibility

Assessment of credibility - generality

[74] The testimonies, in particular, the cross-examination of prosecution's witnesses, were lengthy, and a fair amount of evidence related to collateral facts was adduced at trial in order to impeach the credibility of these witnesses. The Court must ask itself if the prosecution proved beyond a reasonable doubt all the essential elements of a sexual assault for each charge. It is important to note that in order to meet this evidentiary threshold, corroboration of the complainant's evidence is not required. As mentioned before, the contested essential element of this case is whether the complainant consented to the sexual activities that Sailor 3rd Class Stewart admitted took place between the two of them the evening of 9 August 2018. I must also examine if Sailor 3rd Class Stewart took reasonable steps to ascertain her consent before engaging in the sexual activities in question.

[75] It is not the role of a trier of fact to address every single inconsistency that may exist in testimonies. The Court must focus on inconsistencies that influence the assessment of credibility, such as material ones or those that are so numerous they plague the testimony of the witness. Of course, the importance of inconsistencies to impeach the credibility of a witness is fact-driven. Generally, if they bear on collateral facts, they tend to have less importance. Further, evidence of collateral facts that bear no importance on the assessment of credibility carry little value to the case. For example, some witnesses said that Sailor 3rd Class Stewart's guests arrived at 2100 hours while the prosecution's witnesses testified arriving at 2030 hours. In the circumstances of this case, whether they arrived at 2030, 2045 or 2100 hours is not a critical aspect of this case. It is part of the context and it does provide some indication of level of intoxication, but it is not determinative. Even if I accepted that Sailor 3rd Class Stewart's guests arrived at 2100 hours, it does not mean that those who said they arrived at 2030 hours were lying and that the Court should reject the entirety of their evidence. The passage of time between the alleged offences and the trial could influence the recollection that some witnesses have without influencing their credibility as I have explained before. That said, the Court will address material inconsistencies and contradictions and explain how and why they impacted the credibility of some of the witnesses. I will first address the accused's credibility.

Accused's credibility

[76] When assessing the accused's credibility, as his counsel pointed out, it is not a contest between his version and the complainant's. In other words, the Court cannot choose which version it prefers. It must nevertheless consider Sailor 3rd Class Stewart's version of events in light of the whole of the evidence that was accepted at the trial.

[77] Generally, Sailor 3rd Class Stewart strikes the Court as an intelligent, articulate, soft-spoken and well-read young man. He testified in a calm manner, keeping his composure and was not argumentative. Interestingly however, when he testified to material facts, the Court noted that he showed some clear signs of nervousness such as pausing and he seemed to have difficulty swallowing. These body-language signs are in no way determinative of my assessment of his credibility nor indicative of his lack of credibility, however, they do provide the Court with a certain perspective. I also noted that he had a tendency to downplay both his level of intoxication, and the complainant's, and that he was able to provide the sequence of events accounting for every minute, or even seconds. I will get to that in more detail later.

[78] As for my assessment of his credibility specific to each offence, I will do so firstly in addressing the allegations and evidence that pertains to the first charge, which relates to the sexual assault that allegedly took place in the kitchen.

First charge

[79] The complainant, Sailor 3rd Class Stewart and Aviator Fadus testified about the incident in the kitchen. Sailor 3rd Class Stewart gave a detailed account of what happened, specifically what was said, the sequence of the act involved, as well as his and the complainant's reaction to the interaction. In particular, he testified that he went into the kitchen about twenty minutes after his guests arrived in order to fetch some chips. He affirmed that the complainant walked into the kitchen after him, and looking at the chips, she said they were her favourite. After this, he testified that she hugged him from behind, then Sailor 3rd Class Stewart said he was not sure if it was from behind or if he was facing her. Then while she was hugging him, Sailor 3rd Class Stewart kissed her on the neck playfully, to which she said, "That's my weakness." During his testimony, he repeated this portion of his answer, and continued providing additional details of what followed; that they both hugged each other, she smiled, then he kissed her on the lips, then he placed his hands on her buttocks. He said this interaction lasted five to ten seconds. Then he stated they both mutually stopped kissing, and he continued pouring the chips before returning to the living room.

