



COURT MARTIAL

Citation: *R. v. J.L.*, 2021 CM 2019

Date : 20210917

Docket : 202004

Standing Court Martial

Queen Charlotte Armoury
Charlottetown, Prince Edward Island, Canada

Between :

Her Majesty the Queen

- and -

Private J.L., Accused

Before : Commander S.J. Sukstorf, 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disclose the identity of the persons described during these proceedings as either the complainant or the accused shall not be published in any document or broadcast or transmitted in any way.

DECISION ON FINDING

(Orally)

Background

[1] Private J.L is charged with one offence under section 130 of the *National Defence Act (NDA)*, that is to say, sexual assault, contrary to section 271 of the *Criminal Code* and a second offence contrary to section 93 of the *NDA* for behaving in a disgraceful manner. The particulars of the charges read as follows:

“FIRST CHARGE

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF**

Section 130 of the *National Defence Act*

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

Particulars: In that he, on or about 9 May 2019, at or near Aldershot, Nova Scotia, did commit a sexual assault on A.L.

SECOND CHARGE
Section 93 of the *National Defence Act*

**BEHAVED IN A DISGRACEFUL
MANNER**

Particulars: In that he, on or about 9 May 2019, at or near Aldershot, Nova Scotia, did touch A.L. without her consent.”

[2] At trial, there were four witnesses who testified, one of them being the complainant, A.L., Corporals Dzaganishvili and Doyle and Mr. B. Newman. Private J.L. did not testify.

Evidence

[3] In her examination-in-chief, A.L. testified that:

- (a) she first met Private J.L. sometime during the morning on 8 May 2019, in Aldershot, Nova Scotia while they were both waiting for the van to transport them to the Greenwood Medical Inspection Room (MIR). Private J.L. sat next to her in the MIR. She believes they started talking because of something he saw on her phone;
- (b) a couple of months later, she realized that they had actually met once before during a basic drill course that they had taken together in 2016;
- (c) prior to the incident, she was sitting in building 216 in Aldershot with then-Privates J.L., Newman and Dzaganishvili. A.L. described building 216 as the accommodations where most members resided. They were seated at the lobby of the building which had a fireplace and chairs and they were seated close to the fireplace. It was just the three of them seated there but others transited or walked through the lobby during that time;
- (d) given that she was switching from the Basic Military Qualification (BMQ) course and starting to work in the Personnel Management Cell

(PMC) the next morning, it was the first and only night she stayed in the room assigned to her in building 216 and she was alone in her room;

- (e) they would have all been seated together in the lobby around 2200hrs. She was sure of this timing because she was not formally released from the BMQ course until 2100hrs and in her recollection they were seated together after she was released from the course;
- (f) while they were seated in the lobby, they talked, but she could not remember exactly what they talked about, but she thought they discussed what the PMC would be like because she would be beginning the PMC the next morning and both Corporal Dzaganishvili and Private J.L. were already serving on it. She described PMC as kind of a Privates Awaiting Training (PAT) platoon, but for reservists during the summer as it provided full-time summer employment;
- (g) after her memory was refreshed, she confirmed that Brad Newman (then-Private Newman), was also sitting with them that evening in the lobby. She clarified that although she does not specifically recall him being in the lobby with them, she remembers him as he was on her BMQ course and was transferred to PMC the same day she was;
- (h) in responding to a question by the prosecution as to what she meant in her police statement when she told them that during that evening she had gone out for a smoke with Private J.L. and they talked and it did not seem weird, she replied as follows:

“Q. Okay. So what did you mean when you said that it didn’t seem weird? A. I guess there weren’t any strange conversational topics that had come up in that conversation. During previous conversations, not normally usual conversation topics had come up. So that’s probably why I said that.”

- (i) they chatted in the lobby for about two hours. A.L. stated that she was sitting in one of the chairs and started to fall asleep or, rather, was getting tired and that she decided to go to bed, which she estimated to be around 0005hrs;
- (j) she told the others that she was going to go to bed and got up to walk to her room. She believed that either Corporal Dzaganishvili or Private J.L. asked her if she wanted to be walked to her room, but she could not remember which one of the two had asked. However, when her memory was refreshed on cross-examination, she confirmed that it was Private J.L. She told the Court that she told him that she did not need to be

walked to her room, but Private J.L. got up and followed her to the door of her room;

- (k) she explained that she realized Private J.L. was following her because she could hear footsteps behind her, but she just assumed that he was going to the washroom. The male washroom was located just across the hall from her room. When she opened her door to her room, she noted that he was standing in the hallway;
- (l) when she arrived at the door to her room, she said goodnight to Private J.L. and started to get her things ready for bed, such as putting the sheets on the bed, etc. She then heard the door close behind her and she turned around and Private J.L. was in her room;
- (m) she asked Private J.L. what he was doing in her room because she knew the door was not supposed to be closed if there was more than one person in a room. A.L. explained that she took a couple of steps forward to open the door and he took a couple of steps towards her, away from the door and then pushed her up against the ladder and held her there and tried to kiss her. She told the Court that she tried to move her face around as much as she could;
- (n) Private J.L. put his hands on her shoulder and walked or pushed her back to the ladder. After she was pushed up against the ladder, he put his weight against her torso and used his arms to kind of pin her;
- (o) the force used by Private J.L. was strong, but she clarified that it was not strong enough that it caused physical pain, but it was strong enough that she was not able to move around as she was restricted in her movements. She explained that there were two rungs going up the side of the ladder that connects the rungs that you step on and Private J.L. was holding on to the side rungs of the ladder;
- (p) while she was pinned against the ladder, he tried to kiss her. She believed he kissed her once on the lips, but other than that she was moving her face around so the kisses just kind of landed anywhere that he could reach;
- (q) while Private J.L. had her pinned against the ladder, she told him to stop multiple times. She used a firm tone to tell him to stop. She explained that she was not projecting her voice extremely loudly because it was around midnight and she knew there were members sleeping next door that had a course that started the next morning. Despite her pleas for him to stop, he did not;