[80] It is difficult to believe that Sailor 3rd Class Stewart is able to remember this very short sequence of events that happened three years ago with this level of detail, when he had consumed several drinks before his guests arrived and had at least two more shots of whisky before going to the kitchen. Further, when asked by his counsel to clarify how the complainant responded, he said this, for a third time, "When I kissed her on the neck, she said, 'That's my weakness,'" as if he was reciting a sequence of events that he had memorized for his testimony in Court.

[81] Additionally, the Court finds the testimony of Aviator Fadus not credible nor reliable. During his testimony, he did not indicate seeing Sailor 3rd Class Stewart from the living room. He rather said he walked into the five-by-ten kitchen and saw the complainant hug the accused from behind. He also confirmed that, if he had walked into the kitchen, both of them would have seen him because it is a small room. However neither Sailor 3rd Class Stewart nor the complainant testified seeing Aviator Fadus coming or being in the five-by-ten kitchen at the same time. His evidence as to what he saw contradicts the accused's testimony. He testified that

he was in the kitchen and saw the complainant hug Sailor 3rd Class Stewart from behind for the ten-second duration that he was in the room. A ten-second hug is an unusually long embrace.

[82] Further, Sailor 3rd Class Stewart testified that the entire physical interaction in the kitchen between him and the complainant from the moment she would have hugged him from behind to the moment the accused parted after grabbing her buttocks, lasted a total of five to ten seconds. If Aviator Fadus was in the kitchen for the ten seconds that he claimed he was and saw the complainant hugging the accused from behind, he would have seen more than a hug. He did not testify observing a kiss on the neck or on the lips. He did not report observing the accused and the complainant hugging each other, facing one another. He did not report hearing anything said, such as the complainant saying “those are my favourite”, or, “that’s my weakness.” In fact, he provided no details of what he observed, specifically regarding reactions or comments from both the complainant and Sailor 3rd Class Stewart, and his own reaction or whether he saw the hug ending, and so on.

[83] Furthermore, it is only in May 2021, almost three years after the incident, that he shared this piece of information to the CFNIS investigator, information that would have been critical to Sailor 3rd Class Stewart’s defence if it were true. When cross-examined regarding his belated disclosure of this aspect of his evidence, specifically when he had been contacted by the CFNIS in 2019 to see if he had relevant evidence to provide in the context of the investigation and did not say anything at that time, he proceeded to give excuses in response. His unconvincing reasons included not having the time to talk on the phone when called by the investigator in 2019 and not knowing if he could provide his evidence on the Defence Wide Area Network. Yet, Aviator Fadus knew his long-distance friend and former roommate was under investigation for sexual assault that allegedly took place at his residence while he was present at a gathering he was hosting. Surely, he knew this information was critical to Sailor 3rd Class Stewart’s defence if it were true. The Court finds Aviator Fadus’ evidence in regard to what he said happened in the kitchen to be, as a result, not credible.

[84] Sailor 3rd Class Stewart offered a reason to discredit the complainant’s version of events. He explained that the complainant would not have gone to his kitchen to find something to eat because that is not what people do. Although there is some logic to this statement, this does not mean that the complainant did not go into his kitchen uninvited. Her account as to why she went to the kitchen is supported by her evidence that she came on an empty stomach, could not eat the fish that was offered because of her intolerance and resigned herself to eating chips in the short term. When she realized that she was becoming intoxicated quickly, she decided to try and find something to eat to minimize the effects of alcohol.

[85] As the Court does not believe Sailor 3rd Class Stewart’s version of events regarding what happened in the kitchen, and his testimony does not leave it with a reasonable doubt, the Court must determine if, looking at the evidence it accepted, whether the prosecution proved beyond a reasonable doubt that Sailor 3rd Class Stewart sexually assaulted the complainant in the kitchen, by kissing or touching her.

[86] Turning to the rest of the evidence, the complainant’s evidence in regards to what compelled her to accept Sailor 3rd Class Stewart’s invitation, when and why she was in the

kitchen, what happened and what followed, is credible. She first testified feeling stressed out and just wanted to go out, see coworkers, socialize and have a few drinks. She had just broken up with her boyfriend. She started drinking shots of Fireball whisky almost immediately after her arrival. To counteract the effects of alcohol, she went into the kitchen, bent over to look into the fridge, and then felt hands grabbing her buttocks. She described herself as being cornered. She stood up, turned around, and that's when the accused forcibly kissed her on her mouth. As she was not consenting, she believed she shoved or pushed her way out to past him and went back to the living room. The events recounted by the complainant happened quickly. She said she felt quite shocked. Her testimony is not only internally consistent; her evidence as to her emotional and physical state and the reason she went into the kitchen are supported by uncontested evidence. She had a credible reason to go the kitchen and look into the fridge.

[87] Although she was friendly and socialized with Sailor 3rd Class Stewart, she expressly stated having no sexual interest in him. In the circumstances, the version of events of her going into the kitchen, complimenting his choice of chips, hugging him, receiving a kiss on the neck, then saying, "That's my weakness," and so on, and leaving the kitchen with him bringing more chips to the living room, is not credible. The implausibility of Sailor 3rd Class Stewart's version of events is apparent. It is also apparent that he took no reasonable steps to ascertain consent from the complainant, as I accepted that he went behind her while she was bent over looking in the fridge when she was cornered, grabbed her buttocks, and when she turned around, he forcibly kissed her. There was no interaction between the accused and the complainant prior to him kissing and touching her, other than the social friendly interaction he had with her in the living room in the presence of others.

[88] Consequently, I do not believe Sailor 3rd Class Stewart's version of events. His testimony leaves me with no reasonable doubt. Further, after examining the rest of the evidence, I am left with no reasonable doubt as to his guilt. I find that the prosecution proved beyond a reasonable doubt that he did sexually assault the complainant by kissing or touching her in the kitchen.

Capacity to consent - section 273.1 of the Criminal Code

[89] Before addressing the question of credibility for the second offence, I must determine whether, in light of the evidence admitted at trial, the complainant had the capacity to consent. No expert evidence was adduced to demonstrate that her level of intoxication amounted to her incapacity to consent, which could have assisted the Court in its determination. Consequently, the Court must rely on the evidence adduced at trial to make this determination.

[90] The complainant did consume a fair amount of alcohol that evening in a very short period of time. After her five shots of Fireball whisky consumed within a forty- to forty-five-minute period on a near empty stomach, she consumed at least one mixed drink with alcohol while in the living room. I accept the evidence of Aviator Fadus that he switched the complainant's alcoholic beverage to a non-alcoholic drink because he became concerned with the amount of alcohol she was consuming. She did not know this happened. I have no reason to doubt the veracity of Aviator Fadus' testimony on this portion of his evidence. Further, there was no evidence that her alcohol consumption continued when the three individuals moved into the accused's bedroom.

As for her level of intoxication, she was described by Private Lévesque as someone who “could handle her liquor”, which the Court accepts as evidence that the complainant was not a neophyte to the experience of alcohol consumption and its effect.

[91] As to what was observed, except for the complainant, all witnesses testified that she was slightly intoxicated, or “more than tipsy”. She could walk straight, she was not staggering, she acted normally and her speech was not slurred. Signaller Kwan did testify that before the complainant went into the bedroom, her speech was slightly to mildly slurred. He also testified that, for the second part of the evening, she had to lean on the table. Regardless, the next morning, she was up, went to work and did a ruck march carrying a thirty-pound load.

[92] Her liquor consumption and her level of intoxication observed by those present are, nevertheless, only one aspect to consider in the Court’s determination regarding her capacity to consent to the sexual activity that evening. As stated in the SCC decision *G.F.*, I must be informed of the four things that the complainant must be capable of understanding at the time of the sexual act.