- (r) her arms were pinned to her sides by his elbows. She described how she attempted to slide her arms between them with her body. She was able to flip her hands out and pushed him off after popping her elbows up to try to break the hold as best she could;
- (s) she told Private J.L. to get out of her room and then turned around to finish making her bed. She said her bed was not made so she put one of the issued white sheets on the bottom and then put her knitted blanket on top of it and put a pillow on the bed. She was trying to get her bed ready so she could go to sleep;
- (t) while she was making her bed, Private J.L then grabbed her from behind, put his arms around her waist and then started to kiss her neck. She explained that his hands were placed on each of her hips so his arms were crossed in the process resulting in his right hand being placed on left hip and vice versa. She described that he had her in a firm grip on both sides, but since she had been reaching out when he grabbed her, both of her arms were still free;
- (u) Private J.L. then tried to kiss her neck. She described the force he used as firm, but not painful. However, she did describe that when he kissed her neck, he left a mark on it, being a hickey;
- (v) after that, she elbowed him three times to get him to let her go because asking him to stop was not working. The third blow with her elbow was the hardest one and he let go after that. She, then turned around and told him to “get the fuck out”. She followed him to the door and locked the door behind him after he left;
- (w) in describing the elbow blows, she said that the first couple of times they were not full force as she was just trying to nudge him and be like, “Hey, stop.” But the third time, because the first two had not worked, she gave it full force. She felt it was necessary to give him a full-force elbow blow because using a lesser level of force was not working. She had tried a gentler approach multiple times including asking him to stop for a few minutes and that was not working either; and
- (x) when Private J.L. returned to the lobby, he insinuated to Corporal Dzaganishvili that something intimate had taken place but he did not provide any specific.

[4] In response to the allegations put forward by A.L., the defence presented no direct evidence to counter the allegations that occurred in the room. Instead, he focussed his defence on challenging A.L.’s credibility based on two independent events that occurred in the hours and moments before the alleged sexual assault.

[5] Two incidents which defence sought to explore under a section 276 application became issues at the trial. The accused sought to introduce evidence of what occurred in the chain of events leading up to the alleged sexual assault, being a kiss allegedly initiated by the complainant at the smoke pit as well as the accused's suggestion that he offered to walk the complainant to her room, an offer which he asserted she accepted.

[6] It was during A.L.'s consultation with her legal counsel in preparation for the section 276, stage 2 hearing on the above incidents that the complainant clarified that she did not initiate the kiss that occurred at the smoke pit. Until that stage of proceedings, although the disclosure of the events of that evening indicated that there had been a hug and a kiss that unfolded at the smoke pit prior to the alleged assault that occurred in A.L.'s room, very little attention focussed on this fact by either the investigators or the parties involved. The defence took the position that the kiss that occurred at the smoke pit was consensual and was initiated by the complainant. Based on some of the representations of the prosecution at various stages of the pre-trial application stage, the issue of consent with respect to the kiss was not in dispute. Upon learning the complainant's position that she did not actually consent to the kiss at the smoke pit, it became clear that the events were critical to the complainant's credibility which was a central issue at trial.

[7] After representations made at a stage 1 hearing and written representations being filed at a stage 2 hearing with respect to the defence's section 276 application, the prosecution and the defence put forward the joint position that these two events were essential aspects to the subject matter of the charge before the Court and consequently were not matters that invoked the statutory supervision of section 276 of the *Criminal Code*. The complainant's counsel agreed that the two events were relevant to the credibility of A.L. but cautioned regarding the Court's use of the evidence.

[8] Without having to recount a lengthy analysis, I agreed that based on the submissions of counsel, the evidence was so interwoven into the chain of events leading to the alleged sexual assault and given the diametrically opposed versions of these two events being advanced, the cross-examination on these events was instrumental to the assessment of the complainant's credibility. It was clear that the probative value outweighed the potential prejudice. However, the Court did instruct that the evidence be relevant only for the purpose of assessing A.L.'s credibility and was not to be adduced for the purpose of supporting an inference that, by reason of the previous sexual activity, the complainant was:

- (a) more likely to have consented to the sexual activity that forms the subject matter of the charge; or
- (b) is less worthy of belief.

Presumption of innocence and reasonable doubt

[9] Private J.L. entered these court martial proceedings presumed innocent. That presumption of innocence remains throughout the court martial until such time as the prosecution has, on the evidence put before the Court, satisfied the Court beyond a reasonable doubt that the accused is guilty on the charges.

[10] So, what does the expression “beyond a reasonable doubt” mean? The term “beyond a reasonable doubt” is anchored in our history and traditions of justice. It is so entrenched in our criminal law that some think it needs no explanation, but its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320, paragraph 39):

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

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

[12] Private J.L. did not testify. It is important to remember that because the burden is on the prosecution to prove the charges before the court, Private J.L. has an absolute right to remain silent at his trial. The fact that he did not testify at this trial cannot be taken into account when I decide whether or not the prosecution has proven its case. If, after considering the whole of the evidence, I am not satisfied that the charges against Private J.L. are made out, I cannot look to Private J.L.’s silence to remove the doubt and find him guilty.

[13] 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 Private J.L. 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, paragraph 242.)

Legal framework

Applicable legislative provisions

[14] The general offence of assault is found at section 265 of the *Criminal Code*:

265 (1) A person commits an assault when

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

[. . .]

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

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

271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

[16] The definition of consent is found at subsection 273.1(1) in the *Criminal Code*:

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

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

Consent

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

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

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

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

act, such as birth control measures or the presence of sexually transmitted diseases” (R. v. Hutchinson, 2-14 SCC 19, [2014] 1 S.C.R. 346, at paras. 55 and 57).
[Footnote omitted; emphasis added.]

Section 93 of the NDA– disgraceful conduct

[19] Section 93 of the *NDA* states:

Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.

[20] In order to prove a charge of disgraceful conduct before the Court, the prosecution is required to prove a number of elements of the offence. Based on the unrefuted evidence before the Court, the Court has no problem concluding that the elements of time and place and identity have been met. The elements left to be proven beyond a reasonable doubt for the charge are as follows:

- (a) the conduct alleged in the particulars of the charge;
- (b) that the alleged conduct constituted disgraceful conduct; and
- (c) that the accused had the wrongful intent.

Issues to be decided

[21] Based on the admissions and the unrefuted evidence before the court, there is no dispute regarding the elements concerning date, place or identity as well as the occurrence of a sexual act or sexual touching. Therefore, the critical issues for this Court to determine are the following:

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

Analysis

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

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

Credibility of the witnesses

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

[25] Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a Court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking or relatively unimportant and, therefore, understandably more difficult to recollect? There are other factors that come into play as well. For example, does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence or is the witness impartial?

[26] Pragmatically, when there are no other witnesses, nor physical or other corroborative evidence to support an allegation of sexual assault, the prosecution faces particular challenges. Nonetheless, there is no legal impediment to a court convicting an accused based on uncorroborated evidence of a single complainant.

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

Credibility of the complainant

[28] In assessing the credibility of A.L., I closely reviewed the actual substance of her testimony itself with respect to the two incidents brought up by the defence as well as the specific allegations of sexual assault that occurred within her room.