[93] The complainant said she does not remember the details of the evening, as she has a spotty memory, but she does remember, after leaving the living room, having a tour, and going into the bedroom with Sailor 3rd Class Stewart and Private Lévesque, and watching YouTube videos. She remembers making specific recommendations of videos to watch because they, in some way, reminded her of her ex-boyfriend. She also remembers Private Lévesque leaving the room. Then she said that she felt her head being pushed into the mattress. She remembers still having her shorts on, but they were pushed to the side, and she said she felt hands on her hips, then her vagina being penetrated by Sailor 3rd Class Stewart, and hearing him moan behind her. When she realized what was happening, “what sex feels like”, she said she shut down, having an out-of-body experience. She further stated having a vivid memory of shutting her eyes during her ordeal. This event would have lasted only a few minutes. She then saw Private Lévesque come back, and remembers telling him that she wanted to leave. She walked unassisted without staggering, and testified remembering seeing her car parked outside. She was seen putting her shoes on before leaving Sailor 3rd Class Stewart’s residence. She also remembers somewhat the drive back.

[94] I find, consequently, that the complainant was capable of understanding both the physical act, and that the act was sexual in nature, when she described feeling her vagina being penetrated. She also knew it was Sailor 3rd Class Stewart who was penetrating her. The Court also finds that the complainant had an understanding that she did have the choice to refuse to participate in the sexual activity. If I accept her testimony to be true in this regard, her evidence is the only one that opens the inquiry into whether she had the capacity to consent. What she describes during the sexual act, however, is consistent with the experience of being shocked, and the trauma caused by the realization or the belief that she was being sexually assaulted. Indeed, she describes shutting down and having an out-of-body experience once she realized that she was being sexually assaulted. She was stunned by what was happening to her; she froze. With her description of how the alleged sexual assault unfolded, the recollection of her specific thoughts and emotions that she was able to convey to the Court, combined with the proven amount of alcohol she consumed that night and the observed level of intoxication, the Court finds that,

although the complainant was intoxicated that evening, the evidence that she did not have the capacity to consent, is insufficient. Consequently, I find, in light of the evidence adduced at trial, that although her judgement and memory were most likely affected by her consumption of alcohol, the complainant had an operating mind. Although the sexual activity was brief, she was able to understand the sexual nature of the act and realize that she could choose to decline to participate.

Second charge

Accused's testimony

[95] Turning to Sailor 3rd Class Stewart's version of events in relation to the second charge, the Court finds that through his testimony, he provided a remarkable amount of minute details with an unusual degree of precision, particularly for someone who admitted to consuming five to seven drinks of hard liquor mixed with beer during an evening that took place almost three years ago. In particular, Sailor 3rd Class Stewart was able to account for every thirty to sixty seconds of the various sexual acts that took place in his bedroom, their sequence and the various interactions he had with the complainant leading up to the alleged assault at issue. Sailor 3rd Class Stewart claims that he had sex twice with the complainant, each time for a very short period time during Private Lévesque's brief absence from the bedroom.

[96] When describing the first of those sexual interactions in the bedroom, Sailor 3rd Class Stewart contended that he nodded to Private Lévesque to leave the room so he could be alone with the complainant. Since Private Lévesque needed to go to the bathroom, he left the bedroom momentarily. Although Private Lévesque testified leaving for one or two minutes, Sailor 3rd Class Stewart insisted he left for about ten minutes. This is when he would have engaged in the first consensual sexual activity with the complainant for about ten minutes, which involved a back and buttocks massage, kissing and making out, caressing each other, then digital penetration of her vagina followed by penetration with Sailor 3rd Class Stewart's penis, with a change of position in the meantime from facing each other to him moving behind her.

[97] The accused testified that each one of these acts lasted between thirty seconds to one minute and a half. He also testified he was the one who decided to stop the sexual activity and he told the complainant that they should stop to avoid being caught, even though she wanted to pursue it. Coincidentally, Sailor 3rd Class Stewart made that decision to stop the sexual activity thirty to sixty seconds before Private Lévesque re-entered the room to get his phone and the complainant's car keys. This is when he found them both quietly lying on Sailor 3rd Class Stewart's bed, acting normal as if nothing had happened even though Sailor 3rd Class Stewart, from what he contends, just had sex with the complainant. Further, after Private Lévesque left a second time, the accused claims it was the complainant who initiated sex by undoing her shorts and standing in front of his bed. This is when they had sex again for another five to ten minutes, but perhaps only six minutes. When Private Lévesque came in the second time, the accused testified that he heard knocking on the door while he was having sex with the complainant. Sailor 3rd Class Stewart stated that Private Lévesque waited two seconds before entering.