[29] The first issue raised to challenge A.L.'s credibility arose from Private J.L.'s assertion that A.L. kissed him at the smoke pit shortly before the alleged sexual assault. When A.L. was advised of this, she responded by saying that although the hug was consensual, the kiss was not. This assertion took the defence by surprise as it was Private J.L.'s position that the kiss that occurred at the smoke pit was not just consensual, but rather it was initiated by the complainant.

With respect to the alleged kiss at the smoke pit

[30] With respect to what occurred at the smoke pit, A.L. testified to the following:

- (a) that after she was dismissed for the evening from her BMQ course, she left her room, proceeded down the stairs exiting to the left of the building and headed to the smoke pit;
- (b) while at the smoke pit, having a smoke, she noted that Private J.L. was upset. She could not really remember why but she thinks he might have had an argument with somebody earlier in the evening that had upset him. She explained that he asked for a hug and she willingly gave him a hug. When she was pulling away from the hug, he kissed her and she was surprised and taken aback by it. Her testimony was as follows:

“Q. And did anyone else go with you? A. I believe I went alone when I originally went out to go smoke.

Q. Was anyone else there when you got there? A. Private J.L. would have been there.

Q. Just the two of you? A. Yes, from what I can remember.

Q. And what happened at the smoke pit? A. I was at the smoke pit. I was having a smoke. Private J.L. had been upset. I don't really remember why. I think it might have been a fight with somebody that he had had earlier on in the evening that had upset him. Sorry. I was talking to him. He asked for a hug and I consented to hug him. And then as I was pulling away from the hug he kissed me and I was surprised and taken aback by it. And then we just kind of continued to talk for a couple of minutes. Then went back into—and then went into the lobby which is where we saw D12.

Q. So this is just before you were sitting in the lobby together? A. Yes.

Q. Did he ask you for the kiss? A. No. He asked for the hug, but he didn't ask for the kiss.

Q. And how did you react to the kiss? A. I just kind of pulled back. I was shocked and confused. I didn't really have enough time to react to it, I guess”;

- (c) after the hug and kiss, they continued to talk for a couple of minutes and then went back into the lobby of building 216, which is where they saw Corporal Dzaganishvili;

- (d) at no time did she ever tell the military police or anyone that the kiss at the smoke pit was consensual; and
- (e) it was only after learning about what “consent” means, that she realized the kiss was not consensual.

[31] Private Newman’s relevant testimony was as follows:

- (a) the first time he met both Private J.L. and A.L was on the BMQ course;
- (b) he was pretty good friends with Private J.L. and said that if Private J.L. was still in Nova Scotia, they would still be hanging out;
- (c) he has not spoken to Private J.L. since he left the BMQ;
- (d) on 7 June 2020, he was involved in a car accident that has affected his memory. He can remember things in the present, but with respect to events that happened before the accident, his recall is difficult and blurry and he admitted that there are some things he still cannot remember;
- (e) he recalls the incident that is the subject of the charges before the court took place around the middle of BMQ;
- (f) at the time of the incident, they had all been hanging out for at least one week and they hung out the majority of the day. When queried on the frequency, he clarified, “We might miss a day or so, but almost every day we were hanging with each other for at least an hour”;
- (g) he could not recall when he spoke to the police regarding the incident, but he believed it was some time in 2020. When asked whether the accident occurred prior to his police interview, he could not recall completely but he believed his accident occurred before his police interview;
- (h) when asked when the alleged kiss at the smoke pit occurred, he estimated it would have been between 1500 and 1600hrs. When asked if it could have occurred around 2200hrs, he disagreed. Later when asked if it was possible that they were hanging out at night time, he agreed. When asked if it was possible that he mixed up the nights that he was hanging out at the smoke pit, he agreed that it was “very possible”. However, he did clarify that it was definitely nighttime when the alleged kiss took place;
- (i) on the day or evening in question, they were all sitting at the smoke pit when he saw both Private J.L. and A.L. lean in and kiss each other. He did not observe any surprised look on either of their faces. He estimated

that he was about six feet maximum away from them. He explained that after that kiss it was a normal night;

- (j) he described what he referred to as a bit of “liking” between Private J.L. and A.L. and that they were touchy, putting their arms around each other and laughing at each other’s jokes. In his view, he believed they would get together before he left or someday. He thought that he would see them in a relationship;
- (k) when asked if he saw Private J.L. and A.L. hugging on the day of the incident, he was not a hundred per cent sure that it occurred on that day, but previously he had. He responded to a question “So before the day that you saw the kiss, you saw them hugging? He responded, “For sure. That’s a hundred per cent”;
- (l) when he was told that the evidence suggests that the day of the kiss was the day that Private J.L. and A.L. met for the first time, he rejected that proposition stating “No, they met a good time before that”; and
- (m) it was brought to his attention that his testimony in court was often in conflict with what he stated in his police interview. For example, in his police interview, he stated “If I recall, I think A.L. said yes to kissing him, but that’s it,” while in court, he stated that they both leaned in to spontaneously share a kiss. When challenged on the difference in his evidence, with respect to the request made by Private J.L. for A.L. to kiss him, he clarified that it occurred on a different night. He then described that they did not kiss on the same day that they discussed kissing. He testified that the two incidents were separated by a day or so.

Analysis of the smoke pit evidence

[32] Under direct examination, A.L. stated that she did not kiss the accused, but rather, he kissed her while she hugged him. When challenged under cross-examination, she responded as follows:

“Q. Private J.L. says that during the evening of 8 May 2019, he went out to smoke a cigarette and had a conversation with someone that left him upset. What’s your perspective on this? A. I was out or I went out to the smoke pit and Private J.L. was already sitting there upset about a conversation that he’d had. He never told me who it was with or why.

Q. He says that you joined him outside and saw that he was upset? A. Yes.

Q. He said that you then gave him a hug. What’s your perspective? A. He asked for a hug and I said yes.

Q. Private J.L. says that you then initiated kissing him on the lips. What's your perspective on this? A. Private J.L. kissed me as I was pulling away from the hug and did not ask for consent.

Q. Private J.L. says that you willingly kissed him? A. It's not true."

Later:

"Q. Did Private J.L. force himself on you at the smoke pit? A. Well, we were already hugging so we would have been close together at that point. But he pulled me in for a kiss before I had a chance to even react.

Q. So he didn't force you to kiss him? A. Well, we were liter[ally] a couple of inches apart in face. Like it wouldn't have been easy to be able to tell by looking at him."