[98] In light of all of his evidence, including the accused's and the complainant's respective degree of intoxication, the Court finds that it is not credible that Sailor 3rd Class Stewart would have been engaged in the various sexual acts he described with the complainant during Private Lévesque's first absence. It is also not credible that he would have been in the middle of a sexual act at the time Private Lévesque knocked on his door, because he could not have possibly had time to pull away from the complainant, put his shorts back on while the complainant would turn around and do the same, all of this in less than two seconds.

[99] Further, Sailor 3rd Class Stewart's testimony regarding the knock on the door and the time before the door opened is further contradicted by his own witnesses. They testified that they heard Private Lévesque knocking on the door and opening the door almost immediately. None of Sailor 3rd Class Stewart's witnesses heard the accused say, "Come in," even though they all testified that they could hear everything in the PMQ, including the television on in the upstairs unit. Signaller Kwan even said that it was quiet in the bedroom, implying that he could hear what was happening.

[100] In addition, if it were true that the complainant was consenting, then there was no reason to rush the intercourse, particularly when the accused had already signalled to Private Lévesque that he wished to be alone with the complainant. The accused's concern of getting caught in the circumstances he describes is illogical. After all, the accused had nodded to Private Lévesque to leave the room. Logically, if the sexual activity was consensual, the complainant or accused would have locked the door during Private Lévesque's second absence or would have told him that they wanted some alone time. Instead the accused, from his own admission, hurried into a brief sexual intercourse that included vaginal penetration. The brevity of the sexual acts he describes and his intent to keep them short are rather consistent with someone who does not wish to get caught doing something wrong.

[101] Sailor 3rd Class Stewart's testimony is simply not credible. It is internally inconsistent and illogical. The accused went as far as to contend that Private Lévesque was as intoxicated as he himself was, acknowledging that Private Lévesque had one beer, maybe two. Sailor 3rd Class Stewart then changed his answer saying that they both were not drunk. When Sailor 3rd Class Stewart testified, he had an answer, or an explanation for everything, including why he did not need to push down the complainant's head on the mattress. It is apparent that he carefully crafted his testimony in order to match portions of those of the prosecution's witnesses in a way that gave it some foundation of truth.

[102] Sailor 3rd Class Stewart also testified that the complainant socialized mostly with him. In this context, his reference to a "build-up" between him and the complainant during his cross-examination, is revealing. In particular, he explained there was a build-up throughout the evening which led to the sexual activity that took place in his bedroom. The Court understands from his testimony in this regard that he accepted as broad advance consent the complainant's friendliness toward him, the attention she was giving him when he was cheering while drinking shots, the atmosphere of trust in his bedroom where confidences were exchanged, her lying on his bed in the darkness of his room. This is also supported by his nodding at Private Lévesque to leave that first time because he wanted to be alone with her in his bedroom.

[103] In order to keep the cool air in, the door of his bedroom was conveniently to remain closed. The accused had opportunity to be alone with the complainant, who was both friendly and trusting with him. He also knew she was intoxicated. Private Lévesque did not leave long enough that first time for Sailor 3rd Class Stewart to make a move, as Private Lévesque forgot his phone. When he came back sooner than expected, the Court accepts the evidence that nothing had happened. However, not only did Private Lévesque come back to retrieve his phone the second time, he came back for a cigarette. As the complainant did not have cigarettes with her, she tossed her car keys at Private Lévesque. The accused then suspected that Private Lévesque was going to be absent from the bedroom for a longer period. After all, Private Lévesque needed to go to the bathroom, then walk to the car in the parking lot to retrieve a cigarette, then smoke the cigarette before possibly returning to the bedroom. Unless he was delayed by spending more time on his phone, he would not be back for at least ten minutes, a sufficient time to engage in sexual activity with an intoxicated complainant lying on his bed. Therefore, I do not believe Sailor 3rd Class Stewart's testimony that the complainant initiated the sexual activity or that she was a willing participant. It is simply not credible.