[33] The kiss and hug at the smoke pit are not part of the charged conduct and are collateral facts. The Court reminded itself that the accused's request for a hug and a kiss at the smoke pit was neither material nor relevant to the material facts at issue with respect to the alleged sexual assault that took place in A.L.'s room shortly thereafter. The alleged conduct that occurred at the smoke pit was relevant only to assess A.L.'s credibility. Thus, although defence counsel was permitted to cross-examine A.L. about the alleged kiss at the smoke pit, in the normal course, the collateral fact rule precluded the calling of rebuttal evidence to contradict her version of events.

[34] Nevertheless, in the circumstances of this case, without requesting the permission of the Court, defence called a witness that testified specifically regarding what he observed at the smoke pit. As the SCC recognized in *R. v. R.(D.)*, [1996] 2 S.C.R. 291, evidence that undermines a witness's credibility may escape the exclusionary reach of the collateral fact rule if credibility is central to the case against an accused. In this particular case there is only A.L.'s evidence to support the claim that she did not consent to the sexual touching that occurred in her room.

[35] Relying upon paragraph 62 of *R. v. C.F.*, 2017 ONCA 480, the accused took the view that the non-consensual kiss at the smoke pit was identical to that conduct alleged by A.L. against Private J.L. that occurred in her room. He argued that they both occurred during the same time frame as the charges before the Court, albeit they occurred at different locations – being that one kiss occurred at the smoke pit and not in her room for which the alleged charges relate. He argued that if the alleged kiss at the smoke pit was in fact consensual, A.L.'s credibility and reliability, which is central to this case, would be significantly compromised with respect to the allegations that occurred shortly thereafter in her room.

[36] Under cross-examination, the defence did everything to challenge A.L.'s version of events of what unfolded at the smoke pit and argued that given her position that she did not consent to the kiss at the smoke pit and the fact that there is evidence that she

did, then her evidence is not credible with respect to the allegations of sexual assault that took place later in her room.

[37] Under cross-examination, defence spent a great deal of time trying to suggest that the complainant was lying with respect to what occurred at the smoke pit primarily because charges were not laid with respect to the kiss. In fact, in the cross-examination of A.L., defence implied that she told Corporal Doyle that the first kiss was consensual, a fact that was never verified in the testimony by Corporal Doyle.

“Q. Corporal Doyle says that you described to him that both you and Private J.L. were acting—active, willing participants during the smoke pit kiss? A. I believe that we were at the time. I also wasn’t properly described ‘consent’ either.”

[38] However, for the reasons that follow, I do not find that the evidence of what occurred at the smoke pit undermined A.L.’s credibility with respect to the charges before the court.

[39] Firstly, the evidence suggests that the actions that occurred in A.L.’s room were not directly comparable to the fleeting kiss that occurred at the smoke pit. Although both incidents might have involved a kiss, the circumstances under which they unfolded were very different and, importantly, one fleeting kiss in the midst of a consensual hug is hardly comparable to someone being forcibly constrained and kissed despite their demonstrated objection.

[40] When A.L. was challenged on why she changed her position on the kiss that occurred in the smoke pit, she explained that she now understands consent better as it was never properly explained to her previously. Although this may be true, the consistency in her earlier evidence that the Court was privy to suggests that, aside from her evidence at trial, in response to defence’s assertions of what she told the investigators, her actual evidence was not inconsistent on this issue. Under re-examination, A.L. confirmed the following:

“Q. At any time during any of your interviews, did you state the first kiss was consensual? A. No.”

[41] Corporal Doyle who was the military police who was assigned to the intake interview with A.L. described the first part of the interview process as follows:

“A. I get, the day of, the person I’m talking to start to finish. I ask them to start wherever they feel is important and end wherever they feel is important as well. So that way I’m getting the broad scope of what they’re saying. I use open-ended questions to get as much information as I can. And from there, any blanks that need to be filled in, I ask more specific questions of things I need to hone in on.”

[42] Although originally A.L. could not specifically recall whether she brought up what happened at the smoke pit to the investigators, it became clear upon the review of the direct examination of Corporal Doyle that both the smoke pit as well as the incident in the room had been brought up during the initial interview. Under direct examination, Corporal Doyle responded as follows:

“Q. What instances of sexual activity were relayed to you by the complainant in this case during the interview? A. The two that come to mind are there was initial kiss in the evening in the smoke pit of the West Nova Scotia Regiment and the actual incident that took place in the room, that I believe was the focus of the investigation.

Q. Sorry, can you say that again? A. So there were two incidents; one was the kiss prior to the incident in the room and then the incident that took place in the room itself.

Q. You said that was the focus of the investigation? A. Not the focus. The focus would be the entire picture, but when I hone in on the elements of the offence is where I can fill out the most detail. So that’s probably why I spent the most of my time in that specific spot to make sure it was clear.

Q. And before we get to where you focussed, did you ask questions about the first kiss? A. I can’t remember. I believe I would have to cover what happened as a general investigative practice. But I’m not sure the specifics or the depth in which I covered that specific portion though.”

[43] A.L. was a young 17-year-old girl, away from home, living and working in a military environment. She reported a number of events to the military police at the first intake interview that she had with Corporal Doyle. Based on the testimony of Corporal Doyle, she appears to have explained everything that she felt was relevant including what occurred at the smoke pit. It was not up to her to determine whether the essential elements of an offence were met and what charges should be laid with respect to which incident.

[44] In a situation where a complainant comes forward with a sexual misconduct complaint and the Canadian Forces National Investigation Service (CFNIS) and/or the prosecution decide to lay charges for some allegations and not others, the prosecution’s decision cannot be interpreted to mean that the uncharged conduct was consensual. There are many reasons why the prosecution may decide to pursue some charges and not others. It may be dependent on any number of factors that they must consider in exercising their prosecutorial discretion. However, to infer that, because charges were not laid with respect to what occurred at the smoke pit, the conduct that occurred there was consensual, is completely misplaced.

[45] It is understandable that the more serious events that unfolded in A.L.’s room overshadowed the fleeting kiss at the smoke pit which occurred in the midst of a

consensual hug. It was likely that, in A.L. describing all the events, the investigators saw the kiss to be a minor incident and did not give it significant follow up, so why would A.L.? Aside from the assertions posed to A.L. on cross-examination, there has been no independent evidence brought forward to suggest that A.L. changed her position from what she said in her earlier statements on what occurred at the smoke pit. In my assessment of the evidence, I do not find that she reversed her position, but rather I find that this issue was never explored or canvassed in detail until it was raised in the context of the defence's section 276 application. Defence counsel's unusual questioning on this was not sufficient to convince the Court that she has changed her testimony or was now making a false allegation.

[46] Nonetheless, in order to challenge A.L.'s position on what occurred at the smoke pit, defence called Mr. Newman who testified that he witnessed a kiss that, in his view, appeared to be consensual. He also testified that there was a "liking" going on between Private J.L. and A.L. and that he thought that the two would end up in a relationship. However, upon a review of his evidence outlined above, I found that, despite his best efforts to be honest and forthright, his memory was simply not reliable. Regrettably, the injuries that he suffered in the 7 June 2020 car accident, after the material incidents before the court occurred, directly affected his memory with respect to the incidents. Not only was his evidence inconsistent with itself, it was also inconsistent with the evidence as a whole. As an example, he repeatedly mixed up the timing when the alleged kiss took place as well as the description of what occurred. He originally insisted that the incident occurred around three or four o'clock in the afternoon, but then he also admitted that it was dark and it was night time.

[47] Furthermore, Mr. Newman was adamant in his evidence that they had all been hanging out for a while when the alleged kiss occurred. Whereas the consistency of all the other evidence was that it was during that evening that most of them met each other for the first time. Mr Newman asserted that they all attended the BMQ course together. However, aside from Mr Newman's assertion, the whole of the evidence is that only he and A.L. were on the BMQ course together. The evidence reveals that effective the evening of the alleged offences, both he and A.L. were released from their BMQ course and would join Private J.L. and Corporal Dzaganishvili the next morning on the PMC.

[48] Even if Mr Newman had witnessed a kiss, the fact that the alleged kiss occurred in the midst of a consensual hug, it is unlikely that it would have appeared as non-consensual to a bystander. Further, Mr Newman also testified that he did not witness a hug on the night in question which is also inconsistent with the other evidence before the Court.

[49] In short, given the obvious problems with the reliability of Mr. Newman's testimony, despite his best efforts to remember and to be honest, the Court gave his version of events no weight.

Private J.L.'s offer to walk A.L. to her room

[50] The second incident that the defence relied upon to challenge the credibility of A.L. as based on their position that the accused offered to walk A.L. to her room to which she agreed. In her testimony, A.L. asserted multiple times that although Private J.L. did offer to walk her to her room, she made it clear that she did not need to be walked to her room.

[51] Under cross-examination, the following is the evidence of A.L. with respect to Private J.L.'s offer to walk A.L. to her room:

- (a) after her memory was refreshed, A.L. adopted her earlier police statement that it was Private J.L. who had offered to walk her to her room;
- (b) she read the following excerpt from her police statement:

“Master Corporal Hubley said, okay, when you got up did you say anything? Like how did you say you were going to the room? Did you say you’re going to the room or did you just go to the room? No. I said I was going to . . . I said I was going to the room. I was laying in the chair like I had my back up against one armrest and my legs over the other and I was laid down. I was almost falling asleep in the chair.”

- (c) the questioning that follows:

“Q. So based on this description all you said before leaving was that, you know, you were tired and you were going to bed? A. Yes.

Q. And Private J.L. did not say anything to you. He just followed you? A. That’s what this says here. Yes.

Q. And that’s not correct? A. I believe one of them said something to me. I said that I wanted to go in my room alone because either Private J.L. or D12 offered to walk me into my room. I don’t remember which one of the two it was.

Q. And you did not realize Private J.L. was following you? A. Not until I arrive . . . I didn’t realize that someone was following me. I was under the impression that he was probably going to the washroom because it was across the hall from my door”;

- (d) under cross-examination, defence focussed on the inconsistency between A.L.'s evidence in court regarding her version of going to bed with what he described as a more intense scene that she described to the military police. In her statement, she stated:

“Then I came inside and I said something about how I was getting tired and he said he was going to walk me to bed and I told him not to. I’m seventeen years old. I can walk myself to bed. Like it’s down the hall. And then I got up to go to bed and he got up after me. D12 still sat there and he got up to follow me.

Q. And now I’m gonna get you to read up to line 6 of the following page, on page 11? A. And I told him to like just go like leave me alone. I’m not—I’m going to bed. There’s no reason for you to come with me. I’m getting ready to go to sleep. And he just didn’t really say anything. Just walking like not quite flush with me, just behind me a little bit.

Q. Is that what happened? A. Yes, that’s what I was trying to describe.

Q. So you were quite clear in that you didn’t want to be followed? A. Yes”; and

- (e) A.L. then stated that she made those comments out loud and that it would have been clear to both Corporal Dzaganishvili and Private J.L. that she did not want to be followed.

[52] Corporal Dzaganishvili’s evidence was as follows:

- (a) he met A.L. for the first time that evening when he joined Private J.L. and A.L. at the smoke pit;
- (b) he was with Private J.L. and A.L. in the lobby on the evening of 8 May 2019;
- (c) that while they were in the lobby, Private J.L. acted as though he had a crush on A.L.;
- (d) he heard Private J.L. offer to walk A.L. back to her room. He originally testified that he could not remember if A.L. had responded to Private J.L., but when his memory was refreshed, he recalled telling the military police that he heard A.L. say, “Sure”;

- (e) he admitted that he was not paying particular attention to them, but did not remember hearing A.L. tell Private J.L. that she did not need to be walked to her room; and
- (f) he was on his phone looking at social media and the next thing he remembers is that he saw them both walking away.

[53] Essentially, it is the defence's position that Private J.L. offered to walk A.L. to her room, an offer that she accepted and then she invited him into her room. A.L. was clear in her testimony that she told Private J.L. that she did not need to be walked to her room. It was also clear in the evidence that they were in the lobby of the same building where her room was located.

[54] I found Corporal Dzaganishvili to be a credible and reliable witness who simply testified to what he witnessed and heard; however, he was also clear that he was not always paying complete attention to what was transpiring between Private J.L. and A.L.

[55] After hearing the evidence on this issue, it was clear that notwithstanding whether or not A.L. accepted the offer by Private J.L. to walk her to her room, or whether or not she had a crush on Private J.L., the consistency of the evidence suggests that she did not want nor did she invite him to enter into her actual room. A.L. made it very clear in her earlier police statements as well as in her testimony in court that they were not allowed into each other's rooms and in the event another was in the room, the door must remain open. In her testimony, this was something she asserted several times to explain some of the underlying reason why she did not invite him into her room.