[104] In explaining the messages he sent on Instagram to the complainant, Sailor 3rd Class Stewart testified he did not have the intent to have sex with the complainant that night. When asked by the prosecution about the comment he made to Private Lévesque that when he looked at himself in a mirror, he did not see a rapist, he denied making such comment. When asked to confirm what he meant by "rapist", Sailor 3rd Class Stewart answered that it was someone who commits a sexual assault. He further clarified words to the effect that, "No, more like a man who has sex with women without consent; it does not need to be a sexual assault." Sailor 3rd Class Stewart also said that the complainant sitting on his lap constituted consent. The accused testified that he was "not thinking", and he did what "felt natural".

[105] Although I did not consider the answers of A.R. in her text messages as proof of the content, because it constituted a prior consistent statement, I did consider them in order to understand the context in which Sailor 3rd Class Stewart answered the way he did. His messages do constitute circumstantial evidence of an admission of his wrongdoing that night. His explanation in regard to what he meant is accepted as an excuse to counter its original meaning. As for the text messages exchanged with Private Lévesque that same night and the following week, which were adduced in support of his defence, they were exchanged before Sailor 3rd Class Stewart met Private Lévesque in the accused's car in the parking lot of the CANEX and before his chain of command ordered him not to communicate with Private Lévesque and A.R. The messages clearly indicated that he was very worried regarding what the complainant had told Private Lévesque. I do not accept the accused's explanation in regard to why he wrote these texts. In fact, his explanation sounded like excuses.

The rest of the evidence

Credibility of Private Lévesque

[106] I find Private Lévesque's testimony to be credible. He did not hesitate to accept possible propositions that could discredit his testimony, or discredit his character generally. He also admitted when he could not remember. His testimony is generally supported by some of the

defence evidence. Although there were some minor inconsistencies, none of them were cause to impeach his credibility. He testified in a straightforward manner, was not argumentative and did not try to embellish his version of events. On the contrary, he admitted to facts that were damning, such as recording a conversation with the accused without his knowledge, and when believing it was unlawful, he admitted deleting the recording. Although at the material time he was a close friend with the complainant, they have drifted apart. There is absolutely no evidence of fabrication or motive to lie.

[107] Evidence attempting to inflate his alcohol consumption that evening was based on assumptions and estimates. I accept, therefore, that he only drank one beer the evening of 9 August 2018.

[108] He testified that when he entered the room, he saw Sailor 3rd Class Stewart and the complainant standing close together, face to face. He is not sure if the accused was buttoning the complainant's shorts; however, what he said he remembered seeing is that his hands were on her shorts. He described feeling uncomfortable. He had the impression that there was something awkward happening. It is apparent from his testimony that Private Lévesque did not witness the sexual activity between Sailor 3rd Class Stewart and the complainant. What he witnessed was its aftermath. He also clearly did not know what to make of it. This is supported by his reaction with the complainant when he asked her, as they left, if she was okay, and by the text messages he sent Sailor 3rd Class Stewart, when he wrote, I paraphrase, that he was very sorry.

[109] He also testified that the complainant was drunk; however, he also used the term "tipsy" to describe the level of intoxication of the complainant, but he clarified during his cross-examination that the complainant was "a little bit tipsy" at least, or "slightly drunk". He said he sent the accused a text thanking him for the invite that evening and apologizing for barging in. The text adduced as evidence by the defence showed that it was Sailor 3rd Class Stewart who wrote to him first at 2218 hours thanking him for coming over. He responded that he was "so sorry", without referring to anything in particular. Understanding that this was evidence adduced by the defence at trial, this does not prove that what he saw was consensual. It proved that he was uncomfortable, and did not know what conclusion to draw from what he saw, and gave Sailor 3rd Class Stewart the benefit of the doubt. Nothing more.

[110] I have accepted that Private Lévesque's testimony was both reliable and credible, in particular when he describes how long he left Sailor 3rd Class Stewart's bedroom both times, why he did, and what he did before, during and after being in the accused's bedroom. He was sober that night. He confirmed that the accused nodded at him to leave his bedroom. He testified that when he left Sailor 3rd Class Stewart's bedroom the first time, he realized he had left his phone on the windowsill or on the radiator by the bed. This means that when he left the bedroom this first time, his attention was not on his phone before stepping out. I conclude that he would, therefore, have seen the complainant sitting on Sailor 3rd Class Stewart's lap on his bed, if she had taken this position before he left that first time.