[56] It does not matter what her reason was for not consenting to Private J.L. entering her room and her subsequent rejection of his attempts at sexual touching. For all the above reasons, I do not find that the evidence of whether or not A.L. accepted the offer by Private J.L. to be walked to her room undermines A.L.'s credibility with respect to the alleged actions that occurred later in A.L.'s room. .

Overall credibility of A.L.

[57] With respect to the actual allegations before the court, the defence challenged the credibility of A.L. on a number of levels. He argued that when A.L. and Private J.L. met that morning of the alleged incident at the MIR, she found him "disgusting" and he made her "skin crawl" and that she found him "creepy". Upon my review of the evidence, this is a mischaracterization of what she stated.

"Q. When you met him at the medical clinic on 8 May 2019, you thought that he was saying the most disgusting things? At the medical clinic you thought that what he was talking about was disgusting? A. It wasn't at the medical clinic that he was saying disgusting things. No. It had been . . .

Q. He didn't make comments that made your skin crawl? A. Not at the medical clinic. No. It was over the days following.

Q. Over the days following? A. I had been around him for a couple of days. We had been on PMC together."

[58] A.L. was referred to one of her statements and asked to read it out. And she reads:"

"But even still, like the day that I met him, he was talking about making remarks about tying people up, tying me up specifically. He talked about how he had a candle and handcuffs in his personal bag, like just some of the most disgusting things. Just hearing it made my skin crawl.

Q. So what you told the military police is that this was that morning at the medical clinic? A. Then it would have started that morning."

[59] It was clear from the above references that some of the uncomfortable topics were brought up on the first day of Private J.L. and A.L. meeting, but this fact alone does not suggest anything by itself other than it might have alerted her to being guarded. Corporal Dzaganishvili testified that based on his observations that evening, he surmised that Private J.L. had a "crush" on A.L., but I noted that he did not actually state or observe that A.L. had a "crush" on Private J.L. although he did testify that he thought they knew each other and were friends.

[60] Corporal Dzaganishvili confirmed in his testimony that Private J.L. and A.L. went out to smoke a couple of times. This is not controversial. In her second interview with the CFNIS, the complainant did state that she went out for a smoke break later with the accused and it did not feel weird. This comment was made in the context of the uncomfortable conversation they had when he discussed tying people up, including her.

[61] Defence suggested that although there is no template behaviour for how a victim will act after an alleged assault, he argued that it was still relevant to her credibility because she said that she found him "creepy", etc., and that he made her uncomfortable. She responded as follows:

"Q. Private Dzaganishvili says that there was no tension or anything abnormal between you and Private J.L. after that evening. What's your perspective on that? A. I certainly didn't feel comfortable being around Private J.L., but I didn't express discomfort to my friends or colleagues because I didn't want to cause an issue because we were on the same course. I kind of kept it to myself more than anything until I was ready to talk about it."

[62] Further:

“Q. Private J.L. says that you two continued hanging out with him until he went home for medical reasons? A. I had been around him for those days following. Yes.”

[63] The fact that A.L. continued to mingle with the accused and the others that evening after the alleged smoke pit incident is not by itself indicative of anything other than the fact that she was doing her best to fit into the group as effective the next day, they would all be serving together on the PMC. It was clear on the facts that aside from Mr. Newman who had been on BMQ with her, she had just met the two others on the evening of the alleged incidents. Being a young 17-year-old woman in the military environment, she would likely be willing to tolerate some discomfort and awkwardness in exchange for acceptance within the group. It is for this reason the law is clear that there is no inviolable rule as to how people who might be victims of sexual assault will behave (see *R. v. D.D.*, 2000 SCC 43 at paragraph 65).

[64] Despite the defence’s best efforts to challenge A.L.’s credibility on a number of levels, her evidence remained consistent. I felt that she did her utmost to be honest, but she also readily admitted when she could not remember something. It was clear that some details may have faded in importance over the last two and a half years, but she expressed humility with respect to this. A.L. did not come across as vengeful or angry. In fact as a young 19-year-old, I found her testimony to be balanced and thoughtful and found she handled the cross-examination with maturity and poise. She did not hesitate to admit when she was wrong or admit if something else was a possibility. As an example:

“Q. Private J.L. says that you then turned around to plug your phone and that he hugged you from behind? A. I plugged my phone in. Yes. And he did hug me from behind. Or it was to . . . I believe it was to make my bed, not to plug my phone in, from my knowledge. But there is a possibility that I could have plugged my phone in during that time.”

[65] The above assertion by defence put to A.L. on cross-examination suggests that Private J.L. did approach A.L. from behind to hug her while she was distracted doing something. This is consistent with A.L.’s testimony on the second incident that occurred in her room. The two had just met each other that morning and, it does not matter whether she was plugging in her phone or making her bed, the evidence infers that A.L. was not in a position to consent to being approached from behind and hugged.

[66] Similarly, although A.L. did not object to other possibilities when she was not sure or could not remember, she was also not afraid to hold her ground when she was repeatedly challenged on certain aspects of her testimony.

“Q. Private J.L. says that you then told him to come in? A. No.

Q. Private J.L. says that you two then talked a bit about what happened at the smoke pit earlier that night? A. No.

Q. Private J.L. says that he thanked you for comforting him with a hug earlier that night? A. No.”

[67] In summary, after reviewing the totality of the evidence including any ambiguous conduct of A.L., I found her to be both credible and reliable.

Analysis of the charges

Absence of consent

[68] It remains very important to be aware that, notwithstanding the chain of command's and the investigators' responsibility to believe a complainant when they report misconduct, a court martial must not begin its analysis by automatically believing that a complainant's testimony is truthful. To do this would, in effect, transfer the burden of proof from the prosecution to the defence. This would be an error of law and would violate the accused's presumption of innocence.

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

[70] Nonetheless, some understanding of how those critical moments unfolded that make up the offence before the court is important for this court to make a determination of whether or not A.L. consented and, if not, whether Private J.L. knew that she had not consented.

[71] A.L. was clear and unequivocal in her in-court testimony that she did not consent to the alleged sexual touching that occurred in her room. However, a bare assertion by itself is not sufficient to prove an offence to the required evidentiary standard.

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

[73] The absence of consent is subjective and is determined by reference to the complainant's internal state of mind. The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct she may have displayed. The Court must assess whether the totality of the complainant's conduct and her statements are consistent with her claim of non-consent. The test is whether, on that evening, that she did not want the accused to touch her and kiss her and that she made her intentions clear.

[74] In assessing whether or not A.L. consented to the sexual touching that took place while in her room, I examined very closely the evidence of A.L. as challenged by the defence in cross-examination.

[75] In her direct examination as set out in the opening of this decision, A.L. described two specific incidents that occurred in her room as well as the multiple steps that she took to communicate to the accused that his sexual touching was not welcome.

[76] Firstly, as referenced earlier, it does not matter if A.L. had a crush on Private J.L. and was possibly interested in him or whether or not she accepted his invitation to walk her to her room. On their own, neither of those facts suggest that she wanted Private J.L. to enter the privacy of her room. Consent must be contemporaneous with each and every activity or act that is engaged. Consent requires the voluntary agreement of the complainant for the accused to do what he did in the way in which he did it and when he did it. In other words, did the complainant want the accused to do what he did? A voluntary agreement is one made by a person, who is free to agree or disagree, of his or her own free will. It involves knowledge of what is going to happen and voluntary agreement to do it or let it be done.

[77] From her earliest police statements, A.L. was clear on what the rules were regarding having someone in her room and her actions suggest that she did not want to be caught with Private J.L. in her room with the door closed. Her description of the events are consistent with this expressed concern. In her examination in chief, the following exchange took place:

“Q. Okay. So you said you were organizing your bed. You heard the door close. You turned around? A. And Private J.L. was standing in my room.

Q. And what happened then? A. After that I asked him what he was doing in my room and went to go open the door. There had been a statement come down from the det commander that people were not allowed to be in each other’s rooms as well as if there was somebody in the room that the door had to be open at all times. So I stepped forward to go open the door. And I asked him what he did because I was confused as to why the door was closed. I took a couple of steps forward. He took a couple of steps towards me, away from the door and then pushed me up against the locker—or not the locker, the ladder.”

[78] As to what happened next, she described that when Private J.L. first pushed her up against the ladder, he had his arms on both rungs of the ladder and, using his body weight, he somewhat pinned her against the ladder so she was unable to move. The Court noted that there was a very significant size and weight difference between the complainant and the accused. Notwithstanding this, A.L. described how despite telling him to stop multiple times, she was finally able to push the accused off of her and told him to get out.

[79] In the second incident, the accused approached her from behind and wrapped his arms around her body and then kissed her neck, leaving a mark. She had to give him three separate elbow blows to the gut before she told him, "Get the fuck out." He finally left and she locked the door behind him.

[80] With respect to her testimony regarding the alleged sexual assault that took place in her room, A.L. was challenged on cross-examination on her version of what happened.

[81] Firstly, defence challenged A.L. as to how Private J.L. pushed her up against the ladder:

"Q. In your bedroom, Private J.L. used his weight to pin you against the ladder? A. Yes.

Q. He pushed you essentially with his chest against the ladder? A. Yes, essentially.

Q. He didn't put his hands on your shoulder to push you against the ladder? A. No, he did.

Q. He did? A. He did put his hands against my shoulders and used his chest as well, transferred his hands from the—my shoulders to the rails on the side."

[82] Defence then focussed on the fact that, in one of the earlier police statements, A.L. did not refer to Private J.L. using his hands.

"Q. You never wrote that he put his hands on your shoulder to push you against the ladder? A. I did not write it. No, but it was in my statement.

Q. What you wrote is that he used his weight to pin you against the ladder. Correct? A. Yes."

[83] Defence referred A.L. to one of her statements where she stated:

"[A.L.]: No, he pushed me against the ladder.
MCPL HUBLEY: How did he push you?

[A.L.]: He used, like, what he did was he had -- how do I explain this? He used, like, his weight, I guess you could say, like, he used his chest and he almost slammed me into the ladder, like, he was rough with it. Like, I hit my head off the rung on the ladder because my head just so happened to line up with it because I'm short as hell."

[84] However, later in her statement, A.L. stated the following:

“[A.L.]: So he -- he used, like, his weight, like, he had his arms, like, his hands were on my shoulders at first and he had his body, like, pushed up against mine. And then the -- like, he kind of slammed me into the ladder and then moved his hands from my shoulders to the rungs.”

[85] When pressed under cross-examination as to why she told two different versions, A.L. clarified her versions.

Q. So you told two different versions to the military police. Once where he pushed you with his chest and one where he pushed you with his hands on your shoulder? A. I clarified with further explanation as to what actually happened in the situation. It wasn't a matter of me lying. It was a matter of my clarifying.

Q. So you weren't confused about what happened? A. No, it was just . . .

Q. And you didn't think those details were important in your written report? A. I didn't think about putting them in my written report. No.

Q. And you said that you were slammed into the ladder and you hit your head on the rung of the ladder? A. Yes.

Q. But you testified quite differently last Wednesday. You testified that he had walked you back to the ladder by putting his hand on your shoulder and that it did not physically hurt. That's what you told the Court? A. Yes, that's what I told the Court on Wednesday.

Q. So you . . . Was that the true version? A. I—that's what I remember happening now. However two years has passed since the occurrence and I don't remember every detail vividly anymore.

[86] Defence seemed to be bothered by the fact that A.L. used different words to describe how she was pressed against the ladder. During her interview with police, she described being slammed against the ladder, while during her in-court testimony, she used different wording such as “pushed” or “walked back”. In every description, she testified to being restrained. I reviewed the alleged inconsistencies in her testimony and found that those highlighted are really akin to splitting hairs. In fact, I found that by describing the alleged incidents with different words and ways, it actually reinforced the consistency of the facts asserted therein.

Timings

[87] Defence asserted in his cross-examination of A.L. that the alleged sexual contact in the room was consensual. A.L. strongly rejected these assertions. Defence relied

upon an inconsistency in the timings referred to by A.L. which he felt was an important indicator that her version was not correct.

[88] Defence asserted that, based on the testimony of Corporal Dzaganishvili, who waited for Private J.L. to return to the lobby so they could return to their accommodation's building together, Private J.L. was gone from between a minimum of ten or fifteen minutes to a maximum of thirty minutes.

[89] Further, A.L. asserted in her testimony that when she was held up against the ladder, Private J.L. attempted to kiss her face for three to four minutes, while she was moving her head saying, "No." Defence then submitted that after pushing Private J.L. back and asking him to leave the first time, A.L. continued to make her bed, putting on the white sheet, knitted blanket and arranging her pillow which likely took another minute or two. Then the second assault occurs where Private J.L. approaches her from behind and wraps his arms around her while kissing her neck which would have taken another three or four minutes.

[90] Defence argued that based on the time estimates testified to by A.L., three to four minutes was a long time for the accused to be kissing and holding her. Consequently, it was his position that it is evidenced that A.L. has testified to a false narrative about what unfolded that night. Unfortunately, human experience suggests that estimating the passage of time when someone is being constrained against her will is not an exact science as arguably the passage of time will feel much longer than reality.