[111] As for the duration of his first absence from the bedroom, Private Lévesque testified that he left to go to the bathroom; however, as he was intercepted by Aviator Fatus, he went in the living room to have a short conversation with him instead. Upon realizing he forgot his phone in

the bedroom, he returned to the bedroom to retrieve it. I accept, therefore, that, in light of his explanation as to what he did when he left the bedroom that first time, the reason he returned and his state of soberness, his evidence that he left the bedroom for closer to a one- to two-minute timeframe is credible. Therefore, it is inconceivable that, in that short period of time, when both the accused and the complainant were intoxicated, Sailor 3rd Class Stewart would have had time to engage in the sexual activity that he described and then simply go back to the bed to lie down watching television as if nothing had happened, just in time for Private Lévesque's return. If the accused had all that time for foreplay with the complainant as he contended, kissing her and building up to the sexual act, it does not make sense that he would just push her shorts to the side instead of removing them during the foreplay. In fact, Private Lévesque did not see anything out of the ordinary when he came back that time because nothing had happened yet.

Credibility of the complainant

[112] I find the complainant was an articulate witness whose main concern was to be as accurate as possible in her answers. She demonstrated a lot of courage during her testimony, specifically during her cross-examination when suggestions of very intimate details of the sexual encounter were put to her. She is a credible witness; she was consistent in her evidence and did not try to fill gaps. Further, it is not because a witness has a spotty memory of the event that their testimony is unreliable in its entirety. Their evidence must be assessed in light of the whole of the evidence. Therefore, while her testimony about some collateral matters varied, as she experienced a spotty memory caused by both her intoxication that night and the passage of time, I find that these were peripheral matters that did not impact my assessment of her credibility. When confronted in cross-examination by details of the evening that she did not speak to and that were outside of the material facts, she recognized generally that they could have happened, but could not remember. She did not deny them. She was very clear to state that she had a stressful week and attended the gathering to enjoy herself and unwind.

[113] The complainant was unequivocal that she had no sexual interest in the accused. She said she found him "abrasive and creepy" because of certain events, but that generally she indicated being on a somewhat friendly basis with him prior to the evening. She did not deny being friendly with him that evening. On the contrary, she socialized with him. Her guard was down. She was in his bedroom which she viewed as a quiet retreat from the gathering. There was a trusting atmosphere where confidences were shared. She was emotional, intoxicated and vulnerable as a result of a recent break-up, which she actually shared with other guests. She even chose YouTube videos based on the fact that they reminded her of her ex-boyfriend.

[114] She was consistent in her testimony. She continually maintained her version of events with the aspects of her testimony that she did recall that constituted material facts, in particular, that she was intoxicated that night and that she did not consent to any sexual act with the accused. Her version of events when he pushed her head forcefully into the mattress, and the accused going behind her to undo the button of her shorts and grabbing her by the hips then penetrating her, is credible. When she was last seen by Private Lévesque, she was on the bed, lying face down. The position of her body at that time coincides with what she described unfolded next. Based on the evidence that I find credible, I find that Sailor 3rd Class Stewart

took no reasonable steps to ascertain consent. Sailor 3rd Class Stewart simply turned a blind eye when engaging in a sexual activity with the complainant.

Conclusion

[115] In conclusion, I have rejected Sailor 3rd Class Stewart's testimony. His testimony does not leave me with a reasonable doubt. Looking at the rest of the evidence, finding the testimony of the prosecution's witnesses to be credible, and even when considering the accused's testimony at this stage of my analysis, I find that the prosecution proved, beyond a reasonable doubt, that Sailor 3rd Class Stewart did sexually assault A.R. on two separate occasions, on 9 August 2018.

FOR THESE REASONS, THE COURT:

[116] **FINDS** Sailor 3rd Class Stewart guilty of both charges.

Counsel:

The Director of Military Prosecutions, as represented by Major A. Dhillon and Major C.R. Gallant

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Sailor 3rd Class J.G. Stewart