[91] However, more importantly, absent evidence of how far away A.L.'s room was from the lobby, what floor or hallway it was on, it is difficult to analyze how long it took for Private J.L. to walk to her room and return. We also do not know if the accused stopped at the washroom on his way back to the lobby. Further, it was the defence position that there was some discussion outside A.L.'s room and that Private J.L. stood outside her doorway for a while, for which he did not factor into his timings, which was a possibility that A.L. did not outwardly reject:

"Q. Private J.L. says that he then stood in your bedroom doorway holding your door while you were getting ready for bed? A. Yes.

Q. Private J.L. says that he then asked you if people on course were sleeping close by and that you said yes? A. I don't remember that.

Q. Is it that you don't remember it because it didn't happen or it could have happened and you just don't remember it? A. He could have asked me. I just don't remember if he asked me that. I do remember there being a course right next to my room though that started, so it's a possibility.

Q. He says you told him to keep it down, not to wake people up? A. I don't remember that.

Q. Is it the same thing again, you don't remember but it could have happened or you don't remember because it didn't happen? A. I don't remember. It could have happened, but I don't remember. I don't believe it happened to my knowledge, but . . ."

[92] Once again, Corporal Dzaganishvili testified that Private J.L. was absent between ten to thirty minutes, an estimate that spans a difference of twenty minutes. Nonetheless, the time estimate of A.L. actually matches closely with the time period estimated by Corporal Dzaganishvili. Consequently, the suggested variance or discrepancy in her time assessment on its own is not sufficient by itself to suggest that A.L.'s testimony is false.

[93] Further, defence submitted that it was odd that after the first incident that A.L. continued to prepare her bed while Private J.L. was still in the room. As discussed earlier, there is no predictable way that someone who finds themselves in this sort of situation can be expected to act. A.L. testified that she told Private J.L. to get out and she rebuffed his advances. However, based on the visible significant size and weight difference the court observed between Private J.L. and A.L., A.L. was certainly not in a position to physically remove him from her room and both her testimony and the assertions made by defence in cross-examination suggest that they were both mindful that it was after midnight and that people were sleeping in the rooms adjacent to A.L.'s. It was not unreasonable for her to expect that given her clear rebuff of his advances, he would simply leave as she demanded.

Motive to fabricate

[94] Under cross-examination, A.L. was asked about the fact that Private J.L. was telling their colleagues about how he made her weak in the knees and other details when he kissed her. A.L. did confirm that she was bothered by Private J.L.'s behaviour and said that she told him to stop.

[95] Further, apparently a few days after the alleged incident, Private J.L. told A.L. that he loved her, but then she learned a few days later that he was being returned home for medical reasons and that he got engaged to his girlfriend in Prince Edward Island (PEI).

[96] Defence alleged that these incidents humiliated A.L. and she felt abused and betrayed by his behaviour.

[97] However, aside from these assertions made in the cross-examination of A.L., there was no independent evidence to support that A.L. had any motive to fabricate. Furthermore, there was no evidence to suggest that A.L. had ever demonstrated any type of vengeful conduct or that she made any false claims regarding this incident or any others.

[98] Alternatively, the fact that Private J.L. had left the PMC to return to PEI, might have actually provided her the motive to report the behaviour that she found offensive.

Conclusion

[99] In this case, the critical issue the Court had to decide with respect to both charges was whether A.L. did not consent to the alleged sexual touching that occurred in her room and that the accused was aware of that non-consent. The onus was on the prosecution to prove this.

[100] When I consider the totality of the evidence, I find that A.L.'s account, which was unrefuted, is both credible and reliable. I am satisfied beyond a reasonable doubt that the non-consensual sexual touching in her room occurred as she alleged and the accused was aware of her non-consent. As a result, I find that the prosecution has proven beyond a reasonable doubt all the elements of the offence of sexual assault.

[101] Consequently, since I accepted the fact that Private J.L. did touch A.L. without her consent, I also find that the prosecution has also proven the particulars of the offence of the second charge for behaving in a disgraceful manner, contrary to section 93 of the *NDA*.

[102] The finding on the second charge depended not only on my assessment that the act particularized in the charge sheet has been proven beyond a reasonable doubt, but the prosecution also had to prove that the actions of the accused were disgraceful within the context of section 93 of the *NDA*.

[103] A finding that the alleged conduct constituted disgraceful conduct requires an assessment of the accused's conduct in its context. In assessing the proven conduct, a judge can apply their military experience and general service knowledge and engage in a contextual assessment from the perspective of both the Canadian Armed Forces (CAF) and the military community. A contextual assessment must also include consideration as to the manner by which the incidents might be viewed in the non-military community.

[104] The term "shockingly unacceptable" is a term that is often used to describe incidents that are disgraceful. In addition, there are many other descriptions that capture the essence of what is meant by the term such as shameful, dishonourable, degrading, inducing strong revulsion or profound indignation.

[105] An assessment of "harm" or "risk of harm" is often part of the context and can inform the analysis. The more severe the harm or risk of harm, the more likely something is to bring disgrace to the CAF or tarnish the CAF as an institution to the point that it is disgraceful.

[106] Conversely, the more shockingly unacceptable the facts are in light of CAF operational and military community norms, the less is required on the scale of harm. In other words, a judge might find that the allegations, taken in the military context are

shockingly unacceptable/disgraceful, even if harm or risk of harm is minimal. As confirmed by the Court Martial Appeal Court (CMAC) in *R. v. Marsaw*, CMAC-395 and as applied in a number of courts martial, conduct that involves non-consensual sexual touching, in the context of a sexual assault falls within disgraceful conduct.

[107] The section 93 offences are general intent offences and the prosecution is not required to prove that the accused intended to act in a disgraceful or prejudicial manner. They simply have to prove that the accused intended to engage in the conduct set out in the particulars.

[108] With respect to the requisite intent, I find that Private J.L. intended to touch A.L. notwithstanding her expressed lack of consent. Consequently, the Court is satisfied beyond a reasonable doubt that the prosecution has proven the particulars of the offence and that the actions were disgraceful.

FOR THESE REASONS, THE COURT:

[109] **FINDS** Private J.L. guilty of the first charge of sexual assault, contrary to section 271 of the *Criminal Code* and guilty of the second charge of disgraceful conduct, contrary to section 93 of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major M. Reede and Major C.R. Gallant

Major A. Gélinas-Proulx, Defence Counsel Services, counsel for Private J.L